Polish Response to the European Developments

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I Introductory remarks

The purpose of this paper is to present the provisions of Polish labour law on employment relationships of employees posted to work in the EU and EEA Member States and the way Polish authorities treat employment relationships governed by the provisions of labour laws applicable in the EU and EEA Member States. The presentation focusses on the situation as of 1 May 2004, that is when Poland entered into the European Union, and until the year 2008, when the Poland ratified the Rome Convention on the Law Applicable to Contractual Obligations.¹

The period of the last six years is not considered a period of significant change in the Polish labour law provisions. This paper presents the changes introduced to the system of Polish labour law resulting from Poland's accession to the European Union and consequently, from the necessity to adjust Polish provisions of labour law to the EU norms. The process of adjusting Polish labour law to mandatory EU laws and practice (aquis communautaire) took the form of “copying” EU regulations and incorporating them into the legislation which was adopted previously, in the past economic and political system, and is still valid. As one example, Poland’s accession to the EU gave rise to amendments to the Labour Code, originally enacted on 26 June 1974 and amended nearly 50 times since 1 January 1975, that is on the day when the Act entered into force. In particular, Part II “Employment relationship” was extended by Chapter IIa, which introduced the provisions governing terms of employment of employees seconded to work within the territory of the Republic of Poland from EU Member States (Article 67¹- Article 67²). These provisions were further added to by Article 67³, which laid down the terms of employment of employees seconded to perform work in Poland from non-member States of the European Union.² Further, in case of a Polish employer posting an employee being a Polish citizen to work in a non-member State of the EU, Article 29¹ of the Labour Code obliged the employer to notify the employee of: the period of the work abroad (if longer than one month), the currency in which the employee would receive the remuneration while working abroad, additional benefits,

¹ O.J. 1980 L 266/1-19.
² Chapter IIa was introduced by the Act published in the Journal of Laws of 2003, No 213, item 2081.
including reimbursement of costs of travel to and from the place of work to the place of
residence in Poland, the provision of accommodation in the place of work abroad, and
the terms of travel to Poland. The employer was obliged to promptly notify the
employee abroad in writing of any change to the terms of employment.

The requirements specified in Article 291 of the Labour Code were not applied to
Polish employees posted to work within the European Union. A Polish employer
employing a Polish employee on the basis of an employment contract governed by the
provisions of Polish labour law had the same obligations towards the employee
regardless of whether it was employing the worker in Poland or in another EU Member
State. The employer was obliged to notify the employee of significant changes of the
terms of employment contract, that is of the type of work, the place where it was to be
performed, the amount of remuneration, the working time conditions and the date of the
commencement of work (Article 29 § 1 of the Labour Code (LC)). Further, the
employer was obliged to conclude an employment agreement in writing, and within a
period of no longer than seven days of the conclusion of the employment contract to
notify the employee of: daily and weekly working time standards, the frequency of
payment of remuneration for work; the length of vacation leave the employee is entitled
to, the duration of an employment contract notice period applicable to the employee, the
collective agreement the employee is governed by and work regulations applicable at
the employer (Article 29 § 2-3 LC). Employers exempted from the obligation to issue
work regulations were obliged to notify the employee of the night period, location, date
and time of payment of remuneration, as well as the procedure applied for the
employees to confirm arrival and presence at work, and justifying absence from work
(Article 29 § 3 LC).

The absence of provisions in the Labour Code on principles of employment by
Polish and other EU employers of Polish employees in non-EU Member States did not
mean that Polish authorities underlined free movement of labour within the common
market, despite Poland’s accession to the EU.

The idea of the absolute exclusivity of Polish labour law concerning employment
relationships between Polish employees and Polish employers regardless of whether
work is performed in Poland or abroad, i.e. also in any EU Member State, is the basic
thesis on which the present study per force is founded. Article 6 LC clearly states that
an employment relationship between a Polish employee and a Polish employer is
subject exclusively to the Polish Labour Code. Any exception to this rule may be introduced exclusively by international agreements. On the day preceding Poland’s accession to the EU, as a reaction to Union law on the free movement of employees and services Polish authorities expressed their support for the basic principle governing transactions regulated by domestic labour law provisions, according to which Polish labour law takes precedence over labour law provisions in force at the place where the work is performed if that place is located outside Poland, regardless of whether the employment contract contains a foreign element or not. Consequently, the conflict of laws rules, governing the choice of appropriate national labour law applicable to the employment relationship were given special importance in the “national report”. This report covers the period before Poland's accession, the transition period and the period of Poland’s full membership in the EU, which commences on 1 May 2011 as far as the issues concerning free movement of employees and services are concerned.

In relations between Poland and EU Member States during the period from Poland’s ratification in 2008 of the Rome Convention, the conflict of laws of labour law was regulated by the provisions of Articles 32 - 33 of the Act of 12 November 1965 - Private International Law. The Polish provisions of private international labour law did not apply the unified conflict of laws rules which were in force in the EU and which were applied to the resolution of conflicts among national the national labour laws of EU Member States.

The nature of the provisions of European labour law is that of transnational standards. In part, these provisions aim at achieving a uniform legal situation of all employees within the single EU/EEA labour market. A uniform legal situation of employees on the common market is assured by the directives which harmonize national systems of labour law Among such directives special attention must be paid to Directive 96/71/EC concerning the posting of workers in the framework of the provision of services. Posted workers should, i.a., be afforded a remuneration equal to the minimum remuneration pursuant to universally applicable rules adopted by the authorities of the host country or by the provisions of collective agreements applicable

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to a particular branch, territorial unit or an establishment situated in the location where the posted employees are temporarily employed. There are two theories expounded in the doctrine of European labour law which provide a justification for this obligation. One of them, and the more plausible one, holds that the directive was adopted in order to protect interests of service providers operating in the single market against competition on the part of "new" EU Member States’ employers taking advantage of the freedom of movement bringing “cheaper” employees on cross-border assignments, i.e. employees treated less favourably in relation to their remuneration. The Posting of Workers Directive was adopted with a view to protect the interests of less competitive service providers with, in particular, higher personnel costs including higher wage rates than those received for the same or similar work by employees of the twelve Member States that joined the EU after on 1 May 2004 and 2007. The other theory to explain the harmonizing activity of the systems of national labour laws of the EU Member States refers to the necessity to expand the social aspect of the common market, where all EU citizens should be guaranteed equal rights within social relationships governed by the provisions of national labour law.

The two theories complement each other to a certain extent. Even if in fact the EU institutions aim at counteracting social dumping and harmful competition among service providers, those who benefit from the provisions laying down restrictions on introducing cheap labour to the single market, which takes advantage of almost unlimited freedom of movement, are employees-citizens of the “new” Member States, posted to work in the "old" Member States.

Such a conflict between the interests of the employers from the "new" and "old" Member States has given rise to a lot of attention among labour law practitioners from the "old" EU Member States. As a rule, it is the more active among service providers from the "new" Member States that post their own employees to work in “old” Member States. Almost all known cases concerning a conflict of interests involving empoyers’ and posted workers’ interests stem from differences between the level of remuneration and the corresponding living standards of the employees from the “old” and “new” EU Member States. Service providers from the “old”

The present study consists of three main parts. The first (chapter II) introduces the provisions of Polish law guaranteeing employees whose employment relationships are subject to Polish labour law regardless of the location of the work being carried out
equal treatment in case of their posting to work outside the territory of Poland within the European Union. The second (chapter III) presents the conflict of laws rules applied to employment relationships with a foreign element. In the case of employees posted to work to another EU Member State by a Polish entrepreneur the foreign element in the employment relationship is the place where the work is carried out. In the period from Poland's accession to the European Union to the ratification of the Rome I Convention the Act of 12 November 1965 – Private International Law, under which employment relationships of Polish employees treated as specialists posted to work abroad on a temporary basis by Polish employers were governed by the provisions of Polish labour law.

The third main part (chapters IV-VIII) focusses on the situation subsequent to Poland’s accession to the EU. As for foreign employees posted to work in Poland, protection of the national labour market is guaranteed by the provisions of the Act of 20 April 2004 on the Promotion of Employment and Labour Market Institutions, 6 which imposes on foreigners an obligation to obtain a work permit. This obligation is not imposed on citizens of the EU/EEA Member States.

The decisions of the European Court of Justice of December 2007 in the Viking Line and Laval cases engendered intense discussion among European labour law scholars involving such issues as are pointed to above. Those judgments, considered as threatening to the national systems of labour law in the Scandinavian countries, have not attracted particular attention in Poland. They have not been met with any interest among labour law practitioners or scholars. In the third main part of this paper I seek to explain the reasons behind. I discuss the provisions of the Polish Labour Code governing the principles and procedure for negotiations carried out by the social partners over collective agreements, in particular the legal rules on establishing a minimum wage for work performed in Poland. I also present the provisions of the Act of 23 May 1991 on Collective Dispute Resolution, 7 which must be observed by all trade organizations and employees other than trade union members entering into a collective dispute, organizing strikes and other protest actions governed by Polish collective labour law. Essentially, the ECJ judgments in the Laval and Viking Line cases do not affect Polish legal regulations.

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6 Journal of Laws of 2008 (consolidated text), No. 69, item 415.
II The period before the accession to the European Union. An outline of Polish regulation related to employment of Polish employees in the EU/EEA

Polish statutory provisions govern the principles of employing Polish employees by Polish employers inside and outside of Poland as well as the principles of employment of foreign nationals by foreign employers for work in Poland.

Under Polish labour law provisions, a foreign employee and a foreign employer are free to choose a national system of labour law applicable to their employment relationship as regards work to be performed in Poland.

I Employment of Polish employees by Polish employers in Poland and abroad

a) The Polish Labour Code

Article 1 of the Polish Labour Code is formulated in a way which may suggest that the provisions of the Code have universal application, in that they govern the rights and obligations of employers and employees making no exception as to where work is to be performed. This holds true with the proviso that the Labour Code’s provisions govern rights and obligations subject to the Polish system of substantive labour law. The rules on the scope of application of Polish law are set out in Article 6 LC. An a contrario interpretation of this provision entails that all employment relationships between Polish citizens and Polish employers are governed by Polish labour law regardless of where work is performed (in Poland or abroad), of the employee’s place of residence, the employer’s head office, and the location of the undertaking. The provisions of the Polish Labour Code also apply to employment relationships concluded between Polish citizens and representatives of foreign states or international institutions operating in the territory of the Republic of Poland unless international agreements, treaties or arrangements provide otherwise. 8

Hence, this interpretation of Article 1 read in conjunction with Article 5 LC should lead to the conclusion that employment relationships of Polish citizens employed abroad by foreign employers as well as employment relationships of foreign nationals who provide work in Poland for foreign employers are not governed by Polish labour law unless the provisions of Polish labour law are chosen as "applicable" by the parties.

to the employment contract, or is indicated as the *lex loci laboris* by the connecting factors under rules of private international labour law. Needless to say, the provisions of the Polish Labour Code do not govern employment relationships of foreign employees with foreign employers when work is carried out abroad. Still, they govern employment relationships of Polish employees with foreign employers under which work is performed in Poland within the scope set forth in separate provisions; for example in the Act of 6 July 1982 on the principles of conducting business activity in the territory of the Polish People's Republic in the area of small-scale manufacturing by foreign legal and natural persons. The principles of employment of Polish citizens abroad and of citizens of foreign states in Poland are set out in the Act of 14 December 1994 on employment and measures counteracting unemployment. At the same time the Act of 23 May 1991 on work on board merchant sea going vessels lays down the principles and procedures for employment of Polish and foreign citizens on board merchant vessels “flying the flag of Poland”.

b) The Act of 6 July 1982 on the principles of conducting business activity in the territory of the Polish People's Republic in the area of small-scale manufacturing by foreign legal and natural persons.

The Act of 6 July 1982 was amended in 1989, revising the provision on the applicability of Polish labour law. The wording of Article 19 paragraph 1 of the Act, still in force, stipulates that the provisions of Polish labour law apply to employment relations as regards terms and conditions of employment, social matters, social insurance, and activities of trade organizations at undertakings conducted in Poland by foreign legal and natural persons. This provision – which is an overriding mandatory rule – is a classic example of the application of the *tripartite principle* in employment relationships with a foreign element. Article 19 clearly and explicitly defines the scope of Polish subjective labour law. It covers legal relations prior to the entering into an employment relationship, individual and collective labour law and social security law. Accordingly, the provisions of labour law in force in Poland govern employment relationships of Polish citizens - candidates for work in foreign enterprises to which the said Act applies - and Polish employees employed by foreign employers (legal and

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9 Consolidated text: Journal of Laws of 2003, No. 58 item 514 as amended
10 Journal of Laws of 1991, No 61 item 258, as amended
natural persons) conducting business activity in Poland in the area of small-manufacture.

c) The Act of 14 December 1994 on employment and measures counteracting unemployment / the Act of 20 April 2004 on promotion of employment and labour market institutions.

The Act of 14 December 1994 applies (Article 1 paragraph 2 point 1-3) to:

• Polish citizens resident in Poland seeking and taking up employment or other paid work in the territory of the Republic of Poland as well as employment or other paid work with foreign employers abroad;

• foreigners who legally stay in Poland, being citizens of EU/EEA Member States or have a permanent resident card or who have been granted the status of refugee in Poland, seeking and taking up employment or other paid work in the territory of Poland; and

• foreigners who have been granted by a representative of the central government (voivode) a work permit for the territory of the Republic of Poland.

The principles and procedures for employing Polish citizens abroad by foreign employers and employing foreigners in Poland are set out in the provisions of chapter 6 of the Act (Articles 46-51). This chapter contains one rule which may fall under the category of private international labour law. The rule concerned governs the obligations of the government of the Republic of Poland to include periods of employment abroad in the period of employment in Poland as regards employees’ rights pursuant to the principles in force in the state where an employee is employed and pursuant to the principles stipulated in international agreements. Article 1 of the Act requires that documented periods of employment abroad be included in the period of employment in Poland under two conditions, (i) in case of an absence of other rules governing the said matter in international agreements, and (ii) on the condition that the employee while abroad paid contributions to the Labour Fund. Article 48 § 2 of the Act stipulates that upon meeting these conditions the period of employment or performing other paid work by Polish citizens abroad are treated as a period of employment in Poland as regards the employee’s rights as of the day the employee notified the competent district (powiat - county) labour office of taking up work and undertaking to pay contributions to the Labour Fund in the amount of 9,75 % of the average remuneration for each month of employment abroad.
The Act of 1994 however does not provide a basis for how to choose the applicable national system of substantive labour law to be applied to employment relationships of Polish citizens carrying out work for foreign employers abroad. This is decided by provisions of host state labour law or the connecting factors applicable in pursuance of private international labour law norms of the country where work is carried out. The same rule applies in case of employment of foreign nationals by Polish employers at establishments located in Poland. Since the provisions of Article 1 and Article 6 LC are not automatically applied to employment relationships entered into by foreign citizens with Polish employers under which the work is performed in Poland, the parties of such relationships may choose the system of applicable substantive labour law pursuant to relevant provisions of private international labour law. The provisions of Polish labour law may govern such employment relationships as *lex loci laboris* if foreign provisions of private international labour law do not provide for other connecting factors.

The reason for the presentation of the legal solutions effective under the Act of 1994 on employment and measures counteracting unemployment is that this Act applied until 30 April 2004. As of 1 May 2004 the 1994 Act was replaced by the Act of 20 April 2004 on promotion of employment and labour market institutions. In the part on employment of Polish employees by foreign employers abroad (chapter XVI) the Act of 2004 repeats the legal solutions previously in force. It stipulates that documented periods of employment at a foreign employer’s under which the Polish employee carried out work are included in the periods of employment in Poland as regards employees’ rights (Article 86 § 1). The Act of 2004 does not govern the principles of taking up work by Polish employees at foreign employers abroad. This issue is governed by foreign labour laws, that is by the provisions applicable in the country of employment (Article 84).

d) The Act of 12 November 1965 - Private International Law

The conflict of laws issues concerning substantive labour law pertaining to employment relationships are governed by Title X of the 1965 Act on Private International Law (Articles 32 – 33). Pursuant to the Act, the parties to an employment contract with a foreign element have a limited choice of the applicable substantive labour law. The parties have the right to select the applicable law on the condition that the substantive

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labour law selected is connected with the employment relation (Article 32). Each of the connecting factors discussed in chapter I, above, may be used to resolve conflicts regarding conflict of laws issues of substantive labour law. When deciding to choose the applicable, the parties to the employment contract may use all the connecting factors specified by private international law: personal connecting factors (citizenship, domicile, habitual residence) or objective connecting factors (the place of the conclusion of an employment contract, the place of performance of a legal activity governed by the provisions of labour law, the place of an event other than a legal activity, for example an accident at work, incurring occupational disease, industrial action resulting in legal consequences governed by the provisions of labour law, the location of the employer’s head office, the location of the work establishment, the place where work is carried out). Connecting factors that are undoubtedly relevant in regard to an employment relationship with a foreign element are those provided for in Article 33 § 1, 2 of the 1965 Act: the place of residence or the seat of the parties at the moment of entering into an employment relationship, the place of the performance of work, and the seat of the enterprise. Granting the contract parties a choice of the applicable substantive labour law, the Act allows of using connecting factors other than those provided for in Article 33 of the 1965 Act. The principle is that the parties to an employment relationship choose the legal system most closely connected to the parties. The system may be selected on the basis of a personal connecting factor, for example the past habitual residence of one of the parties in a given country.

In case the parties to an employment relationship with a foreign element do not use their right to select the applicable substantive labour law, the employment relation is subject to the law of the country indicated by one of the connecting factors set out in Article 33 of the 1965 Act. These connecting factors were not listed at random but in a specific order. The connecting factor listed first is the habitual residence common to the parties – natural persons – of the employment relationship or the location of the employee's domicile and employer's seat in the same country if work was to be, is or was carried out at the employer's seat. In the cases where the employee was to carry out, carries out or carried out work at the employer's establishment, the connecting factor will be the labour law applicable in the country where the employee resides and where the seat of the enterprise where the work was to be, is or was carried out is located. In the absence of common habitual residences of the parties, the habitual residence of the employee and the place where the employer’s seat or the seat of the enterprise are
situated, Article 33 § 2 determines as applicable the labour law in force in the state in which the work was to be, is or will be carried out.

The interpretation of Article 33 §1 sentence 2 of the 1965, which reads: “the work … provided at the employer’s enterprise”, has been in debate in the Polish literature on private international law. It has been considered whether this wording may be construed to denote the work provided exclusively "in the location of the seat of the enterprise" or to mean work provided "under the employment at the enterprise." See H. Trammer, Stosunki pracy w polskim prawie prywatnym międzynarodowym, Prawo w handlu zagranicznym (Employment relationships in Polish Private International Law, The Law of Foreign Trade), 1968, p.21, p. 41. The author concludes that the actual place in the meaning of the geographical area where work is provided is of no consequence to the hypothesis of the whole of Article 33, and that employment relationships of employees posted to work abroad are not to be subjected to lex loci laboris. Trammer puts forward this hypothesis in order to indicate that employment relationships of Polish employees posted to work abroad are subject to the provisions of Polish labour law. In my opinion, such a conclusion may be reached on the basis of the structure of lex loci delegationis, whereas Trammer’s reasoning is based on an erroneous distinction between two concepts relating to the place of work, “the employer’s seat” and “the employer’s enterprise”. According to Article 33 the necessary condition for subjecting an employment relationship with a foreign element (in this case that element is the place of work, located abroad) is the place of habitual residence common to the employee and the employer's seat or the employee's habitual residence and the seat of the enterprise. I understand the latter expression to refer to the location of the establishment run by the employer, who may have its seat in another state. Furthermore, there is nothing to indicate an interpretation of the concepts of "employer's seat" or “the seat of the enterprise” to mean the geographical area where work may be performed in the employment relation. The above concepts are specific enough to locate work in a given point of the geographical area – in the country where the following have been situated: the employer’s seat, the seat of the enterprise or the enterprise.

The provision in Article 33 § 2 additionally provides that it is a necessary condition apply lex loci laboris that the parties select the applicable national system of substantive labour law in the first place. This requirement was actually not necessary since – as already mentioned – the fundamental premise for the application of the connecting factor set out in Article 33 is the absence of the parties' choice.

Bearing in mind that the parties of an employment relationship with a foreign element have the right to choose the applicable law at any time they consider the most appropriate, it can be concluded may be also necessary to apply the connecting factor set out in Article 33 § 2 in the cases when: the parties have not used their right to choose the law; do not have their place of habitual residence in the same country, have not located the centres of vital and professional interests in the same country. The location of these centres are determined by the place of habitual residence as regards the employee and, as regards the employer, by the location of his seat or enterprise. When the aforesaid arrangements are being made the parties of the employment relationship
may take up activities leading to the choice of the applicable law. The place where the work is provided may be applied as the connecting factor as an alternative to the connecting factor of the common centre of vital interests only when the applicable law has not been chosen by the parties.

The interrelationship between the connecting factors referred to above may lead to the conclusion that the connecting factor set out in Article 33 § 2 of the 1965 is of an alternative nature not only with regard to the connecting factors indicated in § 1 of Article 33 but also with regard to the connecting factor set out in Article 32 of the Act.

In the present paper what is meant by "applicable" labour law chosen by the parties is the national system of substantive labour law chosen by the parties to an employment relationship with a foreign element in accordance with the indicator set out in Article 32 of the 1965 Act. A choice of a given national system of substantive labour law can only be made if and when that system “is connected” with the employment relationship which is to be governed by it. In this meaning the “applicable” system of labour law is the one that meets the following necessary conditions. Firstly, the foreign system must be freely chosen by both parties to the employment contract. Secondly, the national system chosen by the parties must be “connected with” the employment relationship. To be “connected with” is a phrase used in literary language to determine the interrelations between relationships of various elements connected with one another, or which influence or affect one another.\(^\text{13}\) It follows that there must be an interdependence between the employment relationship with a foreign element and the national system of substantive labour law chosen as "applicable" by the parties. This entails, undoubtedly, that the national law chosen as "applicable" should have a decisive influence on the employment relationship they govern. It is a prerequisite to exerting such an influence that the rights and obligations of the parties be regulated in the same way employment relationships otherwise are regulated in the legal order of the country concerned. The nature of the relationship referred to in Article 32 should be conceived as functional. It would be hard to imagine that an employment relationship entered into by an employer registered in the United States, subject to the provisions of law in force in that country, employing a citizen of the United Arab Emirates in France, was subject

to the provisions of the Polish labour law. There is no interdependence between the parties of such an employment relationship and the national system of substantive labour law chosen by the parties as “applicable”. Neither is there any such an interdependence between national systems of labour law conflicting with each other. The only common connecting factor for the parties of such an employment relationship is the place where work is provided. In my view, should the parties in a case like this choose French labour law as the law "applicable", the employment relationship would not meet the condition of being “connected with” the chosen national system of substantive labour law.

As a matter of fact, what underlies the implied distinction between national systems of labour law are the differences existing in the legal systems of European countries. Legal mechanisms elaborated by the EU with a view to harmonization of Member States’ national systems of labour law (directives, regulations) are conducive to the process of “Europeanisation” of national systems of labour law. These measures are the reason why national systems of substantive labour law of the EU Member States may be indicated by the parties of employment relationships with a foreign elements as “applicable”. The example above illustrates the possibility of choosing the “applicable” labour law on the basis of personal (citizenship) or objective (the employer’s seat, the seat of the enterprise of the place where work is provided) connecting factors applied in the national provisions of private international (labour) law. Despite the fact that the application of any of the connecting factors referred to above is connected with some components of the employment relationship with foreign elements, the nature of the interdependence is formal. An assessment of this connection requires a more in-depth consideration of whether the national system of substantive labour law in force in France may be shaped by the provisions of the law selected by the employment relationship in the example above as "applicable".

Objections against a national system of substantive law such as, e.g. in the example above, should be also considered with regard to whether it would be acceptable to apply that system in case it was not chosen by the parties but indicated on the basis of connecting factors pursuant to private international law rules. Nearly all internal systems and international regulations of private international law presently regulating

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the resolution of conflicts of laws, in keeping with Rome I, take the place where the work is carried out as the connecting factor which, at the outset, indicates the “applicable” law (lex loci laboris). The question is whether a national system of substantive labour law that has been chosen as "applicable" but is yet rejected by the State otherwise supervising the compliance with labour law provisions on the ground that there is no necessary connection with the employment relationship and the law chosen by the parties, may be accepted and applied to an identical or similar employment relationship in case such a national system is indicated by connecting factors applied in private international labour law. This question can only be answered to in the positive. Connecting factors applied in internal and international provisions of private international law indicate lex loci laboris as the applicable law. Unlike the restricted choice granted to the parties of an employment relationship with a foreign element, neither the national nor international norms governing the conflict of laws rules of substantive labour law introduce any additional requirements which have to be met in order to apply the system chosen by the parties to the employment contract. Hence, it should be assumed that lexi loci laboris is ex definitione the “applicable” national system of substantive labour law since it was indicated by the various legislators.

It follows from this that in the example above French labour law, albeit chosen by the parties, may be held to be “inapplicable” to the employment relationships where the employer is subject to American law, the employee to Saudi Arabian law, while work is carried out in the territory of France, if it turns out that the employment relationship is not "compatible" with the solutions of the French labour law in force. A separate issue is whether French labour law should be applied to the employment relationship since the connecting factor of the place where work is carried out indicates French law as lex loci laboris. It is not insignificant that the place where the work is carried out is determined as the final and decisive indicator for the choice of the applicable national system of substantive labour law in internal provisions of private international law. The rules set out in the Polish Act of 1965 on Private International Law may serve as an illustration. Considering the internal contradiction among the functions of the various connecting factors defined in Division X "Employment Relationships" of the Act, the restriction of the parties’ freedom of choice of "applicable" substantive labour law pursuant to Article 32 of the Act should be assessed negatively. This remark is, however, of limited significance now, owing to Poland’s ratification of Rome I.
2 Employment of foreign employees in Poland

a) Citizens of EU and EEU Member States

Foreigners, citizens of EU/EEA Member States have the right to take up employment in Poland without having to obtain a work permit (Article 87 of the Act of 20 April 200X on Employment Promotion and Labour Market Institutions). Their employment relationships are governed by the provisions of the applicable labour law. Employment relationships of EU citizens whose employers’ head office is situated in an EU Member State are subject to the relevant provisions of the labour law applicable in that state. Where under such conditions work is provided in Poland, the provisions of chapter II of the Polish Labour Code (Articles 671-674) determine the terms of employment and remuneration at foreign employers if these terms are less favourable than those determined by Polish labour law.

b) Citizens of other countries

Citizens of other countries must legally stay in the territory of the Republic of Poland; this is a precondition to obtaining a work permit. The procedures for granting the permit are governed by the Employment Promotion and Labour Market Institutions Act. Work permits are issued by the administrative authority (voivode) as the representative of the central government for a definite period of no longer than 3 years. It may be extended, though. The work permit is issued on the basis of information on the absence of possibility to employ Polish citizens, obtained from the representative of the local self-government (Starosta) competent for the place of employment of the foreigner. One of the basic conditions for the issuance of the permit is that the parties to the employment relationship establish that the amount of remuneration will not be lower than the remuneration of Polish employees performing work of comparable type or at a corresponding post (Article 88 c section 1).
III. The radiation theory of extension of domestic labour law regulations (\textit{lex loci delegationis}) in case of employment of Polish workers in other EU/EEA Member States

On the basis of the Act of September 22, 2006, on the accession to the European Union of 10 Member States, which acceded to the EU on 1 May, 2004, the President of the Republic of Poland on March 28, 2007, ratified the Rome Convention. The Convention entered into force with respect to Poland on August 1, 2007.\textsuperscript{15} Article 6 paragraph 1 of Rome I on “Individual employment contracts” introduces certain restrictions on the freedom of the contracting parties of employment contracts as regards the choice of law. However, the underlying an general norm concerning conflicts of substantive labour law, applicable to labour relations with a foreign element, is the principle of freedom to choose the applicable law laid down in Article 3 paragraph 1 of the Rome Convention. The Rome Convention was replaced by the Rome I Regulation.\textsuperscript{16}

The Private International Law Act of 1965, which applied in Poland up to the day when the Rome Convention entered into force, also accepted the freedom of the parties of a labour relation to choose the applicable national system of substantive labour law, on the condition that the chosen law was connected with the labour relation. Notwithstanding this freedom, labour relations of Polish employees employed outside the boundaries of the Polish People's Republic were entirely subject to the specificity of the Polish labour law, despite the fact that by virtue of the location where the work was to be carried out, \textit{lex loci laboris} could be taken into consideration as the regulations connected with the labour relations in which foreign elements were present owing to the location of work to be performed. In this light, the purpose of the present chapter is to explain this particular phenomenon, which was in conflict with the then applicable provisions of private international labour law.

In Poland, the employment relations of employees posted to work abroad were regulated by resolutions of the Council of Ministers. The unpublished regulation No. 138/65 of the Economic Committee of the Council of Ministers, of June 9, 1965, on the terms and conditions for delegating and remunerating specialists posted to work abroad

\textsuperscript{15} Journal of Laws of 2008, No. 10, item 57, 58.

by foreign trade enterprises in order to render services related to export (the KERM regulation) governed labour relations of Polish employees (specialists) employed by Polish or foreign employers abroad. The foreign element in those labour relations was the place in which the work was to be provided, or, at times, the employing entity. Foreign trade enterprises played the role of intermediary organisations employing Polish workers at Polish or foreign employers. The work and payment conditions laid down in this Regulation were respected in the case where the employers for the Polish specialists posted to work abroad were Polish agencies of foreign trade. The role of Polish enterprises of foreign trade as an agent in employing Polish employees abroad was affirmed in Supreme Court decisions in which it was clearly and unambiguously stated that Polish employees did not remain under employment relations abroad with Polish agencies of international trade. The KERM regulation applied only to the Polish national employers who employed Polish employees abroad.

In cases where Polish employees provided work for foreign employers abroad, the direct employer on Poland of such employees was the Polish agency of international trade. Nearly half a century ago Polish enterprises of foreign trade acted as a temporary work agency for Polish employees and foreign employers. In the judgment of March 18,

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17 According to European Court of Justice decision in Case 35/70 S.A.R.L. Manpower v Caisse primaire d'assurance maladie de Strasbourg [1079] ECR 1251, the definition of a temporary work agency is as follows: "the object of the undertaking is not to work but to engage workers to put them for consideration at the disposal of other undertakings". Polish provisions on delegating employees to work abroad may be treated as the prototype of norms regulating temporary work agency activities. L. Zappalá, “Legislative and Judicial Approaches to Temporary Agency Work in EU Law – A Historical Overview”, in: K. Ahlberg, B. Bercusson, N. Bruun, H. Kountouros, Ch. Vigneau, L. Zappalá, Transnational Labour Regulation. A Case Study of Temporary Agency Work, P.I.E. P. Lang, Brussels-Berlin-Frankfurt a. Main-New York-Oxford-Wien 2008, pp.163-164 writes that the concept of temporary work agency was formulated in the case law of the European Court of Justice at the beginning of 1970, when the three-lateral legal relation between the agency, user employer, and employee was introduced. A temporary work agency was defined as an entity employing an employee posted to work at a work establishment of the user employer

18 Judgment of the Supreme Court April 10, 1974, I PR 66/74, OSNCP 1975, issue 3, item 45.


20 I PR 23/75, OSNCP 1975, issue 2.
1975\textsuperscript{20} the Supreme Court stated that a legal relation established between a Polish employee (specialist) and a Polish foreign trade enterprise exhibited the features characteristic of an employment relation. Polish judicature was obliged to qualify the actual work agency relation in that way, as it was impossible to assume that in the legal sense an employment relation was established as a result of delegating a Polish employee to work at a foreign employer. Legal relations between Polish foreign trade enterprises and foreign employers employing Polish employees were not subject to labour law regulations. Polish enterprises of foreign trade acting in the capacity of the direct employer were obliged, as regards employment relations with Polish workers employed abroad by foreign employers, by commercial contracts governed by the provisions of the private trade law to carry out legal actions required by user employers – foreign entrepreneurs. In its judgment of September 11, 1973,\textsuperscript{21} the Supreme Court clearly stated that "dismissal of a specialist is justified by the circumstance related to rendering service for a foreign contractor". The Supreme Court came to the conclusion that "the fact of making such a demand (the demand for dismissal of a Polish employee employed as an specialist by a foreign employer) reveals that the realization of the demand for dismissal is not without reservations". The Economic Committee of the Council of Ministers resolution No. 138/65 entitled Polish enterprises of foreign trade which posted a Polish specialist to work abroad to reduce the period of stay or to dismiss the employee from the foreign contract upon the request of the foreign entrepreneur (user employer). The consequence of the decision to reduce the period of stay was the termination of the employment contract by the Polish enterprise of foreign trade acting in the capacity of a temporary work agency. Depending on when the user employer (foreign entrepreneur) notified the Polish enterprise of foreign trade of its refusal to continue to employ the posted specialist, the entity being the direct employer could terminate the employment relation with notice or with immediate effect. In the judgment of September 11, 1973, the Supreme Court examined whether the reduction of delegation of a Polish specialist upon the foreign employer's application (demand) on grounds of there being a breach of the provisions of the commercial contract with the Polish enterprise of foreign trade, constituted a sufficient reason for immediate termination of the employment contract concluded with this employee by the Polish enterprise foreign trade. The Supreme Court held that in such a case, the demand of the

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\textsuperscript{21} I PR 105/73, OSNCP 1974, issue 5, item 97.
\end{flushright}
foreign user employer is itself a sufficient reason to justify immediate termination of the employment relation on grounds of the fault of the employee. The legal consequence of the failure to fulfill the obligations by a foreign entrepreneur were transferred by the foreign trade enterprise, *de facto* temporary work agency, on the Polish employee.

The legal situation of Polish employees employed abroad by foreign employers was not subject to any substantial change under the subsequent unpublished resolution of the Council of Ministers No. 8/72 of January 7, 1972, on pay and employment of workers of export building works and export-related services, later replaced by the regulation of the Council of Ministers of December 27, 1974, on certain rights and obligations of the employee posted to work abroad in order to perform export building works and export-related services. The Regulation settled more explicitly than under previously applicable provisions of law that a foreign trade enterprise, called "delegating entity" prior to the Regulation No. 8/72, that it was justified treating such an entity as a temporary work agency even to a greater extent than this was done under previous unpublished resolutions of the Council of Ministers. Employers in Poland employing an employee posted to work abroad by a posting entity was obliged to grant such an employee unpaid leave. Applying the current criteria to evaluation of the situation from several dozen years ago, it should be stated that a Polish employee with the status of a "specialist" and thus posted to work abroad remained under two employment relations with the Polish employers during the delegation: (i) with the parent employer, who granted him unpaid leave, and (ii) with the delegating entity, which acted in the capacity of a temporary work agency, and in addition (iii) in a legal relation with the user employer. Undoubtedly, the employment relations of the Polish employee with Polish employers were regulated by the provisions of the Polish labour law.

What needs to be considered is whether there was an employment relation established between a Polish employee and a foreign user employer and, if the answer is positive it needs to be reflected on which provisions of national labour law were used by the parties of this legal relation to regulate the wording of their rights and obligations and to specifying an institution of labour law by which legal action in disputes between them should be handled and resolved. The employment relation between a Polish

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employee and a foreign employer under which the employee was obliged to provide work abroad was undoubtedly an employment relation with two foreign elements: (i) the employing entity and (ii) the location of where work was to be provided. The question that arose was, whether a separate employment relation was established between the employee and the foreign employer. What From the Supreme Court judgments mentioned above it follows unambiguously that on the basis of the Council of Ministers' resolutions from the 1960s an employment relation between a Polish employee posted to work abroad and a foreign employer could not be deemed to be established. The regulation of the Council of Ministers of December 27, 1974, did not introduce any substantial changes in this regard. Personally, I definitely do not share the official opinion on the private international labour law asserting that employment relations of Polish employees (specialists) employed abroad on the basis of the Regulation of the Council of Ministers of December 27, 1974, were governed by the provisions of national labour law, as indicated by Article 32 and Article 33 of the 1965 Act on Private International Law. Polish specialists in private international labour law did not take into consideration whether employment relations of a Polish specialist employed abroad by a Polish delegating entity should be analysed within the categories developed by the provisions of the 1965 Act.23 Neither was this issue dealt with in the studies of lawyers specialising in labour law.24

To my mind, disregarding the rules regulating the conflicts of law of the substantive labour law, it was assumed that the aforementioned relations were governed by the regulations of the Polish labour law in whole. The parties of these relations were


24 B. Wagner, „Praca za granicą i jej wpływ na dalsze zatrudnienie w macierzystym zakładzie pracy” (Work Abroad and its Impact Upon Employment in Poland), Praca i Zabezpieczenie Społeczne, 1978, No. 2, p. 63 and the following; J. Kruszewska, Umowa o pracę za granicą w zakresie budownictwa eksportowego i usług (Employment Contracts Abroad in Export Construction Sites and Services) , Wydawnictwo Prawnicze, Warszawa 1988. There is no information on the "applicable" labour law in the studies on labour law. The authors take for granted the assumption that employment relations of the Polish employees employed abroad by Polish employers (delegating entities/entities in charge) are subject to the regulations of the Polish law in whole. They do not pay attention to the fact that the location where work is to be performed is abroad; the foreign partner of the Polish entrepreneur employing Polish employees makes demands resulting from the provisions of the foreign law which concern working time, the norms of work efficiency, safety and protection at work.
not given any possibility to choose the applicable national substantive labour law despite the fact that it might have seemed that there was a possibility to choose between Polish regulations and the regulations which applied at the location where work was to be performed. Instead, the employment relations of Polish employees posted to work abroad were regulated by the provisions of the Polish labour law. Hence, what needs to be considered is whether it was consistent with the provisions of Article 32 and Article 33 of the Polish Act on Private International Law to deprive the parties to an employment relations with a foreign entity of the possibility of choosing the applicable law. The Labour Code states that employment relations between Polish citizens and Polish representative offices, missions and other agencies abroad shall be governed by the provisions of the provisions of the Code (Article 6 § 1). Entities delegating Polish employees to work abroad did not hold the status of Polish agencies pursuant to Article 6 § 1 of the Labour Code. Owing to the location of the work to be performed their labour relations could be regulated by the provisions chosen by the parties or the provisions of the labour law which were in force at the place where work was performed. Employment contracts concluded by entities delegating Polish employees to work abroad included phrases which indicated the will of the parties of these relations to subject them to the provisions of the Polish labour law on the matters related to remuneration for work, working time, holiday leaves, benefits granted due to accidents at work or occupational diseases. Thus, there can be no doubt that Polish employees acceding to employment contracts drawn up by Polish employers which included the aforementioned statements on subjecting the such labour law matters to the regulation of the Polish labour law expressed their willingness to subject the employment relations abroad to the labour law applicable in Poland. Lawyers specializing in private international law underlined that even if by way of an agreement the parties of the employment relation had chosen a law different from the Polish law, pursuant to Article 32 of the 1965 Act on Private International Law, the applicable law would have been the Polish labour law as the common personal law of the parties of the employment relation with a foreign element. There are bases for serious doubts as to the validity of that view. Article 32 of the Act on Private International Law allows the parties of an employment relation to subject their relation to the law chosen by the parties on

26 S. Kalus, *Międzynarodowe stosunki pracy...* (International Labour relations), op.cit., p. 46.
condition that the chosen law is connected with this relation. I agree with M. Pazdan\textsuperscript{27} that a choice of law may only be made in the case of an employment relation connected with at least two separate national labour law systems. In the case of employing a Polish employee abroad by a Polish employer the parties of the employment relation have the right to choose between Polish labour law and the labour law in force at the location of the work being performed. Both national labour law systems are connected with the employment relation. An employment relation connected solely with the scope of Polish law is governed solely by Polish labour law. Considering the absence of a foreign element in such a relation, there is no need to apply the conflict of laws rules of private international labour law, since the provisions of the labour law included in the legal system of another state are without prejudice to the only applicable provisions of the Polish labour law.

Connecting factors used for the specification of the applicable national substantive labour law system in the event of the conflict of laws are applied in the order established by a national legislating body or by a foreign employer. As a rule, in the case of the absence of choice by the parties to the employment relation of the applicable national labour law system, that system is specified by way of using one of the connecting factors referred to above being part of the common provisions of private international law, or in the specific provisions of the private international labour law. The order of these factors is regulated in the conflict of laws rules. In fact, the provisions of private international law or private international labour law do not create a hierarchy of the connecting factors which would be applicable to employment relations. None of the connecting factors used for regulating the conflict of the substantive law may be used as alternatives with respect to the main connecting factor, however, which is the parties' choice of the applicable system of law. However, on account of the degree of the connection with the employment relation of the alternative connecting factors for which these factors are to be applied, some of them are applied more often than others. So far, the conclusion that follows from the above argument is that in employment relations, what constitutes the most important connecting factor is the location of where work is provided, which, in the case of conflict of laws of the substantive labour law indicate the labour law of the country in that country (\textit{lex loci laboris}) as the applicable law.

Nevertheless, the above relation is not taken into account in the common provisions of Polish private international law which are applied to resolutions of conflicts of laws and to the choice of the applicable substantive labour law system. Article 33 § 1 of the Act of 1965 on Private International Law determines that in the absence of the parties' choice of the applicable substantive labour law system the employment relation shall be governed by the law of the country in which the parties have their place of residence or registered office at the moment of entering into this relation. To my mind, there are no relevant arguments supporting de lege ferenda the thesis that in the absence of a choice of a law by the parties, the law applicable to the employment relation as the parties' common personal law is the Polish labour law. De lege lata the above statement is evidence of the tendency to extend the legal regulation applied to the employment relations without foreign elements to the employment relations in which such elements appear. This kind of extension is possible, as a matter of law, and was applied by certain Member States, referring to "the theory of radiation" (Ausstrahlung, Ausstrahlungsthetheorie). This theory was employed in German case law at the end of the 1920s and the beginning of the 1930s. On that basis the theory of radiation was developed and elaborated on in the German and French academic writing. Franz. Gamillscheg aimed to restrict its significance to that part of labour law which was classified as the public law. Since the theory of radiation enabled states to apply the provisions of their national labour law to employment relations with a foreign element, it was often applied by the authorities of certain countries to regulate employment relations between foreign citizens and employers registered as conducting economic activity in those Member States of which the employed workers were citizens or in which the employees had their permanent residence if they were temporarily employed in (posted to) another Member State. The Polish Act of 1965 on Private International Law was no cause for the judicature to apply the theory of radiation, as it subjected the employment relations with a foreign element to a restricted choice of the


29 F. Gamillscheg, Internationales Arbeitsrecht (Arbeitsverweisungsrecht), Berlin-Tübingen 1959, p. 181-182. According to Gamillscheg's view, the theory of radiation could be applied to social insurance relations on the grounds of the argumentation of the particular states which made the acquisition of the rights to social insurance benefits contingent upon the period of insurance.
parties, and in the absence of such a choice to the law of the country in which both parties had their place of residence or registered office at the moment of entering into an employment contract (Article 33 § 1). The Czechoslovak Code of private international law treated *lex loci delegationis* as provisions applicable to govern employment relations of Czechoslovak employees not residing permanently in the country in which the work was provided with the Czechoslovak employers who had their registered office in the territory of the former Czechoslovakia. The theory of radiation was also accepted before the Second World War by the French provisions of private international law adopted on May 15, 1926. This theory played a crucial role in the case law and academic writing concerning national and international labour law. It lays at the foundation of the expansion of the “parent” law in employment relations on the basis of which, and under which domestic employees employed by domestic employers performed work abroad. Disregarding the law of the location where work was to be provided, if the provisions of that labour law were different from the provisions to be applicable as *lex patriae* by virtue of the same citizenship, would have been justified if this connecting factor for the indication of the applicable labour law system could have been applied to the employment relations with a foreign element.

The theory of radiation played a crucial role in the resolution of conflicts of laws of the national provisions of the substantive labour law. It was commonly applied in the Polish People's Republic, which exported workers abroad. Despite the fact that neither did the then applicable provisions, nor judicature, nor academic writings endeavour any effort to justify the automatic application of the Polish provisions of the labour law to the employment relations with a foreign element, while the then applicable provisions of the private international law granted the right to choose between *lex loci obligationis* and *lex loci laboris* to the parties of individual employment relations, by virtue of the location of the provided work in the territory of a foreign country, the national provisions of the substantive labour law were generally applied. I define this

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30 In the judgment issued of April 18, 2001, I PKN 358/00, OSNP 2003, issue 3, item 59 the Supreme Court declared that "the employment relation between the employee residing in Poland and the employer residing and managing an enterprise in Poland is governed by the Polish law even if the employment contract were or were to be executed in another state, unless the parties have chosen a law (Article 33 § 1 the first sentence of the Act of 1965 on Private International Law)".

phenomenon, which was disregarded in the then literature or treated as obvious by the then authors dealing with the national labour law, as *lex loci delegations*.

**IV The Enlargement process of the European Union.**

On 13 December 2002 in Copenhagen, the EU Member States established the terms of accession with the candidates for EU Members, including Poland. The accession treaty was signed by the interested states on 16 April 2006 in Athens. The parties to this treaty agreed that eight out of ten new EU Member states would be able to avail themselves of the principle of free movement of labour within the common market after a seven-year transition period. The old Member States harboured concerns about a sudden inflow of employees from the new Member States into their national labour markets. A transition period therefore could be introduced to protect the national labour markets in those old EU Member States whose authorities were concerned about a constant or transitional inflow of cheaper labour force from the states of East and Central Europe. The transition period applied to workers from the new Member States who were intending to enter into the common market permanently or temporarily. This protection against an inflow of employees from the new Member States did not cover employees posted to work in the old EU Member States within the framework of the freedom to provide services, however.

The maximum 7-year transition period was divided into three stages: two years, three years and two years. The “old” EU Member States could shorten the transition period or derogate from it if it was not considered necessary to protect the national labour market. Not all of the old Member States availed themselves of the right to introduce the transition period, and some of them shortened the maximum 7-year transition period. Some decided to stand to benefit from this period, though. Poland was among the new Member States towards which the transition period was applied nearly in full. Within the scope of Directive No 96/71 on Posting of Workers only a few old Member States (Austria and Germany) applied the transition period also to employees posted to work from Poland. The period in which the Member States may stand to benefit from the transition period as one of the measures to protect the national labour market in the old Member States expires on 30 April 2011.

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32 The transition period did not cover Cyprus and Malta.
The mechanism of protection of national labour law markets allowed the authorities of particular old Member States to modify or derogate from general transition rules introducing limits to free movement of citizens of new. Based on the principle of reciprocity, the new EU Member States were entitled to introduce a transition period towards citizens of the old Member States seeking employment on the "new" labour market. Transition periods were not introduced to legal relations between the new Member States.

Restrictions on the free movement of citizens coming from the new Member States postponed the debate on governing the common labour market without the necessity to interfere with the freedom of making decisions by citizens of the new Member States. In transition periods the authorities of the new Member States, which imposed the restrictions, used traditional administrative means (work permits) towards persons seeking employment and employers willing to employ these persons. It will be possible to discuss harmonization of the principle of freedom to work with the activities aiming at regulating labour market by non-administrative methods after the expiry of the transition period in general, i.e. on 1 May 2011.

V  Posting of Workers Directive No.96/71/EC

From the point of view of free movement of labour and of regulating labour markets by EU Member States, the provision of Article 3 of Directive 96/71/EC is of great importance. This provision lays down the obligation addressed to the authorities of the Member States to ensure that, regardless of what national system of substantive labour law is applied to the employment relationship of employees posted to work to the territory of another EU Member State by their employer, the undertakings guarantee the posted workers the terms and conditions of employment, rates of pay applicable in the state where the work is performed, as specified in Article 3(1). Pursuant to that provision, less favourable provisions in the home state for employees posted to work to another Member State are been replaced by more favourable provisions of the national system of substantive labour law applicable in that State – the law in force in the place where the work is provided. Article 3 of Directive 96/71/EC introduced a new principle – an obligation to substitute lex loci delegationis with the provisions of lex loci

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The obligation to apply more favourable provisions of labour law applicable at the location where work is provided may be introduced by the provisions established by the host country, or by provisions of certain forms of collective agreements negotiated by the social partners in the host country. Provisions to be applied may also be introduced by arbitration awards or court decisions if applicable in the specific context of the labour law system in a given Member State. Provisions fixed by collective agreements or arbitration awards, etc., must “universal application” as set out in Article 3(8) and (10) of the Directive.

The substantive scope of *lex loci laboris* to be applied in the place of *lex loci delegations* if more favourable to posted workers, is specified in Article 3(1)(a-g) of Directive 96/71/EC. The list of the "mandatory" topics is exhaustive. It covers the matters relating to maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay, including overtime rates, the conditions of hiring-out of workers, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people, equality of treatment between men and women and other provisions on non-discrimination.

Article 3(2) of the Directive makes an exception as regards the application of host state provisions on minimum pay and minimum holidays if the period of the posting does not exceed 8 days, save for activities in the field of building work listed in the Annex to the Directive. Further, host Member States are permitted in certain other cases to not require the application of provisions on minimum pay and minimum holidays if the period of the posting does not exceed one month (Article 3(3) and (4)).

The Directive defines the basic legal terms: „posted worker” (Article 2(1)) “the Member State to whose territory the worker is posted” (Article 2(2)); minimum rates of pay (Article 3(1) *in fine*); “collective agreements or arbitration awards which have been declared universally applicable” (Article 3(8)). The major objective of the Directive is to protect employment of posted workers and local labour markets in host countries against social dumping. In the case law of the European Court of Justice, cases dealing with the application of Directive 96/71/EC involved matters connected with discrimination of employers making use of the free movement of services guaranteed by
Directive 2006/123/EC of 12 December 2006 (Services Directive)\textsuperscript{34} and restrictions on economic freedom in the EU Member States in regard to entrepreneurs providing services on the common market. The European Court of Justice has recognized that the following legal and administrative requirements, prohibitions and restrictions established by the authorities of the host countries are inconsistent with the principle of economic freedom on the common market and the freedom to provide services by posting workers to the territory of another Member State:

- the obligation to obtain a permit to work in the host country by posted workers, citizens of the third countries legally employed in the posting country (Webb)\textsuperscript{35}

The ECJ ruled that employers availing themselves of the freedom to provide services in the EU enjoy the right to post to other EU Member State workers who are citizens of the third countries legally employed in the posting country, without the necessity to be granted a permit issued by an immigration office of the host country (\textit{Rush Portugesa};\textsuperscript{36} \textit{Commission v. Luxembourg};\textsuperscript{37} \textit{Commission v. Austria}\textsuperscript{38}). Any requirements imposed by immigration offices of the host country, in particular the obligation to pay for a work permit for one’s own employees who are not citizens of the posting country or other EU Member State, were recognised by the ECJ as inconsistent with the Community law as such requirements restrict the free movement for the purpose of the provision of services (\textit{Vander Elst});\textsuperscript{39}

- the obligation to establish a branch in the host country of the undertaking employing workers posted to work in another EU Member State, and the obligation to obtain by the posted workers being EU citizens a work permit (\textit{Commission v. Belgium}\textsuperscript{40} \textit{Commission v. Germany}\textsuperscript{41}), to obtain a residence visa (\textit{Commission v. Germany}),\textsuperscript{42} to establish a guarantee to secure the salary claims


\textsuperscript{35} Case 279/80, 1981, ECR 3305, § 13-14.

\textsuperscript{36} C-113/89, 1990, ECR I-1417.


\textsuperscript{38} C-168/04, 2006, ECR I-9041.

\textsuperscript{39} C-43/93, 1994, ECR I-3803.

\textsuperscript{40} C-355/98, 2000, ECR I-1221.

\textsuperscript{41} C-493/99,2001, ECR I-8163.

\textsuperscript{42} C-244/04, 2006, ECR I-885.
and payment of the corresponding security contributions of workers (Commission v. Italy),\(^43\) to keep records of employment in the official language of the host country (Commission v. Germany)\(^44\) and to complete employees’ records by the documents required in the host country (Arblade).\(^45\)

- A separate category of cases involved the requirements concerning adjustment of the national norms of labour law applicable in the posting country to the norms of employment applicable in the host country. The ECJ recognised that it was a restriction to the freedom to provide services to impose an obligation on employers posting workers to pay contributions to social insurance in the host country despite meeting the said requirement in the posting country (Seco\(^46\), Guiot\(^47\), Arblade\(^48\)).

- Further, the ECJ recognised that the obligation of employers to pay posted workers remuneration in the amount of the minimum pay established by the authorities of the host country was consistent with the international standards. However, the Court did not accept the practice according to which only employers subject to the provisions of the host country were entitled to be exempted from the obligation to apply the minimum rates of pay for work as being consistent with the principle of equal treatment of national and foreign employers who stood to benefit from the freedom to provide services (Portugaita Construcoes).\(^49\) The obligation to pay posted workers remuneration according to the minimum pay calculated according to hourly rates without including in this remuneration the financial value of the benefits in kind and allowances (Commission v. Germany)\(^50\) was directly imposed on the employer who post workers by Directive 96/71/EC. Accordingly, the employer may not transfer this obligation to a subcontractor (Wollf & Müller).\(^51\) The provisions setting forth the rates of minimal remuneration

\(^{43}\) C-279/00, 2002, ECR I-1425.
\(^{44}\) C-244/04, 2006, ECR I-885; C-490/04, 2007, ECR I-6095.
\(^{45}\) C-369/96, 1999, ECR I-08453.
\(^{46}\) 62-63/81, 1982, ECR 223.
\(^{48}\) C-369/96, 1999, ECR I-08453.
\(^{51}\) C-60/03, 2004, ECR I-9553.
for work in the host country should have the character of the norms universally applicable. Thus, the ECJ considered as restricting free movement for the purpose to provide services and as discriminatory actions aiming at forcing employers bound by collective agreements in the posting country to negotiate the terms and conditions of pay with the trade unions in the host country (Laval un Patneri\textsuperscript{52}, International Transport Workers’ Federation, Finnish Seamen’s Union v. Viking Line ABP, OÜ Vikin Line Eesti\textsuperscript{53}) (called Viking). Operations of local authorities of Lower Saxony in the Federal Republic of Germany were also considered as inconsistent with the principle of freedom to provide services. In that case, it was a requirement for participation in tendering for a contract for performance of particular works was to pay remuneration according the rates of pay higher than the generally applicable minimum rates of pay to workers employed by employers wishing to be awarded a public contract (Rüffert).\textsuperscript{54} The ECJ held that the provisions of Community law did not forbid trade unions (national and international) to initiate industrial actions justified by the protection of the overriding general interest, on condition that such actions were relevant to secure an achievement of the right goal and that they did not go beyond the necessary means to achieve this goals (Viking).

Directive 96/71/EC treats the provisions of labour law applicable in the state where work is provided as norms establishing minimum standards of employment in the matters specified in Article 3. This means that the provisions of labour law governing employment relationships of workers posted to work to another EU Member State which are more favourable than the provisions applicable to the place where the work is provided, are still binding. Pursuant to Article 3(7) of the Directive the Directive does not prevent application of terms and conditions of employment which are more favourable to posted workers. Assessing the legal situation of posted workers, the body supervising compliance with the provisions of labour law and courts vested with solving disputes related to workers’ claims arising from employment relationships are obliged


\textsuperscript{53} C- 438/05, 2007, ECR I-10779.

to compare terms and conditions of employment and/or pay established by the provisions applicable in the place where the work is provided with the provisions chosen by the parties or applied on the basis of the connecting factor indicated by the applicable provisions of private international law and to apply the provisions more favourable to the posted worker. Article 3(7) of Directive 96/71/EC resolves the conflict of substantive labour law rules between *lex loci laboris* and *lex loci delegationis*.

Article 3 of the Directive specifies the set of standards which shall have application. These are provisions of national substantive labour law applicable at the place where work is provided and are *ex lege* applicable to employment relationships with a foreign element regardless of the will of the parties. These standards may be applied exclusively in case of a foreign element being present in employment relationships at the outset governed by the provisions of substantive labour law other than the provisions applicable at the place where work is provided. In case of posted workers the foreign element in the employment relationship is the place of temporary employment – an EU Member State other than that where the worker is habitually employed. The said provision was laid down to protect local labour markets against social dumping. In case of employment of posted workers by employers who stand to benefit from the free movement within the EU for the purpose of the provision of services, Article 3 of Directive 96/71/EC is to counteract the lowering of costs arising from carrying out activities by means of paying the employed workers remuneration lower than the minimum rates applicable in the state where the work is provided. Nevertheless, it should be remembered that the Directive may neither hinder nor prevent entrepreneurs from being granted the right to the free provision of services within the European Union. The necessary condition to apply its provisions is to establish by the authorities of the Member States clear and universally applicable requirements relating to employment on local labour markets.

Despite the fact that posted workers do not enter the labour market of the state where they are temporarily employed, because employers employing the workers are not permanently located on this market but temporarily provide services, Directive 96/71/EC requires that employers who stand to benefit from the freedom to provide services have full access to the information concerning the minimum national standards of employment and pay applicable in the state where posted workers are temporarily employed. Failure to fulfil this requirement prevents trade unions from initiating
industrial actions in order to protect the interests of workers employed permanently in the host country. Similarly, failure to fulfil this obligation impedes labour courts from adjudicating a possible difference between the minimum rate of pay applicable in the host country (\textit{lex loci laboris}) and in the country where the posted workers are habitually employed. The judgement of the European Court of Justice in the \textit{Laval} case and prior activities of European institutions overseeing observance of international labour law norms proves that the authorities of the Scandinavian countries have difficulties in meeting the requirement in question in the matters relating to setting the minimum remuneration for work.\footnote{A. M. Swiatkowski, \textit{Charter of Social Rights of the Council of Europe, Studies in Employment Law and Social Policy}, Kluwer, XX, 2007,p. 92 et seq.; p.121 et seq.} The character of employment relationships in Scandinavia consists in that the matters related to the establishing of terms and conditions of employment and pay for workers were essentially taken over by the social partners. As a result, the state authorities officially claim that they do not have any influence on or knowledge of the rates of pay for work. However, it is the authorities of Member States and not the social partners who retain responsibility towards European institutions monitoring and imposing sanctions for failure to comply with international standards of the protection of employees’ rights in employment relationships. The judgement of the ECJ in the \textit{Laval} case proves that the place of work, terms and conditions of the employment relationship, and, in particular, the rate of pay constitute the values which are protected by legal measures governed by the provisions of collective labour law. Providing clear and universally applicable regulations governing the minimum terms and conditions of employment and remuneration in the host country is a necessary condition of that protection, which at the same time is the fundamental requirement imposed on the national legislator to ensure the application of the necessary provisions to posted workers. Article 3 of Directive 96/71/EC was laid down to protect posted workers. Absence of legal regulations of terms and conditions of employment and remuneration of local workers is a reason why Article 3 of Directive 96/71/EC may not be applied, while the terms and conditions of employment and remuneration of posted workers are governed by the provisions applicable in the posting country (\textit{lex loci delegationis}). The Directive does not contain any provisions pertaining to terms and conditions of employment that are addressed to the authorities of the country posting workers. Article 3, which defines the legal mechanism of replacing less favourable applicable provisions of labour law by the provisions more favourable to posted workers.
workers, applicable in the host country, is an exceptional standard. As follows from the judgement of the ECJ in the *Laval* case, the rights of workers and trade unions in the host country is subject to restrictions. The scope within which their rights may be enjoyed is determined by the freedom to provide services, ensured by Directive 2006/123/EC.

VI  Directive No. 2006/123/EC on services in the internal market

The goal of Directive 2006/123/EC, initially referred to in its first proposed version as “the Bolkestein Directive”, was to introduce the common market of services within the European Union. It was adopted on 12 December 2006. It is based on the assumption of competitive character of services, which may be achieved by reducing the costs of work, thus, by reducing the number of workers and the amount of their remuneration. The Directive consists in three principles: 1) freedom of establishment; 2) control of services within the European Union by the authorities of the Member State where the activity involving provision of services is registered (the country of origin); 3) mutual assistance of the interested Member States monitoring the services provided within the European Union. These principles, in particular principle 2 (country of origin), would allow business entities providing services to be excluded for a limited period from the control of the EU Member State where a given service is provided. Accordingly, the much referred to, yet mythical “Polish plumber”, who carries out business within the scope of the freedom of provision of services in France, is excluded from the control of the competent French authorities. This concept of the freedom to provide services within the common market entails “free movement of labour law inspectors” within the EU who control whether entrepreneurs comply with the provisions applicable in two Member States: the state where the registered seat of the undertaking is located, and the state where the business involving the provision of given services is carried out. On account of these difficulties, Directive 2006/123/EC neglected the use of the principle of subjecting entrepreneurs to the control of the state where they have registered their service activity. The above principle would require harmonization of the rules on the registration of the exercised service activity within the

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57  O.J. 2006 L 376/36.
common market. It would also require an assurance of effective control over the activity exercised by the supervising bodies operating in the Member States where the entrepreneur’s registered seat is located.

The Directive entered into force on 28 December 2009. It obliges the authorities of the Member States to impose on each entrepreneur providing services to provide on a website requirements (“point of single contact”) which had to be met in a given Member State in order to register a particular service activity.

Services constitute about 70% of the economy of the common market. Thus, as a result of liberalization of the rules of carrying out service activities within the common market, a significant number of entrepreneurs (employers) will employ a significant number of employees and, at the same time, entrepreneurs employing cheaper labour will be preferred, at least in the initial stage of the activity. Hence, Directive 2006/123/EC in the initial period of its application is favourable to entrepreneurs (employers) employing workers from the “newest” EU Member States.

VII Polish collective Labour Law and Freedom of Services and Establishment:

Follow Up of the Laval and Viking ECJ Judgments

The Polish statute regarding collective dispute resolution (adopted on 23 May 1991), only recognises a dispute as a collective if it deals with the following: forming working conditions, remuneration, social benefits or the rights and freedoms of trade union workers (who have the right to associate in a trade union Article 1 (1)). Under Article 22 workers who do not have the right to strike, have their rights and interests protected by a trade union acting on behalf of another workplace and this trade union is able to organise a solidarity strike in support. The collective dispute resolution statute is applicable to workers, trade unions and employers obligated to comply with Polish labour law regulations. In accordance with the lex loci laboris principle this regulation usually applies in the place of work being carried out.

The situations which are exemplified in ECJ rulings, namely the Laval case, could not be taken into account by the Polish collective dispute resolution statute, as the issues

on hand do not constitute the fundamental elements of a collective dispute within the meaning of the Act. The issue between the Latvian employer and the Swedish trade unions could have come under collective labour law regulations if the dispute had occurred in Poland and had come under the collective dispute resolution clause.

The Swedish trade unions that carried out the collective action wanted to protect the interests of Swedish workers. Such action was to make it impossible for employers using foreign workers in Sweden to pay lower wages than those obtaining in Sweden. The aim of the collective action initiated in the Laval case was the prevention of any wage dumping tactics either by Swedish or foreign employers. This type of a collective action is permissible and in accordance with the Polish collective dispute resolution statute if such action was to serve the purpose of protecting workers’ interests whose work agreements come under the regulation of Polish labour law. The factual content of the Laval case proved no local workers’ interests or rights were breached. From the Polish statute perspective however, the decision handed down by the ECJ in Laval holds no relevance for the Polish legal order.

An additional argument, which may be used in support of the fact the Polish collective dispute resolution statute could not be relied upon to resolve the Swedish collective action issue as seen in this case, is the existence of Article 4(2) of the statute and its social peace clause. The protest action undertaken by Swedish trade unions may be regarded as a dispute relating to the content of the collective labour agreement entered into between the Latvian employer and Latvian trade unions, representing the interests of Latvian workers who are temporarily employed by their Latvian employer in Sweden. Swedish trade unions, which initiated the collective action, regarded such a collective agreement as unsatisfactory from the Swedish labour market point of view. The same could be applicable if the changes to such a collective agreement or levels of wages were raised concerning Latvian workers employed by a Latvian employer and applied to the demands defined by regulations concerning remuneration for Swedish workers. If the situation as displayed in the judgment of the ECJ was determined according to the Polish statute it would be necessary to universally acknowledge that a trade union that undertakes a collective action breaches the collective action ban laid down by Article 4(2) of the statute. The statute prohibits trade unions to enter into or organise collective action disputes concerning the implementation of changes to those collective labour agreements which have been agreed to, and this prohibition is in place
for the duration of the period of validity of the agreement. In accordance with the regulation the trade union should withhold any protests until the day in which the other trade organisation (which had entered into the collective labour agreement with the employer undertaking business activities in Sweden), gives notice to such an arrangement.

The ECJ ruling in Viking is of no relevance to Poland’s collective labour law. The call made by the ITF for national trade unions to refrain from carrying out any negotiations with the Finnish employer concerning a collective agreement, who at the time was relocating the company enterprise to Estonia, holds no relevance for the Polish Labour Code or for the general negotiating practices in collective agreements. Article 2412 § 2 of the Labour Code, which regulates the way in which collective labour agreements in Poland can be entered into, obliges the party seeking to initiate a collective agreement to notify all trade unions authorised to represent the interests of all those workers who will fall within the scope of the prospective agreement. It is important to recall that collective agreements in Poland regulate the working conditions, remuneration as well as rights and responsibilities of all workers, regardless of whether they are members of a trade union, it is enough that they are employees of an employer who is party to the collective agreement (Article 239 § 1 Labour Code). A trade union or the employer may initiate a proposal to conclude a collective agreement. Carrying out negotiations in the said agreement is possible thanks to one of the specified parties. It is, however, not an obligation. Polish labour law regulations do not obligate social partners to enter into collective agreements. The collective agreement regulations, which tend to benefit the workers’ position more than other general labour laws do, entail that social partners (especially trade unions) are more inclined to initiate negotiations for a collective agreement. Even if no initiative is taken or no agreement is concluded, laws are still in place to regulate the rights and obligations of workers and employers.

The context of individual work contracts may be regulated and in many cases is regulated by the Labour Code laws, by other statutes or legal acts legislated by the state. The parties to an individual work contract, the employer and the employee, fulfil and define the context of the rights and obligations within the contract, which are generally defined by labour law regulations. There are also rules on preventing a biased, unfavourable treatment of a worker. Article 18 § 1 of the Labour Code clearly states
that in an individual work contract “the contractual clauses in the work agreement or in a different contract upon which a work relation is established cannot be less beneficial to an employee than what is specified by labour law regulations”. Poland has a lower percentage of workers who are members of trade unions than the Nordic countries. Therefore collective labour agreements are not as common in Poland. It is for this reason that calling upon a trade union to carry out boycotting actions against an employer (by way of refusing to negotiate) would not result in the same legal consequences as were anticipated by trade unions in the *Viking* case (namely the impossibility of amending the context of individual work relations). Furthermore the Polish legislator makes it impossible to boycott a party that *has* initiated negotiations for the possibility of entering into a collective agreement. Article 241\(^2\) § 3 of the Labour Code makes it impossible for party that is authorised to carry out negotiations and authorised to enter into a collective labour agreement, to refuse to negotiate. The national trade union would not be permitted to appeal to international trade union associations, as was done in the *Viking* case. Instead, if the employer summoned the trade unions to negotiate for a collective labour agreement, they would be obliged to carry out such negotiations. In accordance with the requirements stipulated in Article 241\(^3\) § 1 of the Labour Code, each negotiating party has the obligation to carry out such negotiations in good faith and with consideration to the legitimate interests of the other party. Should one of the parties fail to fulfil such an obligation during the negotiations, the other party has the right to retract from the negotiations. As trade unions in Poland are usually the initiators and the party with the higher degree of interest in wanting to enter into a collective agreement, these regulations are often taken advantage of by the employer in order to retract from the negotiations, to which they have been called upon by trade unions.

The ECJ decision in the case of *Laval* has made a great impact in Scandinavia in the field of regulating minimum wages. Scandinavian countries have tended to pass on the responsibility of establishing minimum wages and other wage concerns to social partners. A grand example of this approach whereby state authorities hold no interest in wage concerns is in the lack of the requirement for social partners to document wage level decisions.\(^{59}\)

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\(^{59}\) This has been decided by the ECSR, the international body called upon by the Council of Europe to monitor whether member state authorities abide by the international standards established by the European Social Charter of 1961 and by the Revised European Social
Poland in its wage level decisions and approaches is diametrically different from the Scandinavians. State authorities define the general regulations enforced in establishing minimum wages. Social partners are part of the decision making process of establishing such levels. The statute which regulates minimum wages, passed on 10 October 2002, allows for the socio-economic Tripartite Commission, through negotiations, to establish minimum wages annually (Article 2(1)). The Ministry Council forms the basis upon which negotiations are carried out, which are then passed onto the Tripartite Commission (Article 2(1) point 1).

Matters regulated by individual labour law, especially in issues dealing with the establishment of minimum wages by state authorities, have not been affected by the decision handed down by the ECJ in *Laval* case. The case has not resulted in any consequences on state authorities in establishing minimum wages nor has it affected the legal mechanism in which minimum wages are established in Poland.

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The issues raised in this part of the study are both abstract and practical in their nature. They have been discussed in order to comply with the terms of the project. The concepts have been raised in an attempt to show that the decisions handed down by the European Court of Justice in the cases of *Laval* and *Viking* have not caused a revolution in Polish labour law, be it collective or individual. The Polish legal system, albeit somewhat antiquated, lies in accordance with the assumptions raised that formed the basis upon which the rulings were made in the cases in question. The situations presented in the ECJ judgments in *Laval* and *Viking* could not have constituted the subject matter of a collective dispute in Poland under the 1991 Act on collective dispute resolution. There are no relations between an entrepreneur from an EU Member State availing itself of the freedom of movement within the common market to provide services in the territory of Poland and trade unions operating in Poland that would be subject to the regulation of Polish collective labour law. It is permitted by law that trade unions initiate actions against an employer if these actions directly aim at protecting economic, professional and social interests and union freedoms of the groups of workers.

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Charter of 1996. Considering Article 4 § 1 of the Charter (fair remuneration), Scandinavian authorities inform the European Committee of Social Rights of not conducting statistics regarding the level of remuneration. Social partners responsible in Scandinavian countries for establishing the level of remuneration do not have a responsibility to gather such data. For further analysis of Article 4 § 1 of the ESC or the RESC see: A. M. Świątkowski, *Charter of Social Rights* op.cit, pp. 92 et seq.
whose collective employment relationship have been subjected to Polish collective labour law. Regarding the *Laval* case, no interests of the local (Swedish) groups of workers were directly infringed upon by the foreign (Latvian) entrepreneur. The entrepreneur was subject to no legal relations (either with the group of local workers, or with a union organization representing that group) that would be governed by the national provisions of collective labour law, seen from a Polish perspective.

The Polish Act on collective dispute resolution obliges the social partners to comply with the clause on social peace. Trade unions may not initiate any industrial action while the parties to the employment relationship are bound by a collective agreement.

In Poland there is no obligation to conclude collective agreements. Employment relationships between employees and employers who have not entered into a collective agreement are governed by the universally applicable provisions of Polish labour law – the provisions of the Labour Code. Therefore, if an international trade union organisation were to call on a national trade union to boycott a foreign entrepreneur this could not have any legal consequences. If a national trade union abstained from negotiating for a collective agreement with a foreign entrepreneur, no legal gap would have occurred in the relationships between the foreign entrepreneur and the workers employed by him, temporarily posted to work in Poland. In the place of a collective agreement, the provisions of the Labour Code would apply. This is true only in case where a legal relation is created between a foreign entrepreneur and workers providing work in Poland and where such an employment relationship with a foreign element is subject to the provisions of Polish labour law as *lex loci laboris*.

In Poland, the Minimum Wage Act of 10 October 2002 is applied. Subjecting employment relationships to the provisions of Polish labour law would have made it impossible for a dispute which such as those underlying in the *Laval* and *Viking* cases to occur. It would not have been possible to raise an objection against the foreign entrepreneur for applying social dumping standards to the foreign employees in Poland by paying them a remuneration lower that the minimum rates of pay. Each employer posting workers to work in Poland is obliged by Directive 96/71/EC to pay his employees the remuneration according to the generally applicable rates of pay applied in a given Member State.

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**VIII Rüffert and Commission v. Luxembourg - the other half of the Laval Quartet**

The ECJ judgments in the *Laval* and *Viking* cases were supplemented by the Court’s judgments some months later in the cases *Rüffert v. Land Niedersachsen* and *Commission v. Luxembourg*. The judgment in the *Rüffert* case was directly involved a Polish entrepreneur providing services in Germany. The Court held that the principle of freedom to provide services did not require that a Polish subcontractor be obliged by the provisions of labour law applicable at the place where a service is provided to comply with local rates of remuneration as fixed by collective agreements. Directive 96/71/EC, which lays down the terms and conditions of remuneration of workers posted to work in the framework of the provision of services, exclusively refers to the provisions of labour law universally applicable in the EU Member State (Germany) where services are provided by an entrepreneur registered in another EU Member State. Collective agreements are not as such of a universally applicable nature.

As results from the ECJ judgement in the *Commission v. Luxembourg* case, the authorities of a Member State may not require that entrepreneurs providing services comply with the requirements specified in all collective agreements concluded by the social partners. The wording contained in Article 3(8) of Directive 96/71/EC, “declared universally applicable”, does not cover any and all but just some collective agreements. Namely, they are applied to those which encompass certain categories of workers for whom they have been concluded on the scale of the whole country, not only of its territorial units. Further, the concept of “public policy” in Article 3(10) must be given a narrow reach.

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In the ECJ judgments of the quartet of *Viking, Laval, Rüffert and Commission v. Luxembourg* collective agreements play a crucial role. The observations above refer to collective agreements which are universally applicable. This involves the necessity to change the way of regulating minimum national standards relating to labour law in EU Member States. The ECJ requires that the authorities of the Member States engage directly in the matters relating to the regulation of terms and conditions of employment and pay. The universally applicable provisions in the matters relating to labour law constitute the legal norms established by the competent state authorities of Member
States. The Polish Labour Code contains the principles of replacing the universally applicable provisions exclusively by more favourable provisions of collective agreements, at the same time invalidating the provisions of collective agreements less favourable than the universally applicable provisions of labour law established by the state. Instead of invalidated provisions relevant, regulations of labour law issued by the state apply and where no such regulations exist, the provisions are replaced with appropriate provisions of non-discriminatory character (Article 18 of the Labour Code).

From this perspective, the judgments by the European Court of Justice in all four cases just mentioned above give more importance to the Polish system of labour law.

IX Concluding remarks

Polish authorities conduct a policy typical of nearly all “new” EU Member States. In principle, the Polish government is of the opinion that the Polish provisions of labour law apply to employment relationships of Polish employees employed by Polish employers regardless of the place where the work is carried out. In employment contracts concluded for a fixed term with Polish employees posted to work abroad, Polish employers are obliged to fix the duration of the work abroad, the currency in which the employee will receive the remuneration while working abroad, to inform them of the benefits allocated due to the posting to work abroad as well as the terms of the employees’ return to Poland (Articles 29(1–2) of the Polish Labour Code).

As an exception to the above mentioned rule governing employment relationships between Polish employees and Polish employers, Chapter II a of the Labour Code (Articles 67(1–67(4) lays down the terms of employment of foreign employees posted to work in Poland by employers having their seat in another EU Member State. Foreign employers were obliged to guarantee the posted employees terms of employment not less favourable than those resulting from the provisions of the Polish Labour Code. Provisions adopted by the Act of 14 November 2003 amending the Polish Labour Code concerning the matters on remuneration for work, \textsuperscript{61} came into force on the day of Poland's accession to the European Union (1 May 2004). They may have practical application for employees posted from EU Member States where the applicable

\textsuperscript{61} See fn 2, above.
provisions of labour law are less favourable than the terms and conditions of employment and pay applicable under Polish law. However, the standards of European labour law governed by Directives which regulate the rules for the resolution of the conflict of national labour law provisions applicable in employment relationships with a foreign element, definitely favour legal regulations concerning labour law applicable in the "new" Member States. The above tendency may be observed particularly in matters relating to regulation of remuneration for work. Each “new” Member State establish minimum rates of pay generally applicable in that State, from which the social partners may depart for the benefit of workers covered by a collective agreement. Hence, the provisions laid down by the "new" Member States constitute a competitive alternative to the higher rates of pay and other terms and conditions of employment negotiated by parties to collective agreements.

In my opinion, the free movement of workers and entrepreneurs along with a greater mobility of candidates to provide work from the "new" Member States may lead to competition between national systems of labour law between the “old” and the “new” EU Member States. The conflict of laws rules specified in the universally applicable provisions of private international labour law, that is in the Rome I Regulation and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 62 will give preference to the parties of individual and collective employment relationships with a foreign element to choose competitive national systems of labour law of the “new” EU Member States. In the present period of labour force management, the free movement of workers combined with non-administrative "soft" measures of regulating national labour markets (resigning from controlling employment or even issuing work permits) by the authorities of the EU Members States favour a competitive labour force.