Measures to Protect and Provide in the Context of the Posted Workers Directive
The Norwegian Experience

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**Prefatory Observations**

This draft paper aims at addressing the different questions that are set out in the Outline. It will however need to be expanded on and elaborated into more detail, in particular in the second half (chapters 5 to 9). I believe however that this is better kept on hold until the workshop discussions are done, as they will contribute to identify which issues are more important to focus on. Any and all comments are welcome.

I have left aside the saga of ILO Convention No. 94. It figures on the historical timeline from the very start of it, as seen here from 1990-91, and was ratified by Norway albeit after the entry into force of the EEA Agreement. The compatibility of the implementation measures in domestic law with EC/EEA law is, also, an issue that is pending in the ESA, which in an opening letter to Norway argued quite slavish along the lines of the ECJ in *Rüffert*. It is uncertain at present whether the procedure will be brought to a close with some form of settlement or end with a formal criticism.
1 Introduction, Backdrop

When the ECJ’s decision in *Rush*\(^1\) was handed down in March, 1990, it quickly drew attention across the Nordic countries. It brought about a new awareness of the potentialities of free movement rights in the EC legal order albeit at the same time seemingly allowing a wide scope for national labour and employment relations. The judgment was pronounced at a particular point in time. Following the Delors – Brundtland informal talks in 1989 the EFTA states, including the Nordic countries except Denmark, an EC member since 1973, were looking at the possibility of a “more structured partnership” with the EC. Therefore, developments within the EC and in EC law were of immediate importance and were followed with keen interest.

This was certainly the case in Norway, whose Prime Minister at the time, Gro Harlem Brundtland, had conducted the talks in 1989 with Jaques Delors which initiated the “Delors/Oslo Process” that led to the formal opening of negotiations between the EC and the EFTA states in June, 1990. One of the basic foundations agreed upon at an early stage was that an EEA agreement should include all of the EC Treaty and secondary law on the internal market, including the law on the four freedoms of movement, and the competition law rules. The EEA Agreement was signed on 2 May, 1992, and was intended to enter into force on 1 January, 1993. Complications in certain EFTA and EC member states\(^2\) led to a postponement of the entry into force of the Agreement until 1 January, 1994.\(^3\)

The potential impact of a possible EEA agreement on the national labour market and labour market regulation was realised from the very start. The Norwegian Trade Union Confederation (LO) put forward a demand, prior to the opening of the EEA negotiations, that an agreement should contain safeguards to ensure that domestic terms and conditions of employment apply to work performed by EC based businesses with their employees in Norway.

This fell on fertile ground. A precursor of sorts existed in the immigration law regulations, requiring wages to conform to collectively agreed or otherwise prevailing standards as a condition for a work permit. More importantly, Ms. Brundtland’s

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\(^2\) Switzerland rejected the EEA Agreement by referendum in December 1992, and in some EC member states the ratification procedures were protracted.

\(^3\) At that time the EFTA block was disintegrating. Most of the states were negotiating for full membership of the EC. Austria, Finland, and Sweden joined the EC as per 1 January, 1995, leaving Norway along with Iceland and Lichtenstein alone as the EFTA wing of the EEA Agreement.
minority Labour government depended heavily on its sister organisation, the LO, for political support in order to attain popular and political acceptance for an EEA agreement. A part of the collaboration that sprang from this was the adoption in 1993 of a new Act, dubbed the Act on Extension of Collective Agreements, etc., which was intended as a form of preventive measure. This Act serves as a basis and core component of the later implementation of the Posted Workers Directive (PWD).  

The following presentation proceeds from here. First, we look briefly at the immigration law rules concerned and their development. Second, we will map the adoption process of the 1993 Act and highlight some of its key features. Third, the implementation of the Posted Workers Directive and subsequent measures adopted to fortify domestic legislation and its enforcement are in issue. Together, this provides a background for the discussion of more specific questions concerning the form and effects of Norwegian measures of implementation pertaining to the PWD. The relation to the Services Directive is discussed in conclusion.

2 Work Permits and the Requirement of “Norwegian” Wages

When the prospect of a European affiliation appeared on the horizon the Nordic countries had since long operated a regime of free movement of workers between them. Under the 1954 treaty on a common labour market, citizens of Nordic countries were exempt from requirements of passports, residence and work permits. Labour mobility under this regime never assumed great proportions, however. In 1992 it was estimated that immigrants from the other Nordic countries amounted to no more than 1 per cent of the total population in Norway at the time.

Apart from this, labour mobility into Norway fell within the scope of application of immigration law. That was true also for the temporary posting of workers in the framework of cross-border provision of services. Dating further back in time the notable developments got under way from 1970. In the light of a considerable increase in immigration from primarily Asian countries a review of immigration policies was initiated.

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6 The Treaty of 22 May 1954 on a Common Nordic Labour Market and an accompanying Protocol, NT II 1622, (in force from 1 July 1954) applied to citizens of Denmark, Finland, Norway and Sweden. It was superseded by a new Treaty of 3 June 1982, NT V 705 (in force from 1 August 1983), to which also Iceland acceded.
As a first step, on recommendation of the Committee that was appointed to perform
a review, stricter requirements for work permits were introduced in 1971. They included
i.a. a requirement that an employment relationship should have a probable duration of
minimum 6 months, and that wages and other working conditions should not be below
what was otherwise “normal” in the domestic labour market. This set the tone for the
measures to be adopted subsequently. The Committee, presenting its report in 1973, proposed an extension of the minimum period of employment in Norway to one year,
which was subsequently adopted.

The Committee did not devote much attention to immigration in the context of
cross-border provision of services, at the time dubbed “foreign contractors in Norway”. This was a growing concern, however. The incipient offshore oil industry brought with it significantly more extensive labour mobility in this form than had been expected. In view of this the Ministry for Labour, in a separate follow-up to a report already pending in the Storting, proposed that a “relatively restrictive regime” should be adopted. This had a dual motivation, in part to safeguard employment for Norwegian workers and in part to aim to secure acceptable terms and conditions of employment for foreign workers in Norway. To achieve this the Ministry proposed that if both Norwegian and foreign workers were employed at a place of work, the builder or its contractors should be obligated to see to it that the same wage provisions and other terms and conditions be applied “regardless of nationality”. If only foreign workers were employed the Ministry proposed that there should be a requirement that wages and other terms and conditions should not be inferior to the standards “applying pursuant to collective agreement or scale or is otherwise normal for the place and profession in question”.

These proposals were approved by the Storting and were subsequently included into the regulations issued in pursuance of the Immigration Act of 1956 and its successor of 1988. With the superseding act of 2008 the pertinent provision is included in the Act itself, where it reads:

“Pay and working conditions shall not be inferior to the collective agreement or pay scale for the branch or industry. If no such collective agreement or pay scale exists, pay and working conditions shall not be inferior to that which is normal for the place and profession concerned.” (Sec. 23 para. 1 item b.)

An exception applied to “installation work” by technical experts, installation engineers, assemblers, etc., who did not need a work permit for a period of up to three months.

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8 See NOU 1973: 17 Innvandringspolitikken [Immigration Policy].
9 See Innst. S. nr. 85 (1974-75), 8 [Recommendation by the relevant Standing Committee of the Storting to the Plenary.]
10 Act of 25 June 1954 No. 14 (fremmedloven) and Regulations of 10 January 1975 No. 4, and Act of 24 June 1988 No. 64 (utlendingsloven) and Regulations of 21 December 1990 No. 1028, respectively.
11 Act of 15 May 2008 No. 35 on the Right of Foreigners to Entry and Residence (utlendingsloven), in force from 1 January 2010.
This is still the case pursuant to the more comprehensive sec. 1-1 of the Regulations to the 2008 Act.  

3 Fear of “Social Dumping”, Legislation in Process

3.1 Prelude

It was this legal situation that prevailed with regard to non-Nordic workers when the idea of an EEA was set in motion and negotiations got under way in 1989 and 1990. The prospect of a wider reaching right to free movement for workers and, particularly, of labour mobility in the context of provision of services gave rise to some concern, especially on the part of trade unions. This was recognised politically, and was accommodated along to different lines in the process leading up to the ratification and subsequent entry into force of the EEA Agreement.

Firstly, in its White Paper on ratification the Government presented a quite moderate prognosis of possible labour market effects of free movement law. Referring to the experience with the internal Nordic labour market it considered as unlikely that inward mobility from EC/EEA states would be significant. This was emphasised by the Storting’s Standing Committee, which could “see no reason to presume that the EEA agreement would result in much of labour market mobility”. Further, the Government White Paper invoked the ECJ judgment in Rush, citing the Court’s notorious dictum.

“Finally, it should be stated, in response to the concern expressed in this connection by the French Government, that Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means (…)” (para. 18).

It was, understandably, argued that thereby it was settled that a Member State could apply their legislation as well as collective agreements on wages and working conditions to all forms of paid work being carried out on its territory, independent of a worker’s or employer’s nationality. The White Paper pointed however to the then recently tabled proposal for a directive on posting of workers as an element of uncertainty. This was echoed in the Standing Committee’s Recommendation, which commented somewhat sceptically on the draft legislative proposal the Ministry of

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12 Regulations of 15 October 2009 No. 1286 on the Right of Foreigners to Entry and Residence (utlendingsforskriften).
13 See St.ppr. nr. 100 (1991-92) Om samtykke til ratifikasjon av Avtale om Det europeiske økonomiske samarbeidsområde (EØS) [December 1991], 253-54.
15 See St.ppr. nr. 100 (1991-92), 252, 253, 254.
16 See St.ppr. nr. 100 (1991-92), 255.
Labour had put out for consultation in June, 1992. The Committee emphasised the importance of putting adequate legislative measures in place to counter problems of “social dumping” before adopting the EEA Agreement and in any case before the entry into force of the Agreement.

That points to the second line of accommodation, the process leading to the adoption in 1993 of the Act on Extension of Collective Agreements, etc.

3.2 Elaboration of the Extension Act – the First Phase

In mid-1990 the LO made emphatically clear that the Confederation would insist on adequate measures to be included in an EEA agreement to ensure the application of domestic terms and conditions of employment for work being performed in Norway by EC based businesses. That aim was accepted politically without much ado. The Ministry of Labour started looking into the matter towards the end of the year. In the absence of substantive input from the LO, or from social partners otherwise, Ministry officials were left to grapple with the issue on their own. From the start, their focus was on the problem of wages, not on other terms and conditions of employment. This was reflected in the Ministry’s first formal communication to the LO and the Confederation of Norwegian Enterprise (NHO), the major employers’ confederation.17

Pointing to the mandatory nature of statute law rules on worker protection and to private international law norms as regards dismissal protection law, etc., the Ministry indicated three alternative ways of dealing with the wage problem. First, the introduction of minimum wage regulation; second, rules requiring compliance with the actual domestic wage levels; and third, permitting national trade unions to take collective action against foreign employers even if they and their workers are bound by collective agreement. The latter alternative explicitly was modelled on the Swedish “Lex Britannia” legislative amendment introduced in 1991.18 As for other terms and conditions set out in collective agreements the Ministry stated that it would depend on, i.a., the duration of work whether such provisions should be made applicable or not to foreign undertakings.

In response, the LO expressed satisfaction with the Minister’s assurance that the Government would take the appropriate action to prevent “social dumping” in due time before the entry into force of an EEA agreement, but did not go into any detail on the alternatives sketched by the Ministry or any other measures. The NHO took a more sceptical approach, emphasising the different forms of regulation of terms and

17 See Kommunaldepartementet (Ministry of Labour), letter of 18 June, 1991 (91/3282 M2 HGG), to LO and NHO.

18 Amendment to sec. 42, etc., in the 1976 Act on Joint Regulation in Working Life, in force from 1 July 1991. The Lex Britannia came to the fore in the ECJ decision in Laval (Case C-341/05 Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggetan, Svenska Elektrikerförbundet, [2007] EFD I-11767), which held the Swedish Act on this point to be in violation of Articles 49 and 50 EC (Articles 56, 57 TFEU), see paras. 112-121.
conditions of employment and the variation in content between different instruments and branches. Both organisations also pointed to the ongoing efforts in the EC to elaborate a directive on the posting of workers.¹⁹

The Ministry subsequently, in the last quarter of the year, drafted a text that in substance was copied into the White Paper on ratification of the EEA Agreement, tabled in May 1992. There, “social dumping” was defined as occurring if foreign workers perform work on terms and conditions of employment that are significantly inferior (“vesentlig dårligere”) to those prevailing in the host country, and the Government stated unequivocally that it would “prevent” the EEA Agreement from leading to a situation where foreign workers might come to Norway and perform work on terms and conditions that are “significantly less favourable” than terms and conditions otherwise applicable in Norway.²⁰

Also in May, a draft consultation document was put to Arbeidsrettsrådet, the Standing Advisory Committee on Collective Labour Law, in which both the Ministry of Labour and the LO and the NHO were represented by senior officials.²¹ That document, virtually without modifications, was subsequently sent out for public consultation on 25 June, 1992.²² This was done even if it was clear that the LO had expressed its preference for another form of measure – general applicability of collective agreements – than that proposed by the Ministry in the consultation document. Two reasons seem to underlie this. At the time the LO had not yet discussed the issues in its Executive Committee; and inside the Ministry the LO’s preferred alternative was considered to probably have a domestic aim going further than what was requisite to resolve problems arising from the EEA Agreement.

This sets the scene for the next phase of the process.

3.3 The Second Phase, Legislation in Draft

The Ministry’s draft proposal envisaged an Act on the fixing of minimum wages that should apply to all work performed in Norway, whatever the law applicable to the employment relationship. Minimum wages could be fixed for all or a part of a branch or industry. The proposal was to empower the National Wages Board (Rikslønnsnemnda), an existing body with social partner representation and essentially an interest dispute arbitration board, to fix minimum wages on request of a representative trade union or

¹⁹ See letters of 28 June 1991 from the LO and 26 September 1991 from the NHO (Ministry ref. 91/3282-7 and -9, respectively).
²⁰ See St.prp. nr. 100 (1991-92), 31-32.
employers’ association. A prerequisite should be that the fixing of minimum wages was justified by the public interest. The Board thus would not have autonomous competence, nor would trade unions or employers’ association have an independent right to have minimum wages fixed on request.

The draft proposal contained nothing specific on the objective of the envisaged legislation. It also said nothing of a requirement of there existing substandard wage levels for any workers as a prerequisite to making a minimum wage resolution. The sole indication was linked to the notion of “public interest” and accentuated the consideration to protect domestic business and employees from competition.

The consultation document discussed but rejected forms of “extension” or imposing general applicability of collective agreements, for several reasons. To confer general applicability on collective agreements was seen as a very extensive encroachment on free collective bargaining. It could also be perceived as a form of devolution of legislative power to social partners. It was doubtful whether decisions by a public body on granting general applicability could provide satisfactory protection against “social dumping”. Moreover, collective agreements in many cases do not contain specific provisions on wages or set minimum standards that are considerably lower than the wage levels actually prevailing within the agreement’s domain.

The consultation document met with split reactions. On the one hand, nearly all of the social partners, etc., that submitted opinions agreed that there was a need for measures to ensure parity of terms and conditions of employment. On the other hand, opinions differed on which kinds of measures that should be resorted to.

At its session on 22 June the LO’s General Council had adopted a statement of principle insisting, firstly, that social partners should have as much control as possible over if and when the scope of collective agreements should be extended, secondly, that the responsibility for wage fixing should remain with the social partners, and thirdly, it should be for the social partners to decide on the minimum levels to be given an extended scope of application. An LO memo citing, i.a., these basic views and arguing strongly in favour of a system of “extension” of national collective agreements subject to requests by representative trade unions was passed on to the Ministry of Labour through the Prime Minister’s Office in mid-August. Presenting the matter to the Minister, the Ministry Department in charge expressed strong scepticism to the LO’s “extension” proposal, essentially maintaining the assessments expressed in the consultation document.

In the consultation proper, opinions being submitted in early September, the NHO and other employers’ associations supported the proposal for a minimum wage fixing

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23 The term "representative” here is a simplification for the technical Norwegian concept of “innstillingsrett” pursuant to the Labour Disputes Act, 1927, sec. 11, denoting national trade unions with an active membership of at least 10 000 and employers’ associations with minimum 100 members with a total employment of at least 10 000.
regime. The LO, on the other hand, insisted strongly on an “extension” of collective agreements alternative. So did the Confederation of Vocational Unions (YS) and a number of other national trade union organisations – possibly to the surprise of Ministry of Labour officials who had assumed that smaller and competing unions would resist general applicability alternatives as they might render the LO in a stronger position. Further, objections were raised towards either alternative. The Ministry of Trade and Industry was critical of what it saw as an absence of trying to assess the scope and extent of a potential “social dumping” problem and counselled against establishing a machinery empowered to fix wages and other terms of employment, for fear of upward pressure on wages and negative economic effects. Similar objections were submitted, more comprehensively, by the Directorate of Prices and Competition; objections that would reappear at a later stage in the legislative process.

After the conclusion of the consultation procedure the Department drafted a memo, at the end of September to the Minister of Labour seeking a political go-ahead to prepare a draft Bill, maintaining its arguments against the “extension” alternative proposed by the LO but accepting that a Board should have power to fix some terms and conditions of employment beyond wages. It insisted that a “public interest” requirement should apply, and concluded that for several reasons it was unadvisable to make use of the National Wages Board as a terms fixing body. The Department proposed to establish a new independent body, composed in the same way as the National Wages Board, for this purpose. While strong on some points, the memo gave no clear conclusion on the issue of the two basic alternatives, independent fixing of wages and other terms or the “extension” alternative. This in essence foreboded the subsequent developments.

Following a first round of political consultations the Department a short two weeks later drafted a new memo to the Minister proposing to accept, with some modifications, the LO’s “extension” proposal. This notwithstanding, work was in progress on a draft Bill that was finalised on 23 October, 1992, and which was based on the independent fixing of terms alternative. That draft Bill was not politically approved and was never brought to public light, however. Some two weeks later a new draft based on the “extension” alternative was largely ready. Intensive consultations, with Ministries and others on salient substantive and technical points followed until a mere ten days before a Bill was officially tabled, on 26 November 1992.24

3.4 The Third Phase. Bill, Controversy, and Adoption

The proposed Act was fairly short and simple, but lacking in clarity nonetheless. Its main features can be summarised as follows.

- The Act should apply to fixing of wages and other terms and conditions of employment for work performed in the service on another, including a mandatory choice of law rule prescribing the application of Norwegian law.

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24 Ot.prp. nr. 26 (1992-93) Om lov om allmenngjøring av tariffavtaler m.v.
• The draft proposal contained no object clause and had no provision stipulating differences from or comparison with prevailing standards domestically as prerequisites to extension decisions.
• Only representative trade unions and employers’ associations, parties to a given collective agreement should be entitled to require the competent body to take a stand in substance on a demand for extension.
• An independent administrative law body, Tariffnemnda (the Tariff Board), was to be established, with permanent representation from the major social partners, LO and NHO, and vested with the power to decide in “extension” cases.

Further, the draft proposal included some simple procedural provisions, a provision on the period of validity of a decision by the Board, and a special provision on enforcement boycotts.

The Bill drew after it strong objections. Even if the Government to a great extent had taken the LO’s views into account, the trade union confederation disagreed sharply with the Bill on some points. Objections were however raised in particular by employers’ associations. The criticism was not levelled at technical aspects of the proposed Act. The main bone of contention was the fact that the Bill proposed a fundamentally different form of machinery from that which was up for consideration in the consultation round and, moreover, a solution the Ministry had discussed but rejected in the consultation document. The turnaround in the Bill came as a surprise to the employer side.

The controversy led to a rather drawn-out procedure in the Standing Committee of the Storting. From mid-January, 1993, the Committee staged a series of consultation meetings with a number of trade union and employers’ organisations, and several of those actors submitted written opinions to the Committee. Proposals on some key points were put forward by the NHO and countered by the LO. Two issues in particular were subjects of dissension. Several social partners on either side argued in favour of including an object clause in the Act. How to frame it, however, was a different matter. The LO strongly opposed the NHO’s proposal to use the expression “significantly inferior”, copied from the Government’s definition of “social dumping” in the 1992 White Paper. Drawing on a formulation in the Bill’s introductory summary the LO instead proposed a standard, which can be seen to be adapted from immigration law provisions, of terms being “on par with” those fixed in a relevant collective agreement or with that which is normal for the place and profession concerned. The Ministry and its political leadership still maintained, in communication with the Standing Committee

25 The first part of the appellation, tariff, corresponds to the term designating a collective agreement in Norwegian, tariffavtale.
26 In Norwegian: Kommunal- og muljøvernkomiteen.
27 All written submissions are included in the Appendix to the Standing Committee’s Recommendation, Innst. O. nr. 98 (1992-93).
and its Labour Party wing, that it was unnecessary to include an object clause, arguing
that the objectives of the Act were clearly explained in the preparatory work, the Bill. 28
A solution on this point was arrived at only after the insistence on an object clause by
the Christian Democratic (KrF) wing of the Standing Committee and a compromise
inside of the Committee in early May.

The second main point of dissension was on the requirement of a factual basis as a
prerequisite for Tariffnemnda to make decisions in substance. The Bill did not stipulate
any provision on this. This issue also was the subject of considerable communication
back and forth between the Standing Committee and the Ministry but was not clarified
to any great extent. In the end the Standing Committee however employed a wording
from the NHO’s proposal for an object clause. Framing one of its own stating that the
objective of the Act was to secure terms and conditions for foreign workers “on par
with” those enjoyed by Norwegian workers, the Committee added wording to the effect
that this was meant to prevent foreign workers from working on terms and conditions
that “as a whole” are “demonstrably inferior” to collectively agreed or otherwise normal
standards for similar work. While the Ministry was opposed to construing a formulation
of this kind as an evidentiary rule, the Chair of the Standing Committee during the
Storting’s debate emphasized that the term “demonstrably” was intended to express a
basic requirement of evidence, aimed at preventing “inappropriate” requests for
decisions by the Tariff Board. 29

The Standing Committee tabled its Recommendations on 13 May; debates in the
Storting took place on the 18th and 25th of May, and the Act was formally adopted on 4
June, 1993 – Act No. 58 relating to Extension of Collective Agreements, etc.-

3.5 The Legislative Process in Retrospect

The Extension Act was born under the looming prospects of a European internal
market. The open Nordic labour market that had been in existence for almost 40 years
had not resulted in downward pressures or notable disturbances on the domestic labour
market. Considerably different in technical regards, terms and conditions of
employment in substance were not differing a lot across the Nordic countries. Part of
the reason for this could be found in cooperation of long standing at the administrative
and legislative level as well as between social partners. EC/EEA-wide free movement
law, and the reminder provided by the Rush case, presented quite different perspectives.

The LO immediately realised that unions density and collective agreement coverage
rates were not such as to render possible relying on collective bargaining and collective
action measures to curb possible low-wage competition from foreign workers or

28 See, i.a., Ministry of Labour (Kommunal- og arbeidsdepartementet), letter of 17 March 1993
(91/3282-93 M2 IP), to the Standing Committee, the Committee’s letter to the Ministry of 22
April and telefax from the KrF wing of 23 April, and the Ministry’s letter to the Committee
of 28 April 1993 (91/3282-101 M2 HGG)

29 See Blankenborg (A), Ot.forh. 1992-93, 675.
employers. Trade union density stood at a total of about 55 per cent and collective agreement coverage in the private sector was at about the same level, however differing significantly between branches. This was in marked contrast to the Nordic neighbours where density and coverage rates were between 75 and 90 per cent according to commonly cited figures. Hence the Norwegian LO from the very beginning opted for the legislative route.

The LO’s call for legislation met with little opposition. Employers’ associations also saw a need for legislative measures enabling protection against “social dumping”. In the first phase these views however were not made specific. That left Ministry of Labour officials in a bit of a vacuum to consider possible forms of regulation. The minimum wage alternative first tabled rested on a critical assessment of extension of, or declaring generally applicable, collective agreements, in part based on freedom of association considerations in view of the pluralistic trade union situation in Norway and in part on difficulties involved in extracting suitable standards, in form and scope, from collective agreements often differing widely with regard to their provisions and levels of precision. The LO on the contrary placed emphasis on the role of social partners, in particular the major ones, in the determination of wages and other terms and conditions of employment on the national labour market and in the national economy and argued strongly for a solution that not only would give it a role in this regard but also would not restrict a decision-making body to solely deal with wages. Once a better and more specific communication was established with the political level of the Ministry of Labour during the final phase of the consultation procedure in 1992, it was this approach that prevailed, even if at the outset it was still met with some reservation by Ministry officials.

It attests to the political impact of the LO that the Bill was drafted based on LO’s preferred alternative without bringing other major social partners into the process even though the proposal to be tabled was quite a turnaround from the consultation round. The outcome of the Standing Committee’s deliberations illustrates the same. There was strong opposition on many points to key demands from the LO by other actors, employers’ associations in particular. On some points also the Ministry of Labour at the political level disagreed. On most issues of consequence the LO’s views still prevailed. The Act as it was adopted was not quite tailored to order but the paternity nonetheless was unmistakeable.

4 The Extension Act as Adopted

4.1 Overview

A notion of “social dumping” figures in the background but does not appear in the Act itself. On the contrary, the notion of “social dumping” as employed at the time, and still, presupposes pay and other terms and conditions that are inferior to those otherwise prevailing in Norway. That is a less demanding standard than the parity requirement in
the Act’s object clause, sec. 1-1, in which the words “demonstrably inferior” is not a reference to a degree of difference in substantive terms. The wording of the object clause was far from clear in this respect30 but the point was made clear in the preparatory work to the Act, in particular during the parliamentary debate.

The Tariff Board was established as an independent public administrative body composed of five permanent members, two representing the major social partners, and supplemented for decisions by one representative of the party to the collective agreement concerned making a demand for extension and one representative of the other party to the agreement (sec. 2). Representative trade unions and employers’ associations (cf. fn. X, supra) were given the right to request the Board to decide in substance on demands for extension. Other social partners were accorded no right but the Board was empowered to make decisions on its own initiative in exceptional cases.

In the wording of sec. 3 a decision on extension would involve “that a nation-wide collective agreement shall wholly or partly apply to all employees performing work of the kind covered by the collective agreement”. This wording however is an overstatement. Collective agreements in the Norwegian context are typically comprehensive instruments regulating a wide range of issues at the collective as well as the individual employment contract levels. Sec. 3, second paragraph, expressly stipulated that extension decisions ca “be made only in respect of those parts of the collective agreement which stipulate terms of wages and employment of individual employees”, i.e., *normative* provisions of the collective agreement. Further, the Tariff Board could, “in special cases”, set “terms of wages and employment other than those ensuing from the collective agreement”. This alternative was intended for situations where the actual terms and condition in a branch or sector do not reflect the formal provisions of an agreement, typically where a minimum standards collective agreement is added to by workplace bargaining. An extension decision at the outset is valid for the duration of the period of validity of the collective agreement, which typically is two years. A decision however retains effect beyond this, lapsing only if either party to the collective agreement has not made a new demand for extension within one month of the renewal of the agreement (sec. 4).

As a public administrative body the Tariff Board, its procedure and decision, are subject to administrative law. A provision permitting a simplified procedure in securing requisite information, through oral hearings, was included on this ground, and a duty of information was imposed on public authorities as well as on employers, their managers, and employees (sec. 6, 7). Further, for employers and persons managing a business on

30 Sec. 1-1 "Objectives of the Act” as adopted in 1993 read ”The objective of the Act is to ensure foreign employees of terms of wages and employment on par with those of Norwegian employees, in order to prevent that employees perform work on terms which, based on a total assessment, are demonstrably inferior to the terms stipulated in existing nation-wide collective agreements for the trade or industry in question or are otherwise normal for the place or occupation concerned”.
the employers’ behalf wilful or negligent violation of a decision by the Tariff Board is liable to criminal sanctions, in the form of a fine. A new twist on enforcement mechanisms was introduced with a provision enabling workers concerned or their trade union to institute private criminal proceedings (sec. 8).

The Extension Act as adopted in 1993 entered into force coincidently with the EEA Agreement, on 1 January 1994. From then on, it essentially remained passive for ten years.

4.2 Observations
A first observation concerns Tariff Board decisions. A decision to “extend” a collective agreement does not create rights and obligations in contract law between workers and employers concerned. In legal terms, a decision by the Tariff Board lays down statutory regulations. It is characteristic of the Tariff Board that it exercises delegated legislative power. It is quite unique in the Norwegian context that such empowerment is devolved on a public administrative body that is independent from politically responsible levels of government and parliamentary control. The strong representation by social partners on the Board adds to this distinctive feature.

A further point to be noted is the objectives of the Act and thereby of regulations issued by the Tariff Board. The parity requirement in the object clause, sec. 1-1 of the Act, and the wording “demonstrably inferior” reflect the duality of the Act’s objectives. The aim is in part to ensure that foreign workers enjoy terms and conditions on par with Norwegian workers while working in Norway, and in part to preclude distortion of competition as regards undertakings employing Norwegian workers. This corresponds to a basic principle of immigration policy. It was, and still is, a fundamental tenet of immigration policy that labour immigrant should have the same terms and conditions of employment as are otherwise applicable on the national labour market, which is deemed to be important not only to safeguard immigrant labour against being employed on unacceptable terms but also in order to protect workers and earnest domestic undertakings from unfair competition.31

These two facets intertwine. The parity objective first and foremost is aimed at protecting domestic undertakings and employees from competition; the perspective is not primarily to protect foreign workers from exploitation or inappropriate treatment. Arguably, not any difference can be deemed to amount to exploitation or unacceptable standards. The paradox is that the more equal to a domestic worker the foreign worker is treated, the more its competitive advantage on the labour market is weakened. That is not necessarily to the benefit of the foreign worker. This goes to indicate that drawing the line between the reasonable use of competitive advantage and unacceptable standards is far from a simple task. Thus from the outset, it can fairly be held that protection against foreign competition is the dominant facet of the Extension Act and its

specific provisions. It is protection against “social dumping” in the sense of undercutting domestic standards that was at the core of the concerns and efforts resulting in the Act.

Another feature is that the wording of the Act does not differentiate between what was later to be termed “posted workers” and workers entering the country in an individual capacity under the free movement of persons rules (Article 28 EEA). The distinction is not addressed at all in the preparatory work. This may seem surprising in light of the ECJ’s decision in Rush and the first proposal for a Directive (COM(91) 230 final). Both were triggers and a key backdrop of the legislative process. The explanation evidently is that both categories of workers should come within the scope of the Act, a conclusion which is consistent with the underlying presumption that decisions made under the act would apply also to domestic undertakings and workers. The implicit premise was to avoid nationality discrimination.

It is a point to be noted, however, that otherwise, the relation to EC/EEA law and the possible limitations it might entail on the Extension Act itself and the exercise of power to regulate in pursuance of the Act in reality was not discussed in the legislative process. This may be due to a too simplistic reliance on the dictum in Rush, or it may mirror a yet insufficient familiarity with EC law, or both.

Finally, another facet is the enforcement measures. In the Act as adopted these were scanty at best. Criminal liability as pointed to above was one, a right to resort to enforcement boycott by parties to an “extended” collective agreement was the other measure included in the Act. In fact, very little attention was paid to matters of control and enforcement in the preparation of the Extension Act.

The two latter topics figure more prominently at later stages of the development of the legislation.

5 Implementing the Posted Workers Directive

5.1 The Transposition 1999 - 2000

As a non-member of the EU Norway was not a party to the adoption process of the Posted Workers Directive and had limited access to information about the deliberations. This was accentuated after the referendum in November 1994 rejecting a proposal to join the EU. The essential elements were however known at the time the Directive was included into the EEA Agreement and accepted for implementation in Norway, the deadline for implementation to be 16 December 1999, as set out in the Directive.

32 EEA Committee, Decision No. 37, 30 April 1998, amending Appendix XVIII to the EEA Agreement.

The Ministry of Labour issued a public consultation document on 5 February, 1999, proposing a novel Act on Posted Workers. The draft law adhered closely to the Directive’s main provisions. Sec. 2 essentially replicated Articles 1 and 2 PWD; sec. 3 enumerated relevant national provisions in pursuance of Article 3(1) and included a choice of law clause and a provision similar to Article 3(7), first paragraph; and provisions on information, jurisdiction and enforcement of judicial decisions followed in sec. 4, 5, and 6. In the absence of any minimum wage legislation in Norway the draft pointed to the Extension Act, proposing that provisions on “minimum wages” in an “extended” collective agreement should apply also to posted workers.

Comments and objections to the draft were few but some were significant. Some minor comments, mainly of a technical nature, were made on points concerning annual holidays, and the choice of law and jurisdiction provisions. The Norwegian Shipowners’ Association and the Ministry of Foreign Affairs discussed the geographical scope of an act with regard to petroleum activity on the Norwegian part of the continental shelf, the former in particular arguing in favour having an act apply there as well. That was eventually accepted, even if it was not strictly required under the EEA Agreement.

Further, some objections were urged against the draft’s construction of Article 3(1) of the Directive and the proposal to limit the applicability of regulations issued by the Tariff Board to “minimum wages”. Those objections also were accepted in the subsequent Bill and the Act adopted thereafter.

The case of implementation apparently was considered as an essentially technical issue. Not only were comments on the draft legislation few; there was also no notable controversy or disagreement between social partners on either side. The major substantive point being brought up was raised by the LO, and not commented upon in any other submissions. The LO suggested that an alternative based on Article 3(8) PWD, first alternative, should be included into an act, in order to complement the “extension of collective agreements” alternative which the LO considered as too restricted. This proposal was rejected by the Ministry of Labour, which considered it as inexpedient, pointing, i.a., to the difficulties involved in appreciating the consequences to existing arrangements if it is laid down by law that collectively agreed terms and conditions of employment that are not concretised, were to be applied to posted workers. Moreover, the Ministry regarded this alternative as potentially untenable in respect of nationality discrimination. It also noted that very few collective agreements in

34 The synthesis here is based on a complete set of copies of the written observations to the consultation document, obtained from the Ministry of Labour, in the author’s possession.
35 On standard construction, the Norwegian part of the continental shelf is not part of the national “territory” within the meaning of Article 126 EEA.
36 I.e., “collective agreements or arbitration awards which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned”.

Norway would qualify in terms of scope and raised doubts as to whether the Article 3(8) alternative could be used alongside the extension of collective agreements machinery.\textsuperscript{37}

On a smaller point the LO won through. It argued that the existing provisions an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship, transposing Directive 93/533/EEC,\textsuperscript{38} should be included among the provisions of domestic law to apply mandatorily to posted workers’ employment relationships, in order to facilitate control. The Ministry of Labour went along with this proposal noting that a ”written agreement of employment” would serve as an important measure as regards to what extent a worker would have the opportunity to invoke terms and conditions pursuant to the act in question. The provisions concerned were thus included in the list otherwise based on Article 3(1) PWD.\textsuperscript{39}

A major change occurred in respect of the form of implementation instrument to be used. The Ministry of Justice objected to a separate act, arguing strongly against “little laws” on “particular topics” for reasons of legislative structure and technique, suggesting instead that the provisions on posted workers should be incorporated into the Working Environment Act. The Ministry of Labour abided by this,\textsuperscript{40} and as the Bill was approved by the Storting the new rules on posting of workers were inserted as a new chapter XII B into the 1977 Working Environment Act by Amendment Act of 7 January 2000 No. 3 (in force from 7 January 2000).

5.2 New Act, New Arrangement, 2005

The 1977 Act was superseded by a new Working Environment Act in 2005.\textsuperscript{41} This renewal of the legislation essentially did not bring with any changes in substantive terms from the provisions laid down in chapter XII B of the 1977 Act. There was however an alteration of a legal technical nature. The provisions concerned were moved from the Act itself to Regulations issued in pursuance of sec. 1-7 of the 2005 Act. This followed up on an observation made by the Ministry of Labour in the Bill to the amendment Act of 2000, when however the implementation deadline precluded a full

\textsuperscript{37} See Ot.prp. nr. 13 (1999-2000), 22-23.

\textsuperscript{38} This Directive is implemented in the form of provisions on a ”written agreement of employment”, to be drawn up as a rule within one month after the actual beginning of the employment relation and, hence, subsequent to the conclusion of the contract of employment proper. At the time of the implementation of the PWD the rules on a “written agreement” were part of the 1977 Working Environment Act (4 February 1977 No.). They are now included in sec. 14-5 et seq. of the superseding Working Environment Act of 17 June 2005 No. 62.

\textsuperscript{39} By reference to ”§ 55 B, § 55 C” in the new sec. 73 M, first paragraph, litra a, of the 1977 Working Environment Act.

\textsuperscript{40} See Ot.prp. nr. 13 (1999-2000), X5.2.

\textsuperscript{41} See in fn. 38, supra.
wholly different solution from the statute provisions originally proposed.\textsuperscript{42} This was supported legal technical arguments, in particular that the use of regulations would simplify extending the applicability of the provisions to other relevant Acts than just the Working Environment Act.

The legal base for the Regulations, sec. 1-7 WEA 2005, contains no stipulations on terms and conditions of employment or machinery to determine mandatory rules for posting situations. Instead, sec. 1-7 lays down definitions on who is a posted worker and what is posting, again essentially replicating Articles 1 and 2 PWD, adhering to and replacing sec. 73 K and 73 L of the 1977 Act.

5.3 Observations

By retaining the content of the provisions implemented originally with the amendment Act of 2000, the Regulations of 2005 maintained the same extensive list of mandatory domestic provisions to apply to posted workers. Article 3(10) PWD was briefly touched upon in the preparatory work to the 2000 Act, but not in this respect. The enactment also did not rely on Article 3(7) PWD. It was clearly recognised that the “more favourable” clause in its first paragraph pertained to better terms and conditions pursuant to employment contract or the law otherwise applicable to the employment relation, i.e., as a rule, the worker’s home country. This was reflected in sec. 73 M, third paragraph, of the 1977 Act, replicated in sec. 2, third paragraph, of the 2005 Regulations.\textsuperscript{43} In the preparatory work to the 2000 amendment Act the Ministry of Labour expressed the view that a large number of protective provisions in the WEA (1977) would apply also to posting situation, those being provisions that are enforced by public administrative agencies. The special provisions of chapter XII B were not meant to alter this and on this ground the Ministry did not see a need for including still more provisions on terms and conditions into chapter XII B.\textsuperscript{44}

Still, the enumeration in sec. 73 M, now sec. of the Regulations, of applicable domestic law is more extensive than what is compatible with Article 3(1) and (10) PWD. This is the case in particular with the provisions on “written agreement” (information in writing on terms and conditions), sec. 14-5, 14-6, and 14-8 of the WEA 2005, and further the large majority of stipulations on different forms of leave, in chapter 12 of the Act. These discrepancies have been pointed to in legal writing\textsuperscript{45} but have not been addressed by the legislator, not even after the ECJ’s decision in\textit{Commission v Luxembourg}, 2008, made clear that a requirement to abide by host state

\textsuperscript{42} See Ot.prp. nr. 13 (1999-2000), X5.2, and Ot.prp. nr. 49 (2004-2005) [the Bill for the 2005 Act], 82.

\textsuperscript{43} These provisions stipulate(d) that the rules enumerated to apply to posted workers regardless of the otherwise applicable law shall apply only insofar as ”a posted worker is not subject to more favourable terms and conditions of employment by virtue of contract or the law of the country otherwise governing the employment relation.

\textsuperscript{44} See Ot.prp. nr. 13 (1999-2000), X5.4.

\textsuperscript{45} See in particular Evju 2006, 2008.
rules laid down in pursuance of Directive 91/533/EC is not in compliance with the
PWD and Article 49 EC (now Article 56 TFEU).46

On another note, the legislative provisions implementing the Posted Workers
Directive contain no sound definition of posting as far as its duration in time is
concerned. Sec. 1-7, first paragraph, of the 2005 WEA, replicating sec. 73 L, second
paragraph, of the 1977 Act, merely stipulates that the concept “posted worker” means a
worker who for “a limited period of time” is performing work in a country other than
that with which the employment relationship is habitually connected. The notion of “a
limited period of time” has not been specified or commented on in the preparatory work
to the Acts, nor has it yet been put to a test in practice. The openness of the notion is a
pending paradox, just like in EU law, at the national level pertaining to private
international law as well as immigration law.

6 The Relation Between the Enumeration and the Extension Act
The enumeration of domestic law rules that shall apply to workers who are posted to
Norway in the framework of provision of services, in sec. 2, first paragraph, of the 2005
Regulations, encompass

• chapter 10 WEA, on working time, maximum work periods and minimum rest
  periods; and also the majority of provisions in chapter 12 WEA on forms of leave;
• the Holidays with Pay Act, 1988, snd relevant provisions of the Holidays with Pay
  for Fishermen Act, 1972;
• sec. 14-12 – sec. 14-14 WEA, and sec. 27 of the Labour Market Services Act, 2004,
pertaining to the hiring-out of workers and the supply of workers by temporary
employment undertakings;
• chapter 4 WEA, on health, safety and hygiene at work;
• chapter 11 WEA concerning work of children and of young people, and sec. 15-9
  on dismissal protection for women during pregnancy, after birth, and in the case of
  adoption;
• chapter 13 WEA on protection against discrimination, and the employment related
  provisions of the Gender Equality Act, 1978; and
• sec. 14-5, 14-6, and 14-8 on “written agreement” (written information) on terms
  and conditions of employment.

The Regulations, formerly sec. 73 M WEA 1977, do not contain any provision referring
to rules on pay. An noted previously, there is no minimum wage legislation, mandatory
general rules on minimum pay, or the like in Norway. Wage setting is a matter for
agreements, be they individual, be they collective. The latter dominate in many ways in
a socio-economic and socio-political perspective but their impact in practice differs
considerably across sectors of working life.

46 See Case 319/06 Commission of the EC v Luxembourg, [2008] ECR I-4323, paras. 35-44.
The pay aspect is covered by the Extension Act. Pursuant to the Regulations under sec. 1-7 WEA, sec. 2 second paragraph, if the employment relationship of a posted worker falls within the scope of application of a decision by the Tariff Board, the rules on pay and other terms and conditions of employment shall apply and take precedence over terms ensuing from the provisions of the enumeration in sec. 2.

The importance of this is two-sided. First, provisions on pay are consistently a key element of collective agreements that are put of for “extension” and thus serve as a basis and model for a decision by the Tariff Board. Second, on several counts terms and conditions stipulated in collective agreements are more favourable to workers than the standards laid down in legislation. One example is working time. While the ordinary working week is maximized at 40 hours in the WEA, it is generally 37.5 hours per week in collective agreements. Similarly, annual holiday time is four weeks plus one day pursuant to the 1988 Holidays Act but five weeks under collective agreements.

Differences like these play a part, as the Tariff Board consistently has not restricted its “extension” decisions to matters of pay; it has also fixed other terms and conditions including working time, at collective agreement levels, in the regulations the Board has adopted. In contrast, it has consistently refrained from including the relevant collective agreements provisions on annual holidays with pay.

When the Posted Workers Directive was implemented with the WEA Amendment Act of 2000 an exception clause was included in the new sec. 73 M, fourth paragraph, which now appears in identical terms in sec. 2, fourth paragraph, of the 20065 Regulations. The exception clause answers to the “assembly clause” in Article 3(2) PWD. It applies to cases of “initial assembly and/or first installation of goods where this is an integral part of a contract for the supply of goods and necessary for taking the goods supplied into use and carried out by the skilled and/or specialist workers of the supplying undertaking”, if the period of posting does not exceed eight days. In such cases an exception is made from the enumerated provision that shall apply in respect of the provisions of the Holidays with Pay Act and sec. 10-6 WEA, eleventh paragraph, on the percentage rate for overtime increments. Correspondingly, provisions on holidays, holiday pay, wages and overtime pay in an otherwise applicable decision by the Tariff Board shall not apply during such a short term period of up to eight days.

This exception clause is the key to understanding a formulation in the Extension Act’s provision on the Tariff Board’s competencies. It has been noted above (4.2) that in the preparatory work to the Extension Act in 1992-93 the relation to and the possible boundaries ensuing from EC/EEA law were not discussed. As a part of the Amendment Act of 2000 implementing the Posted Workers Directive a new part sentence was inserted into sec. 3, first paragraph, of the Extension Act. The original wording to the effect that the Tariff Board is empowered to resolve that provisions of a “nation-wide collective agreement shall wholly or partly apply to all employees performing work of

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47 Identical to sec. 73 M, second paragraph, WEA 1977.
the kind covered by the collective agreement” was added to by words stating that this applies only within the restrictions ensuing from chapter XII B WEA (1977). In its present wording sec. 3 similarly refers to sec. 1-7 WEA 2005 and regulations issued in pursuance of that provision.

The wording might suggest a consideration of EC/EEA law and, possibly, an idea of limiting the scope of regulations issued by the Tariff Board merely to posted workers. This is however not the case. The specific wording is solely intended to set out that Tariff Board decisions cannot apply to posted workers under the “assembly clause” exception, to the extent it provides for exemption. The added wording to sec. 3 cannot be taken to imply that regulations laid down by the Tariff Board do not apply to domestic workers or individual labour immigrants. Moreover, it does not reflect any discussion or assessment of the role and powers of the Tariff Board within the framework of EC/EEA law in more general terms. This is a topic the legislator has abstained from addressing head on in the legislative process. It has however surfaced in some other contexts, as we shall see.

7 The Extension Act in operation

7.1 Bringing the Act into Use

The Extension Act remained an unused piece of legislation for a good 10 years. The rules on posted workers also were not brought into play for some time. It was not until the EU enlargement per 1 May 2004 started to draw closer that the first application to the Tariff Board was submitted, by the LO in mid-December 2003. The LO applied to have provisions laid down on the basis of three different national collective agreements to apply to seven specific on-shore petroleum industry works.

This first case gave rise to a serious of issues concerning evidence requirements, the scope of the Tariff boards competencies, and more, and it was also quite contentious. The procedure ended up being rather protracted. A decision laying down the first set of regulations in pursuance of the Extension Act was made only on 11 October, 2004, with the member from the employer side dissenting. the second application was made in February 2005, also by the LO, to obtain an “extension” applicable to the greater Oslo region of the national collective agreements for the building and electric installation industries. In this case, there was more of a consensus; the employer member agreed that there was grounds for issuing regulations but took a different view from the majority on certain specific points of the provisions to be laid down. The Board’s decision was issued in June 2005.

The split and divided attitudes evidenced in these two first cases have persisted in subsequent cases. While there has been consensus in general terms on issuing “extension” regulations for the building industry, there has been sharp disagreement in other cases. In one, concerning shipyards, the undertakings concerned assisted by the
NHO filed suit for annulment of the Tariff Board’s decision. Losing in the first instance City Court the case is now on appeal to the Court of Appeals.

7.2 The EEA Compatibility Issue

This legal dispute is related to general traits of the Extension Act and Tariff Board practices, which again are linked to issues of EC/EEA law on both Treaty/Agreement and directive levels.

In its first decision, 2004, the Tariff Board took a rather fuzzy stance on its competence relative to the EEA Agreement and its implementation into Norwegian law. The Board stated that it considered its decision to be in compliance with the Extensions Act but that the compatibility of the Act with EEA law was a matter for the legislator to assess. Thereby the Board bypassed its obligation, in domestic law generally as well as pursuant to the applicable EEA law, to independently to consider and ensure that its decision is not in violation of international law obligations undertaken by Norway. This stance drew considerable criticism in subsequent evaluations.

Based on the experience from the Board’s first case of the considerable difficulties in applying the Act the Ministry of Labour launched a first evaluation of the Extension Act in May 2005, followed by a second round in October of that year, in the form of public consultations based on reports drawn up by the Ministry. The consultation rounds revealed strongly diverging opinions on the Act and its compatibility with EEA law, and on elements of the Acts as construed by the Tariff Board, in particular the requirement pertaining to the factual basis for a possible decision, dubbed the “documentation requirement”. An expert opinion written for and submitted by the major employers’ confederation, the NHO, argued that the Extension Act as such was in contravention of EC/EEA law, i.a., on the grounds of the discretionatory power of the Tariff Board and the lack of transparency inherent in the arrangement of the “extension” scheme as a whole. This view was, not surprisingly, contested by several other submissions. There was disagreement also on the maximum level of minimum wages that can be fixed in “extension” regulations so as not to transgress limits ensuing from EC/EEA law. Opinions differed from minimal levels drawn from the lowest collectively agreed salaries, as a measure of “subsistence minima” that should be considered a ceiling, to considerably more liberal approaches, some pointing to practices in a number of EU Member States.

In subsequent cases the Tariff Board took a guarded position on the EC/EEA law issue, either bypassing it or referring to the Ministry’s opinion in the consultation documents that the Act in and of itself is not incompatible with the EEA Agreement. The issue was then brought to a point with the shipyards case, which was initiated with an application from the LO in September 2007. At the outset, it was the documentation requirement that was brought to the fore. The employer side, and the member representing the NHO on the Board, argued strongly that there was no factual basis for an “extension” decision. This was added to by a new expert opinion submitted by the NHO challenging the compatibility of the Act with EEA law and also several aspects of
the Board’s competencies within the framework of the Act. In the course of this initial phase of the procedure the European Court of Justice came down with the decisions in Laval and Rüffert, and then Commission v Luxembourg. The ensuing debate, coupled with the fact that Norsk Industri, a member association of the NHO, had filed a complaint with the ESA on the legality of the Act, led the Tariff Board to seek the opinion of the Legal Department of the Ministry of Justice, in late June, 2008. Offering a rather protracted exposé of generalities the Legal Department opined, in early September, that it considered the Act as such to not contravene the EEA Agreement, even if it vests the Tariff Board with wide-reaching competencies which, on their wording, empower the Board to make decisions going beyond the limits ensuing from the Posted Workers Directive. The Legal Department then noted, cursorily, that the Board’s powers must be applied within the limits of the EEA Agreement and secondary legislation being a part of it, and that the Tariff Board has an independent responsibility to exercise its powers accordingly. From this the Board proceeded to lay down regulations by a decision of 6 October, 2008, the member representing the NHO vigorously dissenting, in particular on the issue of a factual basis but also on points relating to the standards imposed by the regulations. I.e., weekly working time was set at 37.5 hours, like in the relevant collective agreement, and thus shorter than the statutory maximum of 40 hours. These points of controversy reappeared in the pending court case on the Tariff Board’s decision (cf. above).

8 Legislative Development Since Enlargement

After the EU/EEA enlargement in 2004 Norway saw a sharp increase in inward labour migration, of workers individually as well as in the framework of provision of services. This brought about new initiatives supervisory and control measures.

Concurrently with the first case before the Tariff Board a Bill was tabled by the then center-liberal government in late May 2004. The proposals were enacted by an amendment act of 2 July 2004 No. 66. It introduced an obligation on contracting employers to report detailed information on contractors and employees involved to the Tax Authority. Legal authority to issue regulations requiring workers to carry ID cards and to maintain lists of workers at the workplace on grounds of health and safety was included into the Working Environment Act (1977). This was swiftly implemented for the building industry. Moreover, the Labour Inspection Authority was vested with supervision and control of compliance with requirements on terms and conditions of employment, including pay, pursuant to the Immigration Act and regulations issued under the Extension Act, thus significantly amending the essentially private enforcement regime originally stipulated in that Act.

48 And similarly the Petroleum Safety Authority, which within its remit is vested with the same responsibilities and powers as the Labour Inspection Authority.
Further initiatives surfaced in the fall of 2005. Following up on the three-party declaration forming the political platform of the new center-left government that took office in September, 2005, the Labour-led government in May 2006 launched an “Action Plan against Social Dumping” consisting of a wide range of measures. A first follow-up appeared in June of that year with a Bill proposing to reinforce the supervision and control powers of the Labour Inspection Authority, which was subsequently adopted in November 2006. That amendment also included the introduction into the Extension Act of legal authority to issue regulations requiring a contracting employer to inform contractors of obligations ensuing from “extension” regulations. A further step on that path, as well as a qualitative innovation, followed with an amendment act of June 2007. Again the powers of the Labour Inspection Authority were strengthened. In addition, elected union representatives in a contracting employer’s undertaking, members of a trade union party to an “extended collective agreement, were given a right to require any contractor to produce information on the terms and conditions of employment of workers performing work within the scope of application of regulations in pursuance of the Extension Act. Complementing this, the provision authorizing regulations on a duty of information was expanded to also include the stipulation of a duty for a contracting employer to ensure that a contractor complies with its obligations (sec. 9). Regulations on the information obligation and the duty to ensure, and on the right of access of elected unions representatives, were issued on 22 February 2008.

The last of the legislative amendments so far occurred with an Act of 29 June 2009 No. 42 amending the Extension Act. Aside from a minor restructuring of the Extension Act and some primarily technical amendments, the essential feature of this revision was the introduction of a provision on joint and several liability for wages, including overtime supplements, and holiday pay (sec. 13). This applies top-down through the whole chain of contractors and subcontractors. A worker’s claim must be filed in writing within three months of its due date; the targeted debtor then must meet its obligation within three weeks. A contractor or subcontractor against whom a claim is filed has a right of recourse against the other undertaking in the chain, and should notify all contractors and subcontractors that share in the liability as swiftly as possible and in any case within two weeks of a claim that has been received. These provisions are inspired by arrangement existing in Germany under the Arbeitnehmer-Entsendegesetz sec. 5. The objective of the reform is to make the enforcement of “extension” regulations more effective and to improve the protections for workers, in particular posted workers.

49 Cf. St.meld. No. 2 (2005-2006) and further St.meld. No. 9 (2005-2006) on transitional measures pertaining to workers from the new EEA Member States.
52 See Ot.prp. nr. 88 (2008-2009), 57.
9 Summing Up, Current Issues

The Norwegian regime pertaining to posted workers and the wider notion of “social dumping” has evolved gradually. It was triggered initially by developments at EC level, the key factors being the ECJ’s decision in Rush and subsequently the Commission’s initiative to elaborate a Directive on posting of workers. Those developments took on a particular relevance as the negotiations to establish an EEA agreement got under way. Thereby, the Norwegian labour market and its actors were faced with fundamentally new prospects of workers and service providers descending on the domestic scene. The Extension Act of 1993 was the first response. Not much happened for a number of years after the entry into force of the EEA Agreement on 1 January, 1994; thus the Act rested in passivity. That was still the case when the Posted Workers Directive was adopted, in 1996, and subsequently implemented into Norwegian law, in 1999-2000. It was not until the reality of EU/EEA enlargement drew close that making use of the Act and to reinforce measures to safeguard its effectiveness and compliance in practice became a matter of concern.

The basic form of measure chosen in Norway is fundamentally different from the approaches applied in Denmark and Sweden. One, and the main, explanation is the realization at the outset that collective agreement coverage and trade union density are not at levels that would render viable to rely on collective bargaining and collective action measures alone. For that reason, the relation between domestic law and industrial relations practices and the impending EC law was not discussed or analysed at any length in this regard. A discussion on the possibility of employing collective action measures, including boycott, similar to those employed by Swedish unions in the Laval case, surfaced, but just barely, after the ECJ’s decisions in Viking Line and Laval. These issues are still moot.

Another difference is, that as a result of the legislative approach that was chosen in Norway the effects of the ECJ case law with the Laval Quartet are in no way as comprehensive or disturbing in the national industrial relations context as is the case in Denmark and Sweden. The EU level developments have not necessitated any legislative amendments or reform. They have contributed to a certain intensification of differences between the dominant social partners.

In that respect, bringing the Extension Act to use can be seen as a somewhat mixed experience. In particular in the building industry the major players have shown a joint interest in obtaining regulations. In other branches, the situation has turned out to be quite the opposite. With controversy arising in regard to whether regulations are requisite and justified in the first place, differences of opinion on scope and level of terms and conditions to be included once regulations are issued may seem to have intensified. The pending law-suit concerning the shipyards regulation of 2008 may serve as an illustration. However, there are no real signs that the antagonism that is
expressed by the discord in this field has impacted negatively on the generally god and trustful relations between the social partners.

Still, disagreement on the Extension Act and its application persists and may well be put to further tests. The first test balloon was landed when ESA, in July 2009, gave its opinion on the complaint filed by Norsk Industri in 2008 against the Extension Act as such. The ESA stated that the Act in itself clearly is not incompatible with EC/EEA law and added, moreover, some pertinent observations on the freedom of a Member State to decide on the level of minimum standards. Complaints filed subsequently against the ID card scheme and the regulations on the duty to inform and endure and the right of access are pending at this point in time (March 2010). It appears, however, that it is likely that some form of settlement will be arrived at in those cases, possibly implying some amendments but not disallowing the schemes in question. Currently, the primarily interesting and important matter is the on-going court case concerning the validity of the shipyard regulations of 2008. That case has so many facets it is difficult to forecast which issues may be the subject of primary attention and whether the Court of Appeal – or as the case may be, the Supreme Court at a next stage – will submit questions to the EFTA Court for an advisory opinion.

Even if in the larger scheme of national industrial relations the discord over the Extension Act and posting regulations is not much more than a skirmish it seems destined to remain a source of controversy and debate.