The Danish law on the posting of workers

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The Danish law on the posting of workers

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This article reviews the background to the Law on the posting of workers and its development in the 10 years it has been in force. The interaction with EU law and the consequences of the Laval decision are also described. Finally there is a focus on selected problems that have been identified as theoretical and practical problem areas for the rules on the posting of workers. The question of the general right of trade unions to monitor compliance with collective bargains has not previously been dealt with more systematically in the Danish legal literature.

1. The background to the Law on the posting of workers.
On 13 October 1999, about 2 months before the deadline for implementing Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (the Posting of workers Directive),¹ the Danish Minister for Employment, Ove Hygum, published a bill for a Law on the posting of workers.² The aim of the bill was to ensure that Denmark met its obligations under Article 7 of the Posting of workers Directive by 16 December 1999, by adopting the necessary legislation and administrative provisions under the Directive.

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

One of the principal problems identified as being associated with the application of collective agreements to workers posted to Denmark from other Member States was ensuring that there would not be different treatment of foreign and Danish undertakings.

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⁴ In Denmark there is no legislation on minimum rates of pay. The question of rates of pay is solely regulated, with varying content, in collective agreements and contracts of employment.
through the use of the collective agreements. Thus agreements should apply to ‘all similar undertakings’ and, if not, problems would arise. In Denmark collective agreements are only applied if the employer is bound by the agreement. As a rule this will be via membership of an employers’ organisation or by a direct agreement with a trade union. If a collective agreement were to apply to foreign workers posted to Denmark from another Member State, but not to a similar Danish undertaking which had not entered into a collective agreement, this could constitute different treatment of foreign undertakings in relation to Danish undertakings. To make Danish collective agreements applicable as *erga omnes* agreements would have been quite foreign to the Danish tradition, so that other solutions had to be sought.

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

The implications referred to above associated with applying Danish collective agreements to posted workers in Denmark should be set against the actual need to make collective agreements applicable to posted workers. In 1999 no particular problems had been identified with ‘social dumping’ in Denmark, though this topic had been in focus at the European level for a number of years in other Member States, and was in fact the reason for adopting the Directive. The Danish trade unions thus thought that the problems of social dumping, particularly in relation to rates of pay, could be solved by the unions’ possibilities for entering into agreements with individual undertakings in the usual way, including via the use of collective action in support of obtaining a collective agreement.

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However, there was agreement that the situation should be closely monitored and that the possibility could be made use of if the need should arise.²

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

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

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

2. The content of the Law on the posting of workers, and selected topics

The Law on the posting of workers primarily contains regulation of certain rights of posted employees under Danish labour law in relation to their employers in their home State. However, a single provision addresses the application of host State rules in Denmark for posted workers from Denmark, as their home State, in another host State within the EU or the European Economic Area (EEA),

According to Chapter 1 (§ 1), Chapter 2 (§§ 2 to 6) applies in situations where, in connection with the provision of services, an undertaking posts employees to Denmark. The provisions in §§ 2 to 5, which constitute the main substantive protective rules, are dealt with below in section 2.1. As well as the adoption of the original Law on the posting of workers, there have been amendments of the deadline for revising the law in

2003,\(^7\) and in 2006\(^8\) substantive amendments were made to the Law in three stages. In section 2.2 below there is a description of the 2008 amendments introducing stricter monitoring of posted workers.\(^9\) In section 2.3 there is a description of the changes made as a consequence of the *Laval* decision.\(^{10}\) In section 2.4 there is a more general description of which rules, under Danish law, can be said to apply to trade union monitoring. In connection with the introduction of § 6a of the Law on the posting of workers, it is stated in the preparatory documentation to the provisions that the Law does not change the existing rules for trade unions’ scope for monitoring employers’ compliance with the terms of collective agreements. However, it is not stated what these rules consist of or what are the main principles lying behind them. The question of trade unions’ rights in connection with monitoring is not dealt with in detail in Danish legal literature, but there are some judicial decisions on labour law that have an influence on this. In particular, the question of trade union monitoring of the conditions of posted workers in Denmark is an area that concerns the labour market parties in connection with the posting of workers. Thus, for example, Denmark has decided to refer to the Commission to obtain clarification of whether EU law sets restrictions on, for example, giving information from RUT to the labour market parties in specific situations. See section 2.5 below. There thus seems to be a need to identify more precisely and to describe the legal rights of trade unions to monitor in Denmark, not least in connection with undertakings which post workers to Denmark. In section 2.5 there is also a discussion of the latest political agreement of 3 December 2009, that the Government will put forward proposed legislation for stricter rules for RUT.

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\(^7\) In Law No 47 of 10 December 1999 on the posting of workers, § 11 included a provision on revision of the Law, according to which a proposal was to be put forward for revision of the Law by 1 January 2003, at the latest. As stated above, §§ 5 and 6 contain a reference to the laws and executive orders giving rights in the areas of the working environment, equal treatment and holidays. At that time, working time was not regulated by law. However, subsequently Law No 248 of 8 May 2002 implemented the Working Time Directive, introducing regulations on the length of working time. By Law No 27 of 5 December 2002 on the extension of the deadline for revision and an addition to the Law on working time, for entry into force on 1 January 2003, Parliament unanimously agreed, with 109 votes, to add in § 5 that the Law should apply to posted workers in Denmark. It was also decided not to introduce the application of collective agreements to posted workers with regard to minimum rates of pay, as the labour market parties had stated that, since the introduction of the Law on the posting of workers, there had been very few cases on minimum rates of pay. These cases had been resolved, and there was agreement that there was no need to amend the law in 2003.

\(^8\) As stated above, in its § 11, Law No 27 of 5 December 2002, on the extension of the deadline for revision and an addition to the Law on working time, introduced a deadline of 1 January 2006 for revision of the Law. On 21 March 2006, Parliament unanimously adopted Law No 132, having established that the labour market parties were still in agreement that there was no reason to amend the Law on the posting of workers with regard to minimum rates of pay, and that Denmark should continue to make use of the provisions in the Posting of workers Directive which allowed Member States like Denmark, that did not use generally applicable collective agreements, to refrain from implementing the provisions of the Directive on minimum rates of pay. This Law contained a new revision deadline of 1 January 2009 to re-evaluate whether the Law on the posting of workers should contain a provision on minimum rates of pay. See Executive Order No 849 of 21 July 2009 on the posting of workers.

\(^9\) Law No 263 of 23 April 2008 on the obligation to give notification in connection with posting. The Law provided for the establishment of a central Register of Foreign Service Providers (RUT).

\(^{10}\) Law No 36 of 18 December 2008 on the implementation of the recommendation of the working group report on the consequences of the *Laval* decision and on extension of the deadline for revision.
Chapter 3 of the Law on the posting of workers (§ 7) regulates the choice of law in situations where workers are or have been posted from Denmark to other EU or EEA Member States. These provisions are dealt with below in section 2.6.

Other provisions, including Chapter 4 (§ 8), concerning information and the establishment of a liaison office in accordance with Article 4 of the Directive, and Chapters 5 to 7 (§§ 9 to 11), are dealt with in section 2.7.

2.1. Foreign employers who post employees to Denmark

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

A ‘posted worker’ is defined in § 3 as an employee who ‘carries out their work temporarily’ in Denmark. The provision is in line with Article 2(1) of the Directive which, however, uses the term ‘for a limited period’ rather than ‘temporarily’.\(^{11}\) This is in order to avoid any misunderstanding that the period should be thought to mean ‘for a predetermined limited period’, and since the Directive means a ‘temporary’ period this is the term used in the Danish Law. If an employee works more than temporarily in Denmark, Denmark will be the State in which the employee normally works so that Danish law will apply in general.\(^ {12}\) It is not decisive whether the person concerned might be considered to be independently self-employed in the State where they normally work (their home State).\(^ {13}\) In accordance with Article 2(2) of the Directive, it is the definition of a ‘worker’ in Denmark, as the host State, that applies in § 3, and it is this concept of a worker that is decisive for whether the person concerned is covered by the Directive. According to § 4 of the Law, an undertaking is regarded as posting a worker to Denmark if: (1) on their account and under their direction an undertaking posts an employee in connection with the provision of a service for a recipient of that service in Denmark; or (2) an undertaking post workers to an establishment or to an undertaking owned by the same group of companies or to an undertaking which has a similar association with the undertaking that makes the posting.

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

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

When it is determined, under §§ 3 and 4 of the Law on the posting of workers, that there is a posting in Denmark, then under § 5 of the Law regardless of which State’s law otherwise governs the employment relationship, the Danish law on the working

\(^{11}\) FT 1999-2000, A 1223.

\(^{12}\) See the Rome Convention of 19 June 1980, on the law applicable to contractual obligations.

\(^{13}\) FT 1999-2000, A 1223.
environment, the law on equal treatment with regard to employment, and the law on parental leave etc. (with certain exceptions), the law on equal pay between men and women, § 7 of the Law on salaried employees on parental leave, the Law on discrimination in employment etc. all apply to the posted worker.

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

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

Special and slightly complex rules on holidays apply to posted workers. Thus, in § 6 of the Law it is provided that if the rules that otherwise apply to the employment relationship are less favourable for the worker with regard to the length of holiday and

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14 Law No 268 of 18 March 2005 on the working environment.
15 Law No 734 of 28 June 2006 on the equal treatment of men and women with regard to employment etc.
16 The Law on the equal treatment of men and women also contains rules on the right to be absent in certain situations that are not considered to be protective measures for pregnant women and women who have recently given birth, for example rules on parental leave and leave for adopting parents. These rules are therefore excluded in relation to posted workers. An exception is also made from the rules on Danish social security legislation whereby during absence from work under the Law on equal treatment, there is a right to maternity pay. However, the Posting of workers Directive does not cover Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community if the posting is not intended to exceed one year. Thus, a worker posted to Denmark can have a right to be absent according to the rules of the Law on equal treatment, but payment during such absence will be according to the rules of the home State.
17 Law No 899 of 5 September 2008 on equal pay for men and women.
18 Law No 81 of 3 February 2009 on legal relations between employers and salaried employees.
19 Law No 1349 of 16 December 2008 on the prohibition of discrimination in employment etc.
20 The home State is the State where the worker normally works in fulfilment of their work contract or, if the worker does not normally work in a specific State, the State where the place of business which employs the worker is situated.
21 The host State is the State in which the worker, in performance of their agreement with their employer from the home State, carries out their work as a posted worker.
22 Even if the parties have agreed a specific choice of law, under the Rome Convention they cannot derogate from certain rules of the Home State (national mandatory rules).
23 A case can be brought in a court in the area in which the worker carries out the work in question.
holiday pay than the rules of the Danish Law on holidays (§§ 6, 12 and 14), the employer must ensure that the worker receives supplementary holiday and holiday pay so that the worker is put in the same position as they would be under the Danish provisions referred to. If posted workers were covered by the Danish holiday rules in their entirety, this would give rise to a number of practical problems. For example, the Law on holidays refers to the year for earning holiday entitlement, which follows the calendar year, and the holiday year (for taking entitled holiday) that differs from the year for earning, and runs from 1 May to 30 April. The Danish Law on holidays\(^\text{24}\) is thus based on the assumption of a longer connection with Denmark. § 6 of the Law on the posting of workers seeks to solve these practical problems. There is no requirement in the Directive that the rules of the Law on holidays on giving notice of holidays etc. should apply. There are only requirements that rules on the length of holiday and holiday pay should apply. Thus, under the Danish provisions, the posted worker is still covered by the holiday rules of the home State, but the employer must ensure that the worker is at least given holiday and holiday pay corresponding to the provisions in the Law on holidays on the minimum number of days holiday. If the home State’s holiday provisions are less favourable than the Danish Law on holidays, the posted worker can earn supplementary holiday and/or holiday pay while posted in Denmark. Under Danish law there is a right to 5 weeks holiday with payment of 12.5% of the annual salary as holiday pay, or with full pay during holidays with a holiday supplement of 1% of the annual pay.\(^\text{25}\)

2.2. Stricter monitoring – since 2008 – of posting to Denmark by foreign service providers

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

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

The background to the introduction of RUT was the ‘Østaftale III’ (Eastern Agreement) of 29 June 2007\(^\text{26}\) concerning the expansion of the EU and the Danish labour market.

\(^{24}\) Law No 407 of 28 May 2004.

\(^{25}\) According to § 6 of the Law on the posting of workers, it is a condition for the right to supplementary holiday that the posting is for more than 8 days.

\(^{26}\) Generally referred to as Østaftalen – the ‘Eastern Agreement’. The Eastern Agreement, which was implemented by making changes to the Law on immigration, the Law on sick pay and allowances, the Law on maternity leave etc., constituted an interim limited restriction of the basic EU principles and it was authorised by the Accession Treaty with the new Member States. During a transitional period of 7 years it was permitted, subject to a number of conditions, to take national measures with a view to regulating the free movement of workers in the form of introducing limits on access to the labour markets of the ’old’
Under the Agreement, monitoring by the authorities was to be intensified with regard to whether foreign undertakings and posted workers complied with the Danish rules on the posting of workers. According to the Agreement it was to be ensured that the relevant authorities had the necessary tools and resources available to them to ensure compliance with the applicable laws and regulations. Under Eastern Agreement II, several ministries were to work together to establish a common register of foreign undertakings and posted workers in Denmark. It was this agreement that the amendment to the Law on the posting of workers, entering into force on 1 April 2008, was to implement.

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

It was also argued that the Commission’s Communication, Guidance on the posting of workers in the framework of the provision of services COM(2006) 159 final, was a basis for introducing more intensive monitoring of compliance with the provisions of the Posting of workers Directive on working conditions during a posting. For example, in the Communication it is stated that the host Member State ‘should be able to demand, in

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Member States. In the first instance the Eastern Agreement (on access to the Danish labour market after the expansion of the EU on 1 May 2004) was entered into on 2 December 2003 between the Liberal Party, the Conservative People’s Party, the Social Democrats, the Socialist People’s Party, the Social Liberal Party, and the Christian Democrats. The Eastern Agreement was then revised by an agreement of 5 April 2006 between the Liberal Party, Conservative People’s Party, the Social Democrats, the Socialist People’s Party, and the Social Liberal Party. On 29 June 2007 an agreement for further adjustments was made between the Government, the Liberal Party, Conservative People’s Party, the Social Democrats, the Socialist People’s Party, and the Social Liberal Party. The agreements are political agreements to introduce the amendments referred to in the agreements in Parliament. Since the Eastern Agreement was revised twice, the agreements can be referred to more specifically as Eastern Agreement I, II and III.

27 The Ministry of Taxation, the Ministry of Economic and Business Affairs and the Ministry of Employment.
accordance with the principle of proportionality, that the service provider submit a
declaration, by the time the work starts, at the latest, which contains information on the
workers who have been posted, the type of service they will provide, where, and how
long the work will take.’

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

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

For the Tax and Customs Administration, the idea is to use RUT as a tool for monitoring
whether foreign undertakings that provide services in Denmark pay VAT on their sales
turnover in Denmark, as well as whether the undertaking withholds payroll taxes for
posted workers subject to tax in Denmark. In the case of foreign temporary employment
undertakings or placement agencies, the Tax and Customs Administration controls
whether the Danish host undertaking withholds payroll taxes in relation to individual
temporary workers, and whether VAT is paid. Also foreign one-man undertakings which
must be registered in RUT, must be assessed for whether they really are self-employed
workers on the Danish labour market, or whether there is an employment relation where
the foreign worker is effectively employed by an employer in Denmark, for example a
construction company. Finally, the Tax and Customs Administration controls whether,
for tax purposes, there really is a posting, or whether there is an evasion through the use
of an employment relationship through direct employment in Danish undertakings so that
the taxation of earned income should be paid to Denmark. In a more detailed note29 on
future controls and the use of RUT, it appears that the Tax and Customs Administration’s
control will be carried out as:

a) ongoing control on the basis of information from RUT,
b) a trial arrangement in the building and construction sector in cooperation with the
   Working Environment Authority, and
c) coordinated ‘fair play’ activities, in cooperation with other authorities, including
   the Immigration Service and government ministries. Based on an actual

28 As per 1 January 2010 the website was not yet fully developed and ready to use.
29 FT 2007-08 (2nd series), L 70, answer to Question 2 from the Labour Market Committee.
assessment, the Tax and Customs Administration may also take action on the basis of referrals from trade union organisations or other non-public bodies.

The supervision of foreign undertakings by the Working Environment Authority includes screening and physical inspection of the working environment of foreign building and construction companies. The aim is to identify those undertakings that have serious working environment problems and to select them for more detailed inspection. As part of its increased efforts, the Working Environment Authority will also inspect particular areas of dangerous work, such as roofing, scaffolding etc. Inspections will also be made on the basis of complaints and referrals. Information from RUT will be included in the Working Environment Authority’s planning and implementation of inspections. The Working Environment Authority will use RUT to gather information on the sites where there are foreign undertakings. This means that the Working Environment Authority’s possibilities for supervising the working environment of these undertakings will be improved. The Working Environment Authority will obtain extracts from RUT at weekly intervals.\textsuperscript{30}

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

According to the preparatory documentation to Law No 70 on the obligation to give notification in connection with posting, the National Labour Market Authority will obtain information monthly, with selected information on foreign undertakings and the foreign workers which such undertakings employ in Denmark.\textsuperscript{31} Information from RUT will also be available to the secretariats of the regional employment boards to enable them to monitor and analyse the extent and nature of foreign service providers on the regional labour markets, and with a view reviewing this at the regional employment board. The new Law will also involve local government authorities, the labour market parties and private persons as potential participants in monitoring, though private persons, including the labour market parties, will only be able to receive partial data from RUT.

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

\textsuperscript{30} FT 2007-08 (2nd series), L 70, answer to Question 2 from the Labour Market Committee.

\textsuperscript{31} FT 2007-08 (2nd series), L 70, answer to Question 2 from the Labour Market Committee.
5a. A foreign undertaking that posts workers to Denmark in connection with the provision of services shall report the following information to the Commerce and Companies Agency:

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

According to the supplementary provisions to the above regulation (§ 5a(2) to (5), and § 5b), notification must be made on the date of the commencement of the provision of the service in Denmark, at the latest in accordance with Law on procedures for reporting etc. of certain information to the Commerce and Companies Agency. The registered information may only be used for the Danish authorities’ control over whether the undertakings comply with the Law on the posting of workers and for statistics on foreign undertakings and posted workers.

However, under § 5c of the Law on the posting of workers it is possible to obtain, by payment, access to information about the name of an undertaking required to make a report, the name of the contact person for that undertaking, and information about the industrial classification code. Breach by a foreign undertaking of the obligation to make a report can be punished by a fine. A foreign undertaking that commences the provision of a service, when the posted workers have begun their work, can be fined if the undertaking has wholly failed to give information for registration or if it has not given information correctly or in due time.

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

2.3. Changes in Denmark as a consequence of the Laval case
After the decision of 18 December 2007 of the Court of Justice (ECJ) the Danish Government appointed a working group to report on the situation, whose remit was as follows:

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32 Certain forms of posting are exempted from the reporting obligation if the posting does not last more than 8 calendar days.
33 Law No 571 of 6 June 2007 on procedures for reporting etc. of certain information to the Commerce and Companies Agency. The law regulates the Commerce and Companies Agency’s general registration functions and contains common rules for reporting, registering, combining and storing information. The Commerce and Companies Agency thus has data responsibility for RUT.
34 Case C-341/05 Laval un Partneri Ltd [2007] ECR I-11767, on the Lithuanian company Laval.
‘With the handing down of judgment by the Court of Justice in the Swedish Laval case on 18 December 2007, it is necessary to assess in more detail the significance and consequences of the judgment for the law in Denmark. At the same time, it is necessary to assess the need for any amendment to the applicable legislation and the practice in the labour market with regard to foreign service providers and their posting of workers to Denmark.

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

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

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

In order to solve this problem, a working group was appointed consisting of the chairman, theatre director Michael Christiansen, 2 representatives form each of DA and LO, 1 representative from each of SALA (the Confederation of Employers’ Associations in Agriculture), the Employers’ Association for the Financial Sector, Local Government Denmark, Danish Regions, the Confederation of Salaried Employees and Civil Servants, the Confederation of Professional Associations, the Association of Managers and Executives and the State Employer’s Authority. Representatives from the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Economic and Business Affairs and the Ministry of Employment also took part.

The working group delivered its report on the consequences of the Laval case on 19 June 2008.

The report made clear that the working group found that the decision in the Laval case necessitated changes to the law in Denmark.

When, as in Denmark, there is no tradition for making collective agreements generally applicable, nor legislation for laying down minimum rates of pay, if a foreign service provider that operates in Denmark is to be subject to a requirement on minimum rates of pay, it is instead possible to rely on collective agreements entered into by the most representative labour market parties at national level and which apply throughout national
territory; see Article 8(2), second paragraph of the Posting of workers Directive. In paragraph 66 of the Laval judgment this possibility is interpreted in such a way that the application of the model of using collective agreements requires the Member State to make a decision to do so, and that the application of collective agreements to undertakings which post workers should guarantee equality of treatment in the matters listed in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71 between the foreign undertakings and domestic undertakings in the same profession or industry which are in a similar position. Domestic undertakings must thus be subject to the same obligations as foreign undertakings that post workers, and both types of undertaking must fulfil these obligations with the same effect before there can be equality of treatment within the meaning of Article 3(8) of the Directive.

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

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

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

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

In its report on the consequences of the Laval case on 19 June 2008, the working group gave a concrete legislative proposal which was later enacted as Law No L 36 of 18

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December 2008 on implementing the recommendation of the working group on the consequences of the *Laval* decision and on the extension of the deadline for revision of the Law.

The new Law inserted a single provision in the Law on the posting of foreign workers, which was inserted as § 6a. The provision states:

‘§ 6a. With a view to ensuring for posted workers rates of pay corresponding to those which Danish employers are obliged to pay for the performance of equivalent work, collective action may be used in relation to foreign service providers, in the same way as in relation to Danish employers, in support of claims for entering into collective agreements; paragraph 2 also applies.

2. It is a condition for initiating the collective action referred to in paragraph 1 that the foreign service provider should previously have been referred to the provisions in the collective agreements between the most representative parties on the labour market in Denmark applying to the whole of the territory of Denmark. These collective agreements shall state, with sufficient clarity, what rates of pay must be used under the collective agreements.’

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

§ 6a(2) lays down the more detailed conditions that must be fulfilled before a foreign service provider can be presented with claims for rates of pay. First there is a requirement for referral to existing terms. According to the preparatory documentation, the requirement for referral means that, as a minimum, it should be clear which provisions are referred to, which collective agreement is referred to, who the parties to the collective agreement are, and how long the collective agreement in question is in force. The question is whether there is a requirement to provide a copy of the collective agreement which it is demanded should be entered into, as otherwise it can hardly be said to be accessible to the foreign service provider.\(^{36}\)

Next, there is a requirement as to the nature of the collective agreement. The collective agreements whose terms are referred to must only be those between the most

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\(^{36}\) It can be difficult enough for a Danish employer or employee to obtain a copy of the relevant nationwide collective agreement for the industry sector concerned. There is no obligation to publish, nor even an obligation to supply a collective agreement to employees under the Law on employment documentation; see Executive Order No 1011 of 15 August 2007 on employers’ obligations to inform employees on the terms of their employment, with subsequent amendments.
representative labour market parties in Denmark, and they must also be applicable to the whole of the territory of Denmark. This means that a number of collective agreements will not be relevant for foreign service providers to refer to. For example, a collective agreement for an individual undertaking would not meet the requirement as it would not necessarily constitute a correct basis for determining the rates of pay that it would be permissible to take collective action to obtain. It is also assumed that a referral may only be made to a collective agreement for the employment sector in question.

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

If disagreements arise about the interpretation and application of § 6a of the Law on the posting of foreign workers in relation to foreign service providers who post their workers to Denmark, the Danish Labour Court has jurisdiction to decide on the application of § 6a. Thus, under § 9(1), No 3) and 5) of the Law on the Labour Court, cases concerning the use of or warnings of collective action can be brought before the Labour Court. In practice the Labour Court is the judicial body that decides on the legality of warnings of conflicts and collective action, also in relation to foreign service providers who are the subject of a conflict about the use of collective action. Thus, if a foreign service provider claims that they are put in a worse position than a Danish employer in relation to a nationwide collective agreement within the same industry sector, the Labour Court can set aside evaluations based on other collective agreement elements that do not directly constitute payment terms. This can be a matter of interpretation. The Labour Court can also decide whether the conditions of § 6a(2) are fulfilled.

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

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

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

2.4. Trade union monitoring of foreign undertakings and of compliance with Danish collective agreements

2.4.1. Introduction and the formation of collective agreements

The possibilities for trade unions to monitor the avoidance or exploitation of the rules that prevent social dumping are both practically and theoretically relevant in connection with the use of foreign workers in Denmark. As stated above, including the description in section 2.2, it is intended that the more intense control measures for public authorities in the Eastern Agreements and in the rules on the introduction of RUT should ensure prevention of avoidance of the rules under the Law on the posting of workers. Just as with all other private bodies, the trade unions can, for payment, obtain the names of undertakings which post their employees to Denmark, as well as their contact persons and industrial classification codes. Moreover, the labour market parties, including trade unions, are involved to a certain extent in the coordinated work in the regional networks established by the police areas. However, there is no legislative authority to exercise control or legally authorised right to delegate control functions to the labour market parties in Denmark. If the trade unions want to monitor the pay and conditions of posted workers in situations where there is not a contractual right to do so via a collective agreement, or where the problem concerns compliance with, for example, the Law on the working environment, tax and VAT regulations, or the Law on immigration, they must submit reports to, for example, the police, the Working Environment Authority or the Tax and Customs Administration, on the basis of information the trade unions have been able to gather lawfully, for example via their members. The trade unions have no special powers in this respect.

If the situation where a trade union has an agreement with a foreign undertaking that it is interesting to analyse more closely whether and to what extent the trade union has a possibility for monitoring through its status as a party to the agreement. In this situation it

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

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

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

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

2.4.3. Trade union monitoring without a specific agreement

In the many situations where nothing is stipulated in an agreement about a trade union’s monitoring of compliance with the agreement, the question arises as to how a trade union can monitor compliance with the agreement, including compliance by undertakings that post workers to Denmark.

First, in this section it is necessary to clarify whether it can be assumed that there is any right to monitor by the trade union as part of the agreement. Next, the content and limits of any such monitoring must be considered. Do trade union representatives have a right to make a physical inspection (2.4.4.1-2)? And to what extent is there a right to monitor information (2.4.4.3)? Does a trade union have a right to documentation on work permits and residence permits for all foreigners employed by an employer (2.4.4.4)?

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39 In particular, in some sectors there can be a binding on monitoring, which gives the same right as an express term in an agreement.
The first question must be answered in the affirmative. A trade union which is a party to an agreement must, as such, have a right to monitor compliance with the agreement. This applies, even if in the circumstances of the agreement the counterparty is not directly involved in fulfilling the terms of the agreement.

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

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

In FVK of 18/1-1985 it was to be decided whether an employers’ association should recognise that the workers’ association’s representatives, including their assistants, should have access to a number of joinery undertakings which did not want such

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40 In construction law the question of the property developer’s presence and right of control of ongoing service provision by contractors is regulated in AB 92 (general terms for building and construction work). According to § 11(3), contractors must allow the developer and their inspectors access to workplaces and production units where the work is carried out. This also applies to ongoing service provision, even if the end product is first verified in a delivery transaction. The developer can also demand such information as is necessary to assess the service. This rule may also be presumed to apply in construction contracts where the right of control is not specified in detail, as it must be assumed to be a natural condition for such a contract that, as part of the construction contract, the developer must be able to have corresponding access as there is a requirement for loyal performance and a proper need for being able to exercise control, even if there is no ground to suspect the contractor, and even if the performance of the contract is incomplete; see e.g. Torsten Iversen i TBB 2003. 482. Of course, there are also contrary contractual considerations. For example, the exercise of control may not amount to the harassment of a contractor. In connection with sales agents, there are also express rules for situations where performance-based services are calculated on a basis that is only known to one of the parties; see Mads Bryde Andersen, Praktisk aftaleret, 2003, p. 347 ff. According to § 15 of the Law on sales agents, a sales agent is entitled to demand all information, including extracts of sales ledgers etc., which the principal possesses and which are necessary for the agent to be able to see whether their commission statement is a correct statement of the commission due to the agent; see Jørgen Lykkegaard, Handelsagentloven, 2007, pp. 96-99. Also, in company law there are express rules on examination, where shareholders have a right to demand an examination of the company’s formation or other specific circumstances of the company’s administration. In U 1967.738 Ø, the High Court ruled that a partner had a right to monitor and verify the accounts of a freight company, for which the other partner was responsible for the day to day management and bookkeeping. This was so even though neither in the partnership agreement, legislation or any other agreement was this laid down. A further example is to be found in § 57 of the Law on copyright.

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

42 The decision is published in Arbejdsetlig tidsskrift (AT) 1985, p. 197.
monitoring. The Snedker- og Tømrerforbundet (Carpenters’ and Joiners’ Union) wanted access for its representatives to a construction joinery undertaking with the aim of helping the union’s members calculate their piecework, and setting up piecework accounts. A quantity surveyor who was engaged in helping the union’s members on behalf of the local union, in connection with measuring specific piecework according to the building price list, had been physically refused entry on the ground that the collective agreement did not contain authorisation for the use of quantity surveyors and that there was no other basis for such a right. The court allowed that the union had a right to obtain access to undertakings covered by the collective agreement, provided it had a prior agreement with the undertaking to this effect, and only to the extent necessary for helping the union’s members’ measure piecework according to the building price list.  

On the basis of the above decisions and the general principles on the monitoring of an ongoing provision of a service, both within and outside the area of labour law, it must thus be said that a right exists for trade unions to monitor compliance with a collective agreement and that it corresponds to the equally natural ongoing right for employers and employers’ associations to ensure that employees and union members comply with the obligatory and normative provisions of a collective agreement. This is further supported by legal theory, where, for example, Hasselbalch states that ‘The agreement must be presumed to give the parties mutual monitoring powers to ensure that it is complied with’, and that ‘the employee party has a right to carry out such monitoring as is necessary to ensure compliance with the collective agreement’.  

The question is, how far does this monitoring extend?  

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

2.4.4.1. Physical non-notified inspections  
One of the most intrusive forms of monitoring is inspection visits by representatives of a trade union who arrive at the address or building site of an undertaking covered by a collective agreement, suddenly and without warning. In the case of foreign undertakings with posted workers, the monitors will not have the possibility of visiting the headquarters of the undertaking in its home State, so monitoring will typically be at the place where the service is provided, for example at a building site. This situation can naturally have a number of variations. In some cases one can imagine a more covert form of monitoring, where the trade union’s inspectors enter the undertaking and speak to the employees, take observations etc, without the undertaking’s management being informed.

43 Subsequent decisions have confirmed this statement of the law, see AR 1210, AR 2220 and AR 2221.  
44 Ole Hasselbalch, Arbejdret Online, 2009, third book, Kollektivarbejdsretten, section XXII.  
http://www.djoef-forlag.dk/services/ARonline/html/lit/kolret/kolret_22.htm
of this or accepting it. Here the question is whether this form of monitoring is covered by the trade union’s right to monitor. In other cases the trade union’s representatives announce themselves immediately to the management, for example the person who is registered in RUT as the contact person. Here the question is whether the inspection can be refused without this amounting to a breach of the agreement.

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

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

In 1989, in an arbitration case on employment law matters, it was disputed whether a trade union had a right to make an unannounced inspection visit to the employer’s workplace. A number of employers were dissatisfied that the painters’ union had made unannounced visits to private workplaces. According to the facts of the case, over a period of six months representatives of the painters’ union had visited more than 65 workplaces, some of them between 2 and 4 times. The aim of the visits was partly to ‘get hold of’ the painting employers who were outside the collective agreement, and partly to help colleagues in the individual workplaces with all kinds of problems.

The arbitrator found that there a binding custom that visits could only be made to the workplaces of painting employers who were parties to the collective agreement after obtaining prior acceptance from the responsible management of the workplaces or building sites, and there was in fact an agreement on compliance with this practice. Thereafter it was stated that visits to workplaces without the prior acceptance of the responsible management of the workplaces could not be made. However, the decision

45 FVK of 27 October 1989. The decision is available at http://arbejdsretsportalen.lovportalder.dk
cannot be taken as meaning unequivocally that an inspection of an undertaking requires prior agreement with the employer or the employer’s organisation.

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

Unannounced and unprovoked inspection visits, at least as far as concerns covert inspections and inspections without permission from the undertaking, appear in general to be so intrusive that there is an overwhelming presumption that consideration for the interests of the organised undertaking weighs heaviest; see the elements mentioned. Again as an overwhelming presumption, it will not be contrary to the collective agreement for the employer to refuse to accept monitoring where the representative directly addresses the undertaking’s management and warns of or requests a physical inspection of the undertaking. In other words, there is no obligation to hold ‘open house’ for the union representative for this purpose. This must in any case be the more general conclusion as to whether there is a right to make an unannounced physical inspection of an undertaking by a union, without there being special grounds for such an inspection.46 It is also possible that an unannounced physical inspection visit could, under special circumstances, constitute a breach of the agreement by the trade union. In this context the proportionality principle of labour law will work in the employer’s interest, as in the first instance the assumption must be that monitoring could be undertaken in some other less intrusive way. Thus, in all cases it must be assumed that an on site inspection must follow prior notification or must be in accordance with rules agreed in advance.

In the absence of such permission, in the worst case a visit must be regarded as a breach of the agreement. Union representatives must therefore take great care over unannounced and intrusive visits to the workplace with a view to making a physical inspection of whether a collective agreement is being complied with and to gather information about

46 However, it is still possible that there may be entirely special situations where the refusal by an employer which is covered by a collective agreement to allow union representatives to make a physical inspection could be considered a breach of the agreement, and there could thus be special circumstances in which the employer will have an obligation to allow an unannounced inspection to be made. The existing decisions about quantity surveyors must be seen in the light of the special need in payment by piecework for control by special experts. On this see Ole Hasselbalch, Arbejdsret Online, 2009, third book, Kollektivarbejdsretten, section XXII: ‘Furthermore, the employee organisation that is a party to a collective agreement is entitled to carry out such control measures as are in fact necessary to ensure that payment is made in accordance with the agreement, for example the measuring of work at the workplace by the union’s representatives. Thus, these have a right to enter the workplace for this purpose (with due consideration for the interests on the employer in connection with such visits).’
employment conditions, including information about union organisation. This applies in particular if there has been no complaint about the conditions, for example via a shop steward or otherwise, and if the monitoring is thus based on a more general desire to carry out sample monitoring or suchlike.

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

2.4.4.2. Unannounced physical inspections of undertakings not covered by a collective agreement

What rules apply to physical visits to undertakings that are not covered by a collective agreement? Here there is a different starting point, and the two situations can be difficult to compare. In connection with a demand for entering into an agreement with an undertaking there is a conflict of interests, and in such a situation the inviolability of property rights means that there is a prohibition of any form of unauthorised entry to private property, and a physical blockade of an undertaking is not a lawful weapon under labour law. In Sweden in this context there are people referred to as ‘syndicalists’, who go to extremes to put pressure on an undertaking.⁴⁷ In Denmark, people who commit a criminal trespass are punishable under § 264 of the Criminal Code. This also applies if union representatives enter a private area with a view to putting pressure on an employer to obtain an agreement. As for undertakings that provide services in Denmark and post workers to Denmark, there are also the principle of freedom of establishment, among others in Article 56 of the Treaty on the Functioning of the European Union (TFEU), and the decisions of the ECJ that have been developed in support of freedom of movement. See more on this in the section below.

2.4.4.3. Information monitoring – what kind of monitoring may be undertaken?

The next question is, what form of monitoring by trade unions of undertakings that are covered by a collective agreement may be assumed to be permissible without prior agreement?

In a number of situations there can be entirely legitimate and reasonable needs for monitoring in the form of verifying that factual information about an undertaking in relation to the terms of an agreement. This is not notably different from the examples given above of other legal situations where an ongoing service provision requires some form of ongoing verification of information. Also, because of the special nature of collective agreements, where a trade union does not participate directly in the performance of the agreement, there is a special need for monitoring.

⁴⁷ See e.g. the judgment of 19 November 2008, Mål No B 1283-08 of Malmö District Court, first department, concerning criminal entry and physical blockade by a number of syndicalists.
For example, a trade union may have been given information by a number of its members that wages have not been paid correctly, perhaps certain supplementary payments or holidays and days off may not have been arranged as set out in the collective agreement. In such a situation the trade union has a proper and justified interest in reviewing the administration of the working times of all the employees in order to verify whether there are individual or general breaches of the agreement.

Hasselbalch also states that there is a ‘generally recognised obligation on the part of the employer to inform the trade union about circumstances that are relevant to the administration of the agreement’. 48

This statement can presumably be extended to an obligation for an employer who is subject to an agreement to give information to the trade union which is relevant to the union’s possibility for ensuring that the agreement is complied with in general, as long as such requirement is reasonable and only the employer is in possession of the information concerned.

By comparison, in individual employment relationships the employer’s right to monitor employees is intensified so that the less opportunity an employer has to monitor the work of an employee, the more the employee is obliged to disclose to the employer information about the ongoing performance of the work, on demand, including by written documentation. In other words, the more difficult it is for an employer to have ongoing monitoring of the performance of work, the more an employee must accept that they must give information about their performance of the work to the employer.

In the first instance the union’s right to monitor must be carried out via its members and shop stewards. This means that in the first instance the union must itself gather the information necessary for it to see whether the terms of the agreement for pay and conditions are complied with. The proportionality principle of labour law must be assumed to apply, so that an employer who is covered by an agreement must not be troubled unnecessarily with requests for information about employment matters which could just as easily be obtained elsewhere by the union. 49

This is also in accordance with an arbitration decision from 1994, where it was found that the union did not have a right to obtain pay slips from an employer who was covered by an agreement with a view to monitoring compliance with the agreement, as the pay slips could have been obtained from the union’s own members, and documents which the union ought easily to have been able to obtain from its members could not be demanded. According to this decision, it was relevant that there was no term in the agreement

48 Ole Hasselbalch, Arbejdsret Online, 2009, third book, Kollektivarbejdsretten, Section XXII, on the mutual right to information, www.djoejforlag.dk/services/ARonline/html/lit/kolret/kolret_22.htm
49 Ole Hasselbalch, Arbejdsret Online, 2009, third book, Kollektivarbejdsretten, Section XXII, on the mutual right to information, www.djoejforlag.dk/services/ARonline/html/lit/kolret/kolret_22.htm, ‘The trade unions’ right to monitor is bound by the general proportionality principle of labour law which, in relation to a trade union’s monitoring of the employer, is not presumed to involve demands or measures that go further than necessary in order to achieve the aim of ensuring compliance with the agreement’.
requiring the employer in question to deliver the pay slips, and reference was made to the principles in §§ 298 and 299 of the Law on the administration of justice on discovery. Finally, it was noted in the decision that the union had to accept responsibility for its members not being willing to provide information in the case.\textsuperscript{50}

It is interesting that the decision also made the union responsible if the union’s own members had the information but did not wish to give it to the union, so that in such a situation it was not a breach of the agreement for the employer to refuse to provide quite general information for monitoring the agreement, which both parties agreed should be complied with.\textsuperscript{51} There can thus be situations where a union has a reasonable assumption that an agreement is being breached, but where the member who has passed on information to the union does not wish to be revealed. If this is compared with the rules on disclosure, it can be debated whether, in all situations, a union can easily obtain documentation on information showing that the employer has breached the agreement. This applies in particular if an employer posts workers who are fearful of losing their jobs with the employer in their home State.

The general rules on an employer’s obligation to provide documentation such as pay slips can thus be described as being that, in the absence of a specific agreement and in all events unless there are special circumstances, the employer cannot be required to provide information, for example in the form of copies of pay slips, work slips, time cards etc. in relation to persons covered by an agreement.\textsuperscript{52}

However, there can be a number of situations where information cannot easily be obtained through the union and its members, and where it would be unreasonable for the union to be responsible for the failure to obtain the information.

One could imagine, for example, that if a union has a suspicion, or that there is a particular risk, that an employer has deliberately chosen not to employ members of the union which is party to an agreement because non-members of the union do not normally demand the rates of pay set out in the agreement, the union can have an interest in obtaining information about the pay of all employees who work under the agreement for that employer. This can also relate to persons who, to all appearances, act as independent third parties or subcontractors. Such monitoring of information can only be made through the employer, and not through the union’s members, unless the union receives information on pay from non-members, which can be difficult in practice.

\textsuperscript{50} FVK of 28 June 1994 in the case of Dansk Metalarbejderforbund v Dansk VVS Installatør Forening on behalf of Finn Jensen ApS. The decision is available at http://arbejdsretsportalen.lovportal.dk and in summary form at http://www.djoefforlag.dk/services/ARonline/index.htm

\textsuperscript{51} In the decision of the Permanent Arbitration Court (Labour Court) of 11 November 1926 in Case AR 1020, it was argued that it was the employer’s obligation to make it clear in the accounts that the rates of pay had been in accordance with the tariff. The decision should be seen in the light of the fact that the accounts can be assumed to have been more simple then, but the principle that a union should have the possibility of verifying information about wages and salaries in one way or another can still be said to apply.

\textsuperscript{52} The situation may be different if, on the basis of individual employment law, employees have a right to receive information from the employer about their pay.
As stated, there can also be situations where, on the basis of information from its members, a union has a suspicion that the pay or conditions are contrary to the collective agreement, but where in the circumstances the union does not want to or cannot expose a particular member who has passed on the information.

Finally, there are situations where there is a clear risk of avoidance of the agreement and where the undertaking that posts workers to Denmark does not have an address in Denmark, and where the need for monitoring is naturally greater than usual.

In these cases, a concrete evaluation must be made of the circumstances that are the basis for the suspicion and whether the principle of proportionality and the weighing of the importance of the demand for delivery of documentation between the employer’s and the union’s interests can justify requiring the delivery of documents, despite the general rule.

It must also be assumed that under the proportionality principle and the principle of negotiation in labour law, in the first instance the union must in any case present a well reasoned demand for the delivery of the information in question.

Thus, Hasselbalch also states that, in the first instance, the employer’s obligation to provide information to the union will be expressed in the demand. This is correct, and it can be added that without the union making a demand for the employer’s delivery of documentation it will not be possible to impose a sanction for a breach of the agreement, because the employer does not deliver, for example, pay slips to the union, unless this is explicitly agreed. The same requirement, for the parties putting forward demands as practical and legal preconditions for bringing legal proceedings, applies generally to a large proportion of all legal proceedings. Meanwhile, it is interesting that the failure to comply with a demand will constitute a breach of the agreement.

Here too, ideas for assessing this can naturally be drawn from the rules for employers’ monitoring, and particular from the exceptions to their right to monitor their employees.

Furthermore, the labour law practice referred to above can be included, and it is possible that other arguments and considerations can be taken into account.

A number of factors that be relevant for assessing whether there are special circumstances that mean that the general rule should be departed from and that, even without a specific agreement to this effect, the employer must be legally obliged under the agreement and its assumptions to provide the documentation which the union seeks. In accordance with this, it can be relevant whether the union has sent a demand for the

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53 Ole Hasselbalch, Arbejdsret Online, 2009, third book, Kollektivarbejdsretten, Section XXII, on the mutual right to information, www.djoeforlag.dk/services/ARonline/html/lit/kolret/kolret_22.htm
54 See below for examples of criteria for assessment.
55 There can of course be a number of situations in which the terms of an agreement are interpreted to mean that there is a special assumption of the existence of the employer’s obligation to provide documentation. See, e.g. the decision of the Permanent Arbitration Court (Labour Court) No AR 1137 of 11 January 1923.
delivery of documentation and whether the union is already in possession of the information, or whether the union could easily and should itself have obtained the information.

It can also be relevant whether the information that the union seeks concerns members or non-members.

On the one hand the union can argue that, in relation to rates of pay, the agreement does not distinguish between members and non-members, just as the union is entitled, under the agreement, to negotiate on behalf of all the employees regardless of whether an employee is a member of a union or not. Thus, the union can argue that, in carrying out monitoring, union membership should make no difference.\textsuperscript{56}

Conversely, the employer can argue that the provision of information about the payment of persons who are not union members constitutes and infringement of privacy rights, is contrary to the Law on personal data, and that the provision of information about the pay of named persons is not necessary; see § 5(3) of the Law on personal data. The provision of information about the payment of persons who are not union members has been tried several times under Swedish law. In AD 1995 No 73, the Swedish Labour Court decided that the employer did not have any obligation, on the basis of a collective agreement and its presumptions, to disclose information about the pay of employees who were not union members.\textsuperscript{57} In a more recent Swedish decision of 14 January 2009 it was also examined whether, under the agreement, the employer was obliged, in connection with pay negotiations, to give pay information about named persons who were not union members. The Labour Court did not find that the terms of the agreement obliged the employer to disclose information about third party employees in pay negotiations, and there was therefore no breach of the agreement.\textsuperscript{58} It is highly likely that the same would apply in Danish law.

If a matter concerns a union member, about whom the union wants information, it can be relevant whether there are special circumstances which suggest that it is more reasonable for the employer to give the information rather than the union member. Thus the general rules must be that the employer is not obliged to give the information.\textsuperscript{59}

Also, the question of whether there have been previous breaches of the agreement concerning the type of information on which documentation is demanded from the employer can play a role, just as the union’s demand for documentation from the employer must always be supported by specifically assessed proper considerations. A reasonable consideration is whether an employer who is covered by an agreement can meet the requirements of the union without significant inconvenience and financial loss.

\textsuperscript{56} A union can also argue that there can hardly be a question of commercially confidential information in relation to the rates of pay of persons who are covered by a collective agreement.

\textsuperscript{57} The same result was reached by the Swedish Labour Court in AD 1989 No 94 (Arbetsdomstolens domar), where the union argued on the basis of the medbestämmandelagen (Law on co-decision making).

\textsuperscript{58} AD 2009 No 3.

\textsuperscript{59} However, if the union has been given a power of attorney from the individual members covered by the pay information to obtain information under the Law on personal data, the employer will be bound by this.
for the employer, and whether the risk of the employer breaching or avoiding the agreement in connection with the matters for which documentation is requested is a significant risk. Finally, it can be relevant whether the matter concerns new circumstances that have arisen since the agreement was entered into, so that when entering into the agreement the union could not have been aware of the need for a special agreement for the delivery of documentation demanded. The basic requirement must naturally be fulfilled, that the provision of the documentation must be necessary to ensure compliance with the agreement, so that the demand is not disproportionate to the measure used. It can thus be stated, on the employer’s obligation to disclose information on pay and conditions to the union, that such an obligation can apply in special situations where the union has an actual and particular justified reason for receiving the information directly from the employer, but there cannot be said to be a general obligation to do so. An overall assessment of the actual situation must be made in specific cases.

2.4.4.4. Information about pay and conditions of foreign workers – including posted workers

Next, it is necessary to ask whether a union that is covered by an agreement can, without a specific agreement, demand more detailed documentation on the pay and conditions of specific groups of foreign workers, including, for example, work permits and residence permits of foreign workers where such are required.

This question has been and can still be relevant, among other things because, until the latest easing of the Law on immigration,60 there have been special requirements that all workers from the 10 new EU Member States could not start work with an employer in Denmark before being able to show work permits and residence permits. Moreover there was, and could still be, a special risk of avoidance of such rules through the use of foreign one-man undertakings exploiting the rules on the freedom to provide services and the freedom of establishment under Articles 49 and 56 TFEU.61 Not least, there is a risk that such parties may avoid the rules on the protection of workers in the Law on the posting of workers, so further initiatives on this are planned by Denmark, for example that such one-man undertakings should be registered in RUT. Since 1 May 2009 Denmark has no longer distinguished between workers from the ‘old’ Member States and workers from the ‘new’ Member States, all of whom are covered by Article 45 TFEU on free movement, but the rules in the Law on immigration still mean that workers from countries outside the EU can obtain work and residence permits in Denmark, subject to certain conditions.62

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60 Law No 264 of 23 April 2008. See also Executive Order No 1044 of 6 August 2007, with subsequent amendments.
61 The accession of the eight new Member States on 1 May 2004 and later of Bulgaria and Romania on 1 January 2007 put a focus on a number of questions prompted by the principle of free movement within the EU. See, e.g. Birgitte Egelund Olsen et al.: Europæiseringen af dansk ret, Jurist- og Økonomforbundets Forlag, 2008, Chapter 25, ‘Enkeltmandsvirksomheder fra de nye østeuropæiske medlemsstater’.
62 In the examples given by way of introduction, where contractually certain normative or obligatory terms must be agreed, particularly concerning the legal status of foreign workers, the parties are bound by the content of the agreement.
It is an interesting and practical question whether a trade union can demand information about the rules in the Law on immigration under which a worker carries out work for an employer covered by a collective agreement, including being shown documentation about work and residence permits, or the information that is registered by RUT, including the names of the individual posted workers, the dates of starting their employment etc.

The unions’ interest in ensuring compliance with collective agreements will not in itself be sufficient to demand documentation on work and residence permit for all workers of foreign origin working for an employer, or the information registered in RUT which is not publicly accessible.

As a general rule only public authorities and the police have a right to initiate proceedings and have control powers for ensuring that the rules of immigration law, tax law, the law on the work environment etc. are complied with.

Thus, unlike in Iceland, for example, in Denmark there are no general rules on the trade unions’ right of insight into the pay and conditions of foreign workers.

Seen in isolation, unless specifically agreed otherwise, as a general rule it lies outside the rights of trade unions to monitor whether employers employ workers without the necessary work and residence permits, notification to RUT etc., as long as the workers receive pay according to the rates in a collective agreement and are treated in accordance with a collective agreement. As stated previously, the authority to exercise control has not been formally delegated to the unions. Questions of work and residence permits, compliance with the rules of the Law on the posting of worker and suchlike are not in principle either normative or obligatorily relevant questions for collective agreements.

Viewed from a wider perspective, and taking into account the elements referred to above, it is relevant to ask whether there may not nevertheless be special circumstances in individual cases where a foreign employer may not be required to provide documentation to a union entitled under a collective agreement showing that the employer’s employees are not illegally employed or, for example, are not employed contrary to the rules in the Law on the posting of workers on registration with RUT.

One could imagine that, on the basis of information from its own members or others, a trade union would ask a foreign employer for information on whether named persons of foreign origin are engaged as employees of the employer, as service providers under the EU rules, or as posted workers under the Law on the posting of workers, and requesting that the answer be supported by documentation. In justification for such a request the union could perhaps, depending on the actual situation, rely on a number of the arguments given above, including the risk of avoidance, that the provision of the documentation would not cause significant loss or inconvenience for the employer, and that the request is properly based on information from union members or others, previous similar episodes etc.

63 Agreement on Foreigners in the Icelandic Labour Market of 7 March 2004 between ASI and SA.
However, a trade union would be unlikely to be successful in claiming that an employer’s failure to comply with such a request constituted a breach of agreement. The public interest relating to requirements based on public law is too narrow in relation to a collective agreement, and a union could in any case have included such an obligation to provide documentation as a term of a collective agreement during the negotiations.

If the requirement for documentation concerns other matters, such as documentation of working time and payment, which are regulated in the collective agreement, the example of employment of foreign workers, for example under the rules on the posting of workers, could be one of the scenarios in which there can be a special justification for demanding further information in the form of documentation from the employer. The specific evaluation could be made using the factors referred to above.

2.4.4.5. Restrictions on monitoring under EU law

If a control measure is specially directed at workers from EU Member States, there can be grounds for considering whether the control is of such a kind as to be capable of being considered a hindrance to or restriction on the free movement of workers under Article 45, 49 or 56 TFEU. This is particularly relevant since 1 May 2009, when there is no longer authority under the Accession Treaty for interim measures against social dumping.

It is well known from the practice of the ECJ that the control measures of the Member States over foreign undertakings often have to balance between the strict demands of free movement on the one hand, and regard for exercising control, public interest etc. on the other hand. The principle that the Member States must ensure the freedom to provide services within the Union, as expressed in Article 56 TFEU, is an inflexible fundamental principle of the EU.

According to Article 56, a service provider established in a Member State has a right to provide services in another Member State and to post their workers for this purpose in accordance with the Posting of workers Directive. According to the practice of the ECJ, the principles of freedom to provide services and freedom of establishment can only be restricted by provisions that are based on Article 52 TFEU, on the grounds of the overriding public interest, while respecting the principles of non-discrimination and proportionality. It can be questioned whether it is the view of the ECJ that only national authorities, and not the labour market parties such as a trade union, can act with a view to imposing on the undertakings of other Member States conditions or lawful restrictions on the grounds of public policy or on the grounds of the overriding public interest. The background to this assessment is illustrated by paragraph 84 of the judgment in the Laval case, which touched on the question of the use by trade unions of collective action.

It follows from the decision in the Vander Elst case that the rules on the freedom to provide services should be interpreted as precluding one Member State from requiring undertakings which are established in another Member State, and enter the first Member State in order to provide services, to obtain work permits and the associated administrative burdens. In this case such administrative burdens were identified with

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64 Case C-43/93 Raymond Vander Elst v Office des Migrations Internationales.
the responsibility for answering questions about employment, and the obligation to pay the costs associated with this. There was then the problem that an administrative fine was imposed in the event the questions were not answered. The case concerned the right of France to require work permits in connection with the use by a Belgian undertaking of Moroccan workers for demolition work in France, in a situation where the Moroccan workers were lawfully resident, and had work permits and permanent jobs in Belgium.

According to the Rush case, the Member State in which the performance of a service is received must have the possibility of controlling that a service provider which is established in another Member State does not use the freedom to provide services for other purposes, so as to misuse the rules on free movement. However any control measures must be taken within the framework established by Union law, so that the measures must not result in the freedom to provide services being rendered illusory or undermined, nor may the exercise of the freedom be made subject to the discretion of the authorities.

According to the general principles developed in the decisions of the ECJ, Member States are entitled to take measures to prevent abuse of the rules on freedom of movement and likewise a Member State may lawfully seek to protect itself from the avoidance of rules such as those in the Posting of workers Directive or similar by introducing special control measures.

However, the right to protect against abuse of the rules is not so extensive as to permit the introduction of restrictions which can hinder or involve disadvantages for the posting undertaking. As stated by Karsten Engsig Sørensen, it must be a condition that the abuse is found to exist in fact and that the restriction is not merely based on general rules or assumptions.

In Case C-244/04 Commission v Germany, it was found that Germany had committed a breach of the Treaty by setting aside its obligations under Article 49 (now 56) in connection with the posting of workers by requiring a prior period of employment of at least one year with the undertaking that posted workers to Germany. In the case, the German Government argued, among other things, that the requirement for an employment contract that had been entered into at least one year prior to the posting was

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65 Case C-113/89 Rush Portuguesa v Office national d'immigration.
66 See also Case C-168/04 Commission v Austria, according to which it was unlawful for Austria to make it a condition for the posting of employees from a third country of an undertaking domiciled in another Member State that authorisation of posting within the EU should have been obtained, and that the employees in question should have been employed for at least one year in the posting undertaking or that in association with this there was an employment contract for an indefinite duration, and for Austria to require evidence of fulfilment of the Austrian pay and conditions requirements. Moreover it was contrary to Article 49 of the EC Treaty (now Article 56 TFEU) for the Austrian immigration law to provide for automatic rejection, without exception, of entry and residence permits that made it impossible to regularise the situation for third country citizens who are lawfully posted by an undertaking domiciled in another Member State once the workers had entered the national territory without a visa.
67 This applies even if the restrictions apply without discrimination between domestic service providers and service providers from other Member States.
68 Karsten Engsig Sørensen in U 2004 B 283 ff.
an appropriate and effective means of preventing undertakings domiciled in other Member States from taking on employees solely for the purpose of posting them abroad. In its judgment the ECJ ruled that such a requirement must be regarded as disproportionate for fulfilling the purpose claimed by Germany.

The ECJ’s judgment in Case C-524/04 Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue concerned the tax treatment of interest paid by companies domiciled in the United Kingdom on loans from companies domiciled in other Member States. The judgment lays down the principles that it would be contrary to the freedom of establishment and to the free movement of capital and of services for Member States to impose unnecessary administrative burdens in their national measures against abuse.

Since the decisions of the ECJ lay down strict requirements for Member States as to which burdens can be imposed on an undertaking that provides services to another Member State in order for there to be found that there is not a restriction on freedom of movement contrary to Article 56 of the Treaty, trade unions must also take care to ensure that their monitoring of compliance with collective agreements, or their requirements made in connection with a collective agreement, cannot be regarded as a restriction or hindrance to freedom of movement. This applies not least when the ECJ has indicated that the labour market parties cannot justify any hindrance to freedom of movement on the grounds of public policy or overriding public interest.

2.4.5. Personal data and monitoring by trade unions
A different perspective on the question of the right of trade unions to monitor foreign workers concerns what possibilities or restrictions there are for the disclosure of information under the data protection rules. The Law on personal data provides that disclosure to third parties of even ordinary personal information, such as information about the pay of individual workers, may only be made subject to compliance with a number of guarantees of security.

§ 5(2) of the Law on personal data requires the collection of data to be for clearly stated and legitimate purposes, and the subsequent processing of the data may not be incompatible with these purposes. The question is whether the disclosure of personal information by an employer, including a posting employer, to a trade union for the purpose of the trade union’s monitoring of pay and conditions, without the agreement of the workers concerned, would be compatible with the originally stated and legitimate purposes for processing the data, namely to ensure the administration of and compliance with the individual worker’s employment agreement and the public law rules associated with it.

Moreover, § 6(1) No 7 of the Law on personal data provides that the disclosure of information to third parties, e.g., a trade union, must be necessary for that third party to be able to pursue a legitimate interest that outweighs consideration for the registered person.
If there is sensitive information, such as information about union membership or ethnic background, then as a rule even more restrictive rules in the Law on personal data apply to the disclosure of the information.

In the case of public employees, information about the employment conditions of an individual, such as their name, job position, education, tasks, salary and business travel is, as a rule, subject to public inspection under the rules of the Law on access to public information, in particular § 2(3) first and second sentences. However, the rules on access to public information are not unconditional and in certain situations the right of access may be excluded. In connection with these rules, under the Law on personal data, the Data Protection Agency has decided that the content of a collective agreement and of any local agreements etc. can be relevant in assessing the opposing interests under § 6(1) No 7 of the Law on personal data with regard to the disclosure of personal data. Examples of interests which can be relevant to such an assessment include the need for shop stewards who are authorised to negotiate to be able to fulfil their responsibilities. According to the Data Protection Agency, the form in which disclosure is made and whether the employee is covered by the rights of third parties to have access to the information can also be relevant. Opposed to this is the interest of employees to protect their privacy and to keep information about their pay and conditions, including their income, to themselves. The Data Protection Agency has not ruled directly on whether consideration for a trade union’s monitoring of compliance with a collective agreement can be given weight when balancing the interests relating to disclosure under § 6(1) No 7 of the Law on personal data, so the question cannot be said to have been finally determined.69

In the case of private sector employees, the Data Protection Agency has not made a general ruling, as private workplaces often have different agreements and traditions for the treatment of information on pay.70

However, according to the practice of the previous Registers Agency there cannot be systematic disclosure of personal information to a trade union with a view to its monitoring activities. See, for example RÅ1996/93, according to which an undertaking’s systematic disclosure of information on accumulated rights to hours off work and bonus hours, shift-working hours, days of holiday on grounds of seniority etc. to a group of employers, without the agreement of those concerned, was contrary to the Law on registers, so the group of employers was not entitled to register such information.

According to the Registers Agency’s annual report for 1995/96, it appears that a group of manufacturers could lawfully register lists with information about the individual employees’ accumulated rights to hours off work, so that the shop steward could follow up and monitor whether the applicable rules were being complied with. But the

69 On the right of public sector employers to disclose information about pay, see the Data Protection Agency’s statement of 12 October 2007, case No 2007-321-0047, available at www.datatilsynet.dk
70 The Data Protection Agency has said that its statement of 12 October 2007 on the right of public sector employers to disclose information about pay is primarily aimed at the public sector, since it is the Data Protection Agency’s impression that private workplaces often have different agreements and traditions for the treatment of information on pay.
acceptability of these arrangement required that the registration must not be made by public display of the lists, since such publication would constitute an unlawful disclosure of personal data.

To the extent that an employer is directly obliged to disclose information on pay and conditions to the shop steward or trade union on the basis of a collective agreement, see the description of the labour law above, it must be assumed that the general rule is that consideration for the trade union outweighs consideration for the persons registered according to § 6(1) No 7 of the Law on personal data, so there may be disclosure without the consent of registered members of the union. It must also be assumed that the principles of proper purpose and finality in § 5(2) of the Law on personal data must be observed in such situations. Thus the assessment, under data protection law, of disclosure of information from an employer to a trade union or shop steward plays a central role in the question of whether disclosure of information can be said to be necessary so the employer responsible for the data can comply with the obligations under employment law, or whether a trade union can take care of the employment law rights of its members in accordance with the agreement. These considerations have been so important, at least on the Danish labour market, that, as an exception to the prohibition on disclosure of information about trade union membership, a special provision has been included in § 7(3) of the Law on personal data, which also applies to situations where the registered person has not given express permission for the disclosure of sensitive information.

The personal data law problems in the area of collective agreements must thus today be interpreted in the light of the rules of the law on collective agreements. This is also in line with the following statement of the Article 29 Data Protection Working Party: see the working party report WP48.

‘The Working Party would like to point out that data protection law does not operate in isolation from labour law and practice, and labour law and practice does not operate in isolation from data protection law. This interaction is necessary and valuable and should assist the development of solutions that properly protect workers’ interests.’

However, in assessing the justification for disclosure, it is important to ensure that only the information that is necessary for the purpose of the trade union’s monitoring is disclosed, so that personal data which, for the purpose of the monitoring, could just as well be given in anonymised form should not be disclosed; see § 5(3) and § 6(1) No 7 of the Law on personal data. In the case of non-union workers, which will often be the case with posted workers, the situation is more doubtful, and the monitoring interests of a trade union will probably not outweigh the privacy interest of the non-union worker.

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71 The popular name is due to the fact that the working party was set up under Article 29 of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The working party is an independent EU advisory body on data protection and the protection of privacy in the EU. Its tasks are laid down under the authority of Article 29 of the Directive.


73 See generally on the registration of organisational relations, including for non-members: Peter Blume and Jens Kristiansen, Databeskyttelse på arbejdsmarkedet, 2002, p. 42.
To the extent that an employer is not directly obliged, under employment law, to disclose information to a trade union, there is always a right for the employees whose personal data is processed by the employer to have a right to inspect the data under § 31 of the Law on personal data. This means that the trade union can receive information from the registered persons with a view to monitoring compliance with an agreement, and the union can obtain powers of attorney to apply to inspect and receive the data of the employer on behalf of an employee. This applies both to union members and non-members.

In Swedish law, which is based on the same principles as Danish personal data law, it has been clarified that there is not a right for a trade union to receive information about the pay of non-members. On the contrary, considerations of privacy dictate that the employer is not obliged to disclose such information for the purposes of monitoring. Also, in Sweden even though a collective agreement might provide that the employer must disclose information about non-union members to the union, such disclosure would be contrary to Swedish personal data law. In other words, in Sweden the rules of the personal data law will overrule the terms of a collective agreement which are contrary to the personal data law.74 The same view can be expressed of Danish law.75

2.4.6. Conclusion

As parties to an agreement, trade unions have a justified interest in being able to conduct ongoing monitoring to ensure that employers bound by an agreement comply with it, and they have a real right to conduct monitoring. However, the right to monitor, which can be derived from the general principles of contract law and labour law, has its limits, just as an employer’s monitoring of the work of their employers is subject to a number of principles.

The limits to trade union monitoring have developed over time through decisions of the courts on labour law, and sometimes a special need for monitoring arises which means that it is necessary to require the employer to give information to the trade union for the purposes of the union’s monitoring.

A trade union will be unlikely to have the right to make a physical inspection via an unannounced visit to an undertaking, unless such an inspection is agreed by the employer or is an express obligation under a collective agreement. Also, an employer will not generally be obliged to give documentation of information which is in the possession of the union’s own members. There must be special circumstances justifying why it would be more reasonable for the employer to give the information rather than by the members direct to their union. This is expressed in the decisions on labour law where it has been decided that information which the union ought easily be able to obtain for itself through

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74 Dnr 498-2007 of 17 December 2007 of Datainspektionen. The decision was upheld by the Administrative Court at the end of 2008; see the report of 30 December 2008 of Datainspektionen published at www.datainspektionen.se
75 Peter Blume and Jens Kristiansen, Databeskyttelse på arbejdsmarkedet, 2002, p. 42.
its members cannot be required to be provided by the employer as part of a monitoring measure.

However, in certain situations the employer may have an obligation, under a collective agreement, to contribute information which the union cannot obtain itself through its shop steward or through its members. Thus, if an employer who is bound by a collective agreement is in possession of information that is not directly available to the trade union, and which concerns pay and conditions that are governed by the agreement, the employer could be obliged to provide such information to the trade union on request, for the purposes of monitoring. It is not impossible that in special circumstances this could include information about posted employees that is not publicly available via RUT. However, there can be other legal implications, namely the limits to hindrances and restrictions on freedom of movement in EU law, and the strict norms of personal data law on the disclosure of information, including confidential and sensitive personal data without the consent of the registered person. Altogether, it can be said that there are many potential legal problems associated with a trade union’s monitoring of an undertaking that posts employees to Denmark, as long as there is no direct authority to monitor either in legislation or in an agreement. This applies both in situations where the foreign undertaking has signed a collective agreement that is silent on the question of monitoring, and in situations where there is no agreement.

It must be assumed that a trade union’s right to monitor is in any case not so extensive that, without an explicit agreement, there will be an obligation for an employer to give documentation of work and residence permits, for example, or of the information in RUT which is not publicly accessible in relation to posted workers.\footnote{On the regulation of the monitoring rights of trade unions in other countries, see \textit{Kristin Alros}, \textit{Arbeidsrett}, Vol 4, No 2 2007, \textit{Tillitsvalgtes og fagforbundenes rett til innsyn i lønns- og arbeidsvilkår}, a comparative study of the regulatory framework in selected European countries.} \footnote{U 2010 B 1, \textit{Martin Grås Lind}, ‘Fagforeningers kontrol af virksomheders løn- og arbejdsvilkår’, reviews the rules on trade union monitoring of pay and conditions from a general standpoint. Significant parts of the Danish version are thus the same.} \footnote{See the agreement of 3 December 2009 between the Liberal Party, Conservative People’s Party, the Social Democrats, the Socialist People’s Party, and the Social Liberal Party, on strengthening the provisions on the central Register of Foreign Service Providers (RUT).}

\textbf{2.5. Agreement of 3 December 2009 on stricter rules for reporting to and compliance with the obligations to report to RUT}

By a political agreement of 3 December 2009,\footnote{U 2010 B 1, \textit{Martin Grås Lind}, ‘Fagforeningers kontrol af virksomheders løn- og arbejdsvilkår’, reviews the rules on trade union monitoring of pay and conditions from a general standpoint. Significant parts of the Danish version are thus the same.} in line with the methodology of previous agreements for amending the Law on the posting of workers, a political agreement was adopted by a number of parliamentary parties that as soon as possible a bill should be put forward amending the rules in the Law on the posting of workers in RUT. The aim of the amendments is to create a better overview of undertakings posting workers to Denmark and of posted workers in Denmark so as to be able to control compliance with the legislation on the work environment and on taxation more effective. The aim is also to give the labour market parties better scope for protecting their interests. Thus, with the amendments to the Law on the posting of workers there is to be a more detailed and effective information and registration obligation, as well as more effective enforcement.
The reasons stated in the agreement for these measures is that there is a growing number of posted workers in Denmark, necessitating a better overview of undertakings posting workers and of posted workers in order to better control compliance with Danish law, and that there have been difficulties associated with the posting of workers in Denmark, in spite of the introduction of RUT in 2008.

By implementing a revision of the existing rules on RUT, the aim is to achieve better enforcement of the obligation to send reports to RUT, and to ensure that the applicable practice on the Danish labour market should be respected.79

According to the agreement, the existing rules will be made more effective by shifting some of the responsibility for reporting to the undertaking providing the work, for example the building contractor who enters into an agreement with a service provider in another Member State, so that the undertaking providing the work has shared responsibility, subject to criminal sanctions, for ensuring that the foreign service provider has sent the necessary information to RUT. Moreover, the level of detail is to be increased so that there will be stricter requirements for information on the contact person for the undertaking that posts workers. The level of fines is to be doubled, and the administrative responsibility is to be moved to Working Environment Authority which will in future be responsible for enforcing the obligations with regard to RUT. Finally, one-man undertakings from other Member States will have to report to RUT, even though such undertakings are in principle not covered by the Law on the posting of workers.

On the obligations for undertakings providing work to ensure that foreign service providers have sent information to RUT, it is stated in more detail in the commentary that backs up the agreement that the duty, that applies to both private and commercial providers of work, must cover ensuring that documentation showing that the foreign service provider has reported to RUT and has given the correct work address and correctly stated the duration of the work. However, the duty of the undertaking providing the work will be limited to the building and construction sector, agriculture and forestry, etc., as it is in these areas that it has been shown that there are problems with the posting of workers. However, this area can later be expanded. The duty of the undertaking providing the work will first come into force when there is technical availability of on-line access to RUT.80

On the stricter requirements for information about the contact person, it is stated in the agreement that the labour market parties have a need to have more information available than under the present arrangement in order to contact foreign service providers. The foreign undertakings do not normally have an establishment with personnel in Denmark, so it has often not been possible to contact them. It is intended to make it clear in the Law that the contact person must be associated with the undertaking, and that the contact

79 Agreement of 3 December 2009 on strengthening the central Register of Foreign Service Providers (RUT).
80 Agreement of 3 December 2009 on strengthening the central Register of Foreign Service Providers (RUT).
person must be appointed from among those persons who work in Denmark in connection with the provision of the service. More detailed contact details must thus be given, including information on how the person can be contacted, for example via a mobile telephone number. According to the agreement, the Danish Government intends to ask the European Commission whether, under EU law, it will be possible to give the information in RUT about workplaces to the labour market parties/private persons, for example if it is not possible for the labour market parties to get in touch with the undertaking concerned via the contact person whose information is given.\textsuperscript{81}

As for the stricter penalties, it is proposed that the level of fines for normal cases should be increased from DKK 5,000 to DKK 10,000, and the fine should be graded according to the seriousness of the breach, exculpatory circumstances, the number of workers and the duration of the posting etc. Examples given of aggravating circumstances justifying a higher fine include repeat offences and clearly evasive arrangements, such as camouflaging workers in the form of one-man undertakings.

The fact that in future the Working Environment Authority will have responsibility for enforcing the obligations relating to RUT will strengthen the possibilities for exerting control, and the Working Environment Authority will also be able to undertake investigations of breaches of the law, including coordinating contact with the Tax and Customs Administration concerning foreign undertakings that have not complied with their obligations to report to RUT.\textsuperscript{82}

2.6. Posting from Denmark to other EU or EEA Member States
Chapter 3 of the Law on the posting of workers (§ 7) regulates situations where persons are or have been posted from Denmark to other EU or EEA Member States.

As stated above, the main aim of the Law on the posting of workers is to implement the Posting of workers Directive as part of Denmark’s obligations as host State in relation to foreign undertakings that wish to provide services in Denmark involving the posting of employees to Denmark. The main aim of the Law is thus to require foreign employers to follow the rules of Danish employment law in those areas referred to in the Directive.

With the temporary posting of workers from Denmark as home State to another host State in the EU or EEA the principle is that the law in the home State (Denmark) continues to apply to the resolution of employment disputes between the employee and employer. It is also provided in Article 6 of the Rome Convention that in an employment relationship, in the absence of an agreement on choice of law, the relationship is governed by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country.

\textsuperscript{81} Agreement of 3 December 2009 on strengthening the central Register of Foreign Service Providers (RUT).
\textsuperscript{82} See generally the agreement of 3 December 2009 between the Liberal Party, Conservative People’s Party, the Social Democrats, the Socialist People’s Party, and the Social Liberal Party, on strengthening the provisions on the central Register of Foreign Service Providers (RUT).
In accordance with this, § 7 of the Law on the posting of workers states that:
‘A person who is or has been posted to an EU Member State or some other country in the European Economic Area (EEA), and who, in carrying out work in that country has been covered by rules that implement Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, in bringing a suit in Denmark concerning a dispute that has arisen in connection with such posting, can choose that the case shall be decided according to those rules, regardless of whether Danish law is otherwise applicable’.

This provision means that if a person who is an employee in Denmark and who is posted, for example to Poland, in the framework of providing services to Poland, brings a case in Denmark against a Danish employer relating to the posting, that person may choose to have the dispute decided according to Polish law.

If Denmark had only implemented the Directive in its capacity as a host State, then in relation to Danish workers posted abroad, the Danish courts should only apply the Rome Convention, so that as a general rule Danish law should apply.\(^\text{83}\)

On the basis of § 7 of the Law on the posting of workers, Danish courts must apply the rules of the host State, in this example Poland, if the employee claims this, and this goes further than Article 7 of the Rome Convention which provides that, in applying the law of a specific country the mandatory rules of the law of another country with which the circumstances have a close connection can be given effect if and to the extent that this country’s rules are to apply, without regard to which country’s law otherwise applies to the agreement.

Under this provision a posted Danish worker thus obtains a right, which may perhaps only be a possibility depending on the court’s discretion, as long as only Article 7 of the Rome Convention applies. The alternative would thus have been that Danish employees would have had to rely on bringing a case in the host State, for example Poland, if they were to be sure that the rules of Poland, as the host State, should apply.

2.7. Other regulations in the Law on the posting of workers

§ 8 of the Law on the posting of workers provides that the National Labour Market Authority is the Danish liaison office with reference to Article 4 of the Posting of workers Directive. Since the passing of the Law, the Authority has coordinated the work of informing foreign employers and workers about the rules that apply to the posting of workers in Denmark. Experience has shown that it is very difficult to reach foreign service providers through Danish information campaigns.

The National Labour Market Authority has had the task of cooperating with the liaison offices of the other Member States in connection with various problems that can arise in connection with the posting of workers to and from Denmark. As stated above, the

political agreement of 3 December 2009 decided to amend § 7 of the Law on the posting of workers so that the Working Environment Authority will be the liaison office in future. It is thought that this will give better coordination of the carrying out of the tasks, as the Working Environment Authority is thought to have better possibilities for cooperating with the authorities of other Member States and to exchange information with them in connection with the results of controls under the Law on the working environment and RUT. The Working Environment Authority is to be given increased authority in connection with enforcing the rules on posting and of attempts to evade the rules.

According to § 9 of the Law on the posting of workers, the Danish courts are the forum for cases concerning workers who are or who have been posted to Denmark. Such workers can always bring a case in the hoist State against their employer in their home State concerning the substantive protection rules in Denmark which are made internationally mandatory for those elements that are listed in the Law on the posting of workers.\textsuperscript{84} \textsuperscript{85}

3. Reflective conclusion

When the gestation and the ongoing amendments to the Law on the posting of workers up to the ECJ’s decisions in the \textit{Viking} case and the \textit{Laval} case are viewed from an overall perspective, it becomes clear that in Denmark, unlike in a number of other Member States, the Posting of Workers Directive, its origins and the earlier decisions of the ECJ, such as the \textit{Rush} case, were not initially paid sufficient attention.

The attitude was that, as hitherto, we in Denmark could solve any problems and we retained the right to solve any problems relating to the legal status of posted workers in Denmark. This was to be done via the Danish model’s dynamic solutions, directly through the labour market parties. The preferred stance was that the influence of Danish politicians and the right of the EU to decide through regulations and directives should be kept to a minimum. Preferably, the Law on the posting of workers should not have been introduced at all, as Denmark regarded the minimum requirements of the Directive as having been complied with already, but ‘for the sake of good order’ the Directive was implemented by a Law entering into force on the day after the deadline for its implementation. This, at least, was the attitude which as evident in the preparatory documentation that formed the basis for the Law on the posting of workers, for example in the responses to the consultation, the responses of working groups, speeches in Parliament, and the commentaries of the draft law.

Moreover, social dumping was not regarded as being a significant problem in Denmark. In the few concrete cases where it had been necessary to intervene, the problems had

\textsuperscript{84} \textit{Lone L. Hansen}, Udstationerede lønmodtagere – er det hjemlandets eller værtslandets regler, der gælder?, U 2005 B 189.  
\textsuperscript{85} For more on posting and foreign workers in Denmark, see Nicole Offendal and Artur Bugsgang: Internationale ansettelserforhold, Thomson Reuters, 2009. See also E.G. Ruth Nielsen, Denmark, The Laval and Viking Cases: Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia Edited by: Roger Blanpain, Andrzej Marian Swiatkowski, February 2009.
been solved through the usual negotiating processes with the undertakings involved. Such situations did not give rise to major litigation on principles or suchlike in Denmark. The consensual attitude, that Denmark could look after itself, was characteristic, and to a large extent it still is.

After the introduction of the Law on the posting of workers in 1999/2000, the Law had a very quiet existence in Denmark, without attracting great political or judicial attention. Because of the provisions in the Law concerning its revision, it was reviewed three times in the years 2000-2010. Each time the revising Law was passed unanimously or by a large Parliamentary majority, without much debate.

The expansion of the EU in 2004 and again in 2007 did not put a direct focus on the Law on the posting of workers. On the other hand, there was political awareness about the rules for Danish undertakings entering into employment contracts directly with workers from the new Member States. There was great interest among Danish employers to recruit workers, particularly in the construction sector and in agriculture and market gardening. The labour market parties, and particularly the trade unions, did not want Danish undertakings employing cheap Polish labour without a collective agreement at, for example, DKK 60 per hour in price competition with the Danish collective agreements. With the expansion of the EU, property developers who did not normally employ construction workers became interested in the possibility of making savings in construction costs by themselves employing cheap foreign labour. Thus, with the expansion of the EU there was great political focus on the introduction of rules to shore up defences against social dumping. Shortly thereafter the Eastern Agreements were entered into on the basis of the Accession Treaties, where the principles were agreed for the introduction of national restrictions on free movement of workers for an interim period. Thus, Denmark made use of the possibilities in the Accession Treaties and made new regulations by amendments to the Law on immigration. The most significant measures for achieving the newly realised aim of preventing social dumping was that such employment required registration, prior approval of the employee and the employing undertaking, as well as regulation of pay and conditions in accordance with or corresponding to the terms of Danish collective agreements. The terms of the Eastern Agreements were gradually eased through several amendments to the Law on immigration, towards more liberal possibilities for employing foreign workers, and on 1 May 2009 the interim regulations in the Law on immigration came to an end, and the same rules applied to workers from all Member States. This easing of the rules further increased the number of foreign workers in Denmark, which matched the growth and the employment needs in the construction industry and in agriculture and market gardening up until the start of the financial crisis. However, as stated above, the trade unions did not achieve special monitoring rights over and above the usual scope for monitoring under collective agreements.

Along with the gradual opening of the Danish labour market for direct employment of foreign workers in Danish undertakings, an increasing number of Danish and foreign undertakings were becoming aware of the possibilities of providing and receiving services in accordance with the general EU principles of free movement. However, this
applied not only to one-man undertakings, which found themselves in a no-man’s land in relation to the rules on the posting of workers, but also to larger undertakings, especially subcontractors using posted workers. The rules of the Law on the posting of workers applied to the posted workers, but it became apparent that there was a need for better registration with a view to ensuring compliance with the rules on VAT and income tax, as well as compliance with the Law on the posting of workers, especially with regard to compliance with the rules on the work environment.

In such situations, the trade union movement wanted to exert pressure through the traditional Danish use of collective action against the incursion of foreign undertakings. However, in practice it was often difficult to identify the management of the foreign undertakings in Denmark, even after the introduction of the RUT registration in 2008. Most recently revision of the rules has been proposed to introduce further registration requirements and possibly allow trade unions increased access to information.

The trade unions’ understanding of the possibilities for using collective action was also subject to serious revision following the decisions of the ECJ in the Viking case and the Laval case. These judgments led to efforts to clarify the situation, which resulted in the introduction of a new provision in § 6a on the Law on the posting of workers whereby, under certain conditions, collective action can be taken against foreign undertakings. However, the introduction of the provision, which directly provides for the right to use collective action against foreign undertakings who post workers to Denmark in the same way as against Danish undertakings, still leaves a number of questions unanswered.

Even though the immediate understanding of the provision by the labour market parties is that a reasonable solution has been achieved which gives equivalent conditions for the use of collective action against foreign and Danish undertakings, it must be noted that ‘rates of pay’ determines the legal parameter in § 6a for justifying the use of collective action. Thus, neither in the wording of the provision nor in its preparatory documentation does the Law give a right to use collective action against foreign undertakings that post workers to Denmark where the collective action is taken to obtain an entirely Danish collective agreement. If collective action is to be initiated against a foreign undertaking in support of minimum rates of pay, this raises a number of questions of interpretation in relation to the requirement for precision in identifying the minimum rate of pay. Thus, it is not certain that the foreign undertaking will be able to know what the minimum rate of pay claimed is, and whether any lack of clarity in connection with the use of collective action will be considered to be a restriction within the meaning of EU law so as to be incompatible with the principles in the Laval case. Finally, in future in cases dealing with Danish labour law, it is possible that the courts will have to consider various shades of meaning, such as whether it makes a difference that a Danish trade union has members among the posted workers, or whether the foreign undertaking is a party to a collective agreement in its home State, and the provision in the Law does not appear to have clarified whether it is possible to conduct a conflict in support of claims for rates of pay that are higher than the minimum rates of pay in a collective agreement. Until the decisions in the Viking and Laval cases, the Posting of Workers Directive and the

common EU rules had unanimous Parliamentary support in Denmark, without attracting much political attention. This came to an end with the \textit{Laval} and \textit{Viking} decisions. The working group that had to consider the consequences of the decisions for Danish law now had a clear mandate to ‘Introduce the necessary amendments, without undermining the Danish model’. Whether the Danish solution, with the introduction of § 6a, is sufficient to comply with the principles in the \textit{Laval} and \textit{Viking} decisions may depend on the future decisions of the ECJ.

The employer may be obligated in different situations, where being part of a collective agreement, to contribute information which the union cannot obtain itself through its shop steward or through its members. Under some circumstances this could include information about posted employees that is not publicly available via RUT. Denmark has decided to ask the Commission for clarification of whether EU law sets restrictions on, for example, giving information from RUT to the labour market parties in specific situations. It will be interesting to find out the Commission's point of view in this matter, and to see which arguments that counts the most; the freedom of movement in EU law or the strict norms of personal data law on the disclosure of information and the need to be able for the unions to monitor the posted workers working conditions etc. It can be concluded that there are many potential legal problems associated with a trade union’s monitoring of an undertaking that posts employees to Denmark, as long as there is no direct authority to monitor either in legislation or in an agreement. This applies both in situations where the foreign undertaking has signed a collective agreement that is silent on the question of monitoring, and in situations where there is no agreement.

It must be assumed under the present regulation in Denmark, that a trade union’s right to monitor is not so extensive that, without an explicit agreement, there will be an obligation for an employer to give documentation of the information in RUT which is not publicly accessible in relation to posted workers.