The evolving regulation: dynamics and consequences

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3 The evolving regulation: dynamics and consequences

3.1 Introduction

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

What we are able to observe is that each stage of enlargement of the European project, and accompanied perceptions regarding differentials in labour costs, has spurred on legislative action (such as the adoption of a Posted Workers Directive and the Services Directive) and judicial intervention (regarding the scope of free movement of services). The political position taken by particular Member States in response to proposed legislation and court proceedings would seem to reflect their appreciation of whether they are in a position to benefit from competition on the basis of low labour costs, such that we see a State like the UK shift its position as it is transformed from a net exporter to a net importer of cheaper labour, while Germany has been more rigorous in maintaining its position and developing its mechanisms for self-protection. Similarly, we detect differences in the responses of Member States to EU instruments and judgments of (what is now) the Court of Justice of the European Union (CJEU), such that these are implemented in multifarious ways. We do not consider that such variety is necessarily a matter for concern, but we consider that such variety reflects the ways in which different EU States subscribe to different varieties of capitalism. This is not to say that differences reflect the desires of a given government in power for a set term, but rather the relative influence of social actors, such as employers and trade unions, and the domestic institutional framework within which they operate. What is clear is that both at domestic level and on the European stage, there is active contestation over the content of EU and domestic regulation of transnational labour, the mode of operation of any such regulation, and what would be their acceptable effects. Here, we endeavour in a modest way to track these processes of implicit and explicit conflict.

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Moreover, we detect evidence of conflict not just within and between EU Member States, but also competition for control between EU institutions. At a simple level, this could be seen as arising between the Council, which adopts EU legislation, and the Court, which applies such legislation and determines its validity in the light of the Treaties. However, the scope for conflict at EU level goes beyond this. Different parts of the Commission would seem to have proposed and supported different measures, such that DG Employment and Social Affairs has taken a much more socially oriented perspective, protective of the interests of labour, to that of the DG for Internal Market and Services, which tends to reflect the perceived business needs of EU transnational companies.

There was also an interesting tussle between the Commission and Council on the one hand and the European Parliament on the other as regards the content of the Services Directive, including the treatment of posted workers and scope for protection of labour standards permitted thereunder.

This suggests that the content of the so-called ‘European social model’ remains unsettled, being shaped and reshaped. Efforts to develop and expand the Single Market also engendered the idea of a ‘social dimension’, materializing in an Action Programme and the Community Social Charter, to foster new dynamism and development in the social policy field. That turned out to be a rather unsuccessful ambition, however. The aspiration of a ‘European Social Area’ had to yield and was substituted by the notion of a ‘Social Dimension of the Internal Market’, tempered by reference to an EU Charter of Fundamental Rights now incorporated into the Treaties.

In other words, we are examining the evolution of regulation regarding transnational labour at an important juncture in the self-understanding of the aims and objectives of the EU.

### 3.2 Free movement of workers and early EEC legislation

Cross-border movement of workers, whether in their individual capacity or in the context of provision of services, entails conflict of laws issues. If a worker departs from country A to perform work in country B the question arises, simply put, whether that worker shall be covered by the law of its ‘home country’ A, or if the law of the place of work, B, shall apply, or if both legal regimes may apply in combination. This is an issue

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4 E.g. Syrpis (ed.) 2012.
5 E.g. Peterson 1995, Bauer 2008, also see fn. 8, infra.
6 COM(89) 568 final.
9 E.g. Vogel-Polsky 1990, 75.
that surfaced in the EU context long before the first draft for a Posting of Workers Directive was tabled in 1991, yet it is a part of the legislative history of that Directive. The private international law dimension stands as the first line of development ultimately leading up to the Posting of Workers Directive and the regulations that were drafted in that early phase emerge, as we shall see, as precursors to essential elements of Article 3 PWD.

It is common to all EU and EEA Member States that prior to the entry into force of the Posting of Workers Directive the law applicable to the individual employment contract of workers moving across borders, to and from the State concerned, was governed by the private international law of that State, private international law in spite of its appellation being national law. Later, effectively from about the same time the first drafts for a Posting of Workers Directive was circulated, the rules of the Rome Convention, 1980, on the law applicable to contractual obligations,10 entered into force and proceeded to play a part in the PWD legislative process. The Directive however, as we shall see, lays down separate rules on matters of choice of law and private international law.

Concerning cross-border movement of workers, early EEC secondary legislation saw two different approaches to the choice of law problem being employed. The first legislative measure, Regulation 1612/68,11 was directed at the free movement of workers, focused on the right of nationals of a Member State to take up an activity as an employed person within the territory of another Member State. The Regulation proscribed limitations on recruitment by national employers of workers from another Member State (Articles 3–6) and, pertinent to the private international law dimension, laid down a requirement of equal treatment with national workers in respect of ‘any conditions of employment and work, in particular as regards remuneration, dismissal’, reinstatement or re-employment, and ‘social and tax advantages’. This applied in respect of legislation as well as any collective agreement or individual employment contract (Article 7; also Article 7 of the 2011 Regulation). The non-discrimination principle in Regulation 1612/68, in keeping with Article 48(2) EEC (Article 45(2)

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TFEU) on freedom of movement of workers entails in principle the application from ‘day one’ of host state labour law to persons utilizing the right to free movement of workers. A worker in cross-border employment is entitled to benefit from the law of the Member State where he or she performs work, from the very first day. On its wording, the fourth recital of the Preamble, Regulation 1612/68 could in principle be held to apply also to what is now understood as posted workers. It was only with Rush that the legal basis in their regard was vested in the rules on freedom to provide services (Article 59 EEC; Article 56 TFEU).

This context is even more evident as regards the early secondary legislation on social security, in which a different approach in part was adopted to the issue of applicable law. Regulation 1408/71\(^{12}\) was based on the Treaty provisions on free movement of workers (Article 51 EEC; Article 48 TFEU), its theme in general terms being co-ordination of national social security legislations to ‘secure mobility of labour under improved conditions’ (fourth and ninth recitals of the Preamble). Under this Regulation, also, the principle of equal treatment and a ‘day one’ principle applies, the starting point and general rule being that ‘persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State’ (Article 3(1), cf. Article 13). What sets the 1971 Regulation apart from its 1968 counterpart, however, is that a specific exception is made for ‘posted workers’. They shall continue to be governed by their home state law as regards social security if a posting lasts (or is anticipated to last) more than twelve months (Article 14(1)(a)(i))\(^{13}\), now twenty-four months pursuant to the 2004 superseding Regulation (Article 12(1)). Thus Regulation 1408/71 was not merely an expression of a different stance on the scope of application of host state law, it was at the same time a clear manifestation of assimilating cross-border posting of workers the domain of Treaty rules on free movement of workers.


\(^{13}\) Article 14(1)(a)(i) of Regulation 1408/71 reads, ‘A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting’.
The 1968 and 1971 regulations, adopted at an early stage, were key instruments in the implementation of free movement for workers. This body of law was forcefully followed up by the then European Court of Justice (ECJ, now CJEU) in its decisions such as Commission v France, in Walrave, both 1974, and Boucherau, 1977, and a short decade later in Prodest. Little headway had however been made on the right to establishment and the freedom to provide services. Applying Article 48 EEC the decision in Commission v France emphasised the requirement of non-discrimination of workers making use of the right to free movement, and thereby readily lent itself to be construed to correspondingly lay down as a principle that host state workers shall not risk having to compete with cheap foreign labour.

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

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

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

Our starting point, when examining EU regulation of transnational movement of labour, is therefore the expansion of what was then the EEC in 1986 to include Portugal and

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14 In this field implementation was ‘ahead of schedule’, commented Laslett 1990, 1. The ensuing process still was long and complicated, see Bercusson 1996, 388-390.
16 See Laslett 1990, 1.
17 This point is forcefully made by Hellsten 2007, 8.
18 See Däubler 1997, 615 with fn. 37.
Spain. This expansion presented the prospect of movement of cheaper labour from these two Iberian countries to the pre-existing Member States. Here, we look at the concerns which underlay the determination regarding ‘work permits’ by the ECJ in the *Rush Portuguesa* case,19 and the subsequent positions taken by Member States in response to *Rush*. The *Rush* decision was proclaimed in a formative phase of policy relating to posted workers and came to serve as a catalyst, in part also a model, in the subsequent wider process.20 As we shall see, the Member States who are the subject of this study viewed the Court’s judgment in that case as granting permission to extend national labour standards (including norms established through collective bargaining) to workers posted from one Member State to another. This shaped their bargaining position in respect of the subsequent Posted Workers Directive (PWD), but also, very significantly, the preparedness of certain States to join the EU and to be bound by that Directive under the mechanism of the EEA. However, our interest in this section lies primarily with anticipatory measures taken by certain Member States to regulate wages paid to posted workers.

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

19 Case C-113/89 [1990] ECR 1417.
3.3 The conflict of laws dimension – towards restriction of choice and national freedom

The 1968 Regulation (1612/68/EEC), albeit relying essentially on a host state, or *lex loci laboris* principle, still left issues of private international law unresolved. It is a general point of departure in private international law, common to most States if not all, that a principle of party autonomy applies, meaning, in the labour and employment law context, that the parties to an employment contract have a freedom to choose which country’s law is to apply in their contractual relation. Private international law being national law, however, the law of the Member States differed considerably on how to determine the applicable labour law, in particular as regards the extent to which domestic law recognised a freedom of contract. Vast differences obtained, and in part still do notwithstanding the later partial harmonisation within the EU by the Rome Convention of 1980, as regards the views on and the reach of domestic law rules considered to be ‘*lois de police*’ or ‘*ordre public*’, which are mandatory, immediately applicable and overriding contractual choice. While in some countries virtually all individual or protective labour law is considered as *ordre public*, in other Member States the concept is reserved for norms of a ‘public law’ nature or is unknown or plays merely a minor role in the labour law field. Here is a distinction also between ‘unilateralism’ and ‘bilateralism’. While a unilateralist approach emphasises territoriality, predominantly *lex fori*, bilateralism is based on the idea of the equivalence of legal orders. It will accept the applicability of a workers home state labour law, at least for work assignments that are in some way temporary or of a limited duration. In this context bilateralism and a broad notion of *ordre public* are two sides of a coin.

These problems were recognized at the outset. On the adoption of Regulation 1612/68 the Council instructed the Commission ‘to examine thoroughly the problems raised by conflict of law rules with regard to labour law, in order to find the most suitable solutions as soon as possible’. The process that was to follow was however not so swift. In March 1972 the Commission tabled a proposal for a regulation on conflict of laws pertaining to employment relations within the Community. In the light of

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21 As illustrated later by e.g. the ECJ decisions in *Arblade* (Joined Cases C-369/96 and C-376/96) and *Commission v Luxembourg* (C-319/06). See also Evju 2006, 11-13. For France, see e.g. Pélissier et al. 2008, 45-46, 118-119, and Ray 2005, 33-36, illustrating also that the French notion of *ordre public* is both relative and complex, and further Meyer 2006.


23 See for Germany e.g. Junker and Wichmann 1996, 506, Deinert 1996, 341; the literature on the topic is otherwise immense. The state of the law in the Scandinavian countries is essentially similar at the outset.

24 COM(76) 653 final, Explanatory Memorandum, 3.

25 Proposition de règlement (CEE) du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l’intérieur de la Communauté, 23 mars 1972.
opinions of the ECOSOC later the same year\textsuperscript{26} and of the European Parliament\textsuperscript{27} an amended proposal was submitted to the Council by the Commission in 1976.\textsuperscript{28}

At the same time, work was also on-going since 1969 with an instrument on the applicable law to contractual and non-contractual obligations,\textsuperscript{29} which ultimately resulted in the 1980 Rome Convention. A first draft Convention was tabled already in 1972.\textsuperscript{30}

The two efforts were obviously not coordinated and the rules proposed differed quite significantly.\textsuperscript{31}

The Convention, in draft and as adopted, essentially embodies the principle of party autonomy and, also, a principle of legal certainty. Further, the rules, applicable to contractual obligations in principle are neutral to the sort of social and socio-economic interests with which substantive law is concerned, labour law in particular, inasmuch as the rules of the Convention are based on an assumption that national legal systems are interchangeable. Article 3(1) of the Convention stipulated free choice of law by contracting parties, including parties to employment contracts, as a general rule. This point of departure was restricted, however, in different ways based on the foundational notion in labour law of the worker being the weaker party.\textsuperscript{32} First, a choice of applicable law could not deprive an employee of protection flowing from mandatory rules of law that would be applicable to the employment contract in the absence of choice (Article 6(1)). In other words, notwithstanding the freedom of choice at the outset the Convention’s rule was that parties are free to chose the law applicable to their employment contract only insofar as the chosen law were more favourable to the employee than the mandatory standards of the law which would otherwise apply. Within the meaning of Article 6(1), mandatory rules that cannot be opted out of were not only provisions relating to the contract of employment itself, but also provisions

\textsuperscript{26} Avis de Comité économique et social sur une proposition de règlement du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l’intérieur de la Communauté, 29 et 30 novembre 1972. OJ C 142/5, 31.12.72.
\textsuperscript{27} OJ C 4, 14.2.73, 14..
\textsuperscript{28} COM(75) 653 final. Amended proposal for a Regulation of the Council on the provisions on conflict of laws on employment relationships within the Community, 28 April 1976.
\textsuperscript{29} While the initiative was taken in 1967 the actual work commenced in 1969; see Giuliano and Lagarde 1980, 1.
\textsuperscript{30} EEC Commission, XIV/398/72 –E.
\textsuperscript{31} For some pertinent observations on this, see Hepple 1978.
such as those, e.g., concerning health and safety which are regarded in certain Member States as being provisions of public law. The Giuliano/Lagarde-report stated that

‘The mandatory rules from which the parties may not derogate consist not only of the provisions relating to the contract of employment itself, but also provisions such as those concerning industrial safety and hygiene which are regarded in certain Member States as being provisions of public law.

It follows from this text that if the law of the country designated by Article 6 (2) makes the collective employment agreements binding for the employer, the employee will not be deprived of the protection afforded to him by these collective employment agreements by the choice of law of another State in the individual employment contract.’

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

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

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33 Cf. ibid., 25.
34 Ibid., 24.
35 Both alternatives are subject to a reservation, ‘unless it appears from the circumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country applies’ Article 6(2) final paragraph.
36 Not fully, since some Member States made a reservation to art. 7(1), implying that Member States may give different effect to internationally mandatory rules not belonging to the law of the adjudicating body (lex fori).
37 The first judgment of the ECJ on a (non-labour law) Rome Convention case was in 2009, Case C-133/08 Intercontainer Interfrigo [2009] ECR I-9687.
38 See extensively van Hoek 2000.
The now outlined provisions of the Rome Convention are replicated in the superseding Rome I Regulation,\(^{39}\) cf. Articles 3 and 8.

Turning to the drafting process relating to specific choice of law rules for temporary cross-border work, the approach was rather different. The 1972 and 1976 draft regulations offered no freedom of choice, except in very limited circumstances. The general rule, its object being to secure equal treatment of all workers in an establishment, was that the law of the normal (habitual) place of work was applicable (1976 draft, Article 3). As regards the scope of a possible regulation there was a fundamental shift from 1972 to the subsequent 1976 draft. The 1972 proposal covered posting within a company group (Article 4, similar to Article 2(3)(b) PWD), the 1976 amended proposal was extended to encompass posting in general, the sending of workers ‘to carry out temporary activities’ in another Member State. The reach of the Article, by way of referring to Article 51 EEC, was linked to that of Regulation 1408/71. For workers being posted in another Member State the point of departure was in keeping with this. Home state law – the ‘country of origin’ law, in contemporary terms – would continue to be applicable. This was however restricted, pursuant to Article 8, by the requirement that on a number of enumerated points the law of the place of work were to apply as mandatory law. The host state rules to be applicable can readily be seen as a precursor to the Posting of Workers Directive, its Article 3(1) in particular. The law of the place of work to be mandatory in posting situations were (Article 8(1) of the 1976 draft)

- provisions on maximum daily and weekly working hours, time off per week and public holidays;
- provisions relating to minimum holidays;
- provisions on minimum guaranteed wages, ‘similar guaranteed payments by the employer’, and payment of wages;
- occupational safety and health;
- special protection for children, adolescents, women and mothers, and the handicapped, etc.;
- provisions on official approval of the termination of employment relationships; rules on the invalidity of restrictive covenants and similar contract clauses; and, new to the 1976 draft,
- provisions on the protection of employees’ representatives; and on
- the business of hiring out workers.

It is a paradox of sorts that the draft regulation seemingly would provide less protection than would the draft Convention. Whereas the latter would exclude free choice in respect of all mandatory rules for the protection of the employee, the regulation would

restrict the application of mandatory rules applicable at the place of work to the topics specified in Article 8(1). On the other hand, Article 8(3) of the draft regulation stipulated that insofar as home state law ‘offer[s] better protection for the worker’ home state law would remain in force. That provision can readily be seen as a precursor to the much debated Article 3(7) of the Posting of Workers Directive.

The proposals for a regulation did not materialize into actual secondary legislation. Both proposals were regarded critically, in some Member States, at least, and also within the Council. With time political constellations and priorities changed and when in 1980 the Rome Convention was adopted, the still pending regulation proposal was ultimately withdrawn in the fall of 1981. This early initiative nonetheless merits a certain attention. Both a link to and a distinction to the later Posting of Workers Directive are evident. The distinction lies in the Treaty base and thematic reference. Deriving from Articles 48, 49 EEC (Articles 45, 46 TFEU) and Regulation 1612/68 the proposed regulation was aimed at the free movement of workers, not at the freedom to provide services. The link has been pointed to above. Further, a line was drawn to ordre public.

The initial proposal of 1972 opened that door wide; it would permit states to impose as mandatory such rules in the domestic legal order as were founded on reasons of ‘ordre public, de securité publique ou de santé publique’, though within the bounds of the EEC Treaty Articles 48 and 49. This potentially far-reaching empowerment was however discarded in the amended proposal of 1976. The underlying idea was that the proposed Article 8(1) reflected the current state of law as regards the range of mandatory rules in conflict of laws settings in Member States. The proposed list in Article 8(1) therefore was a comprehensive list of legal provisions’ that would take precedence in the host state over home state or other chosen law.

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

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40 Cf. Hepple 1978, 43.
42 Commission 1981 [item 8].
43 1972 proposal Article 4(2).
44 COM(75) 653 final, Explanatory Memorandum, 11; our italics.
3.4 Rush Portuguesa
The ECJ decision in Rush, preceding the actual PWD process, however adds to this picture. The decision was proclaimed in a formative phase and came to serve as a catalyst, in part also a model, in the subsequent process. It is the catalyst function that belongs here.

Rush concerned a dispute between the Portuguese company Rush Portuguesa and the French Immigration Office (Office national d’immigration). Rush had concluded a contract with a French undertaking as a sub-contractor, which entailed participation in the construction of a railway (TGV) in France. In order to perform the contract, Rush brought to France their employees from Portugal. After inspections had been carried out, Rush was fined for a breach of the French labour code which concerned employment of foreigners in France, as this was to be regulated by the French Immigration Office. As noted above, this case arose in the context of recent accession of Portugal to the EEC, with all the political sensitivities that this entailed. Notably, Portuguese workers did not have full free movement rights (as yet) but Portuguese enterprise could claim rights to free movement of services. France was nonetheless precluded from applying its immigration laws, etc.

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

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

Expanding on the precursor in Seco (para. 14), the Court here widened the scope for national regulation from ‘minimum wages’ to the entire spectrum of labour law, seemingly granting a host state a wide licence to apply its national law to employees of cross-border service providers. The Court offered no explanation or reasoning to

underpin this sweeping statement. By answering a question that was not requisite to
the decision it has been argued that the Court committed ‘a basic error of the craft of
judicial decision-making’. But it may also be seen as a considered policy statement,
intended both to discourage cross-border service providers from using Articles 59 and
60 to mount comprehensive challenges to host state labour laws and to appease France,
in particular, and host states generally.

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

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

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

Yet, the reaction by the Member States to Rush was far from uniform. In particular, it is
possible to detect a broad discrepancy between what we might term ‘labour exporter’

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47 See e.g. Davies 1995, 74, Barnard 2008b, 147.
48 Davies 2002, 300.
and ‘labour importer’ states. At the same time, there was some palpable difference between the ways in which different labour importing Member States chose to seek to regulate the terms of posted work, Germany possibly being the most interventionist, as opposed to the Netherlands which arguably had comparable concerns. Finally, we should note that Rush seemed to offer (false) reassurance in terms of accession (in 1995) for Finland and Sweden, and also contributed to Denmark’s confidence in ratification of EU Treaty.

However, we should also note that the two statements made in Rush, highlighted above, were far from clear in their scope. What, for example, is meant by the statement that the Portuguese workers in that case ‘did not at any time gain access to the labour market of the host state’? Arguably, it is comprehensible only in the context of Rush where the workers concerned did not yet benefit from freedom of movement in Community law. Is it sufficient for this purpose that the workers are merely posted by the service provider and will return home once the service provider’s task is complete? This would not seem to be what the intended meaning was, given that non-entry to the host state labour market is made as a separate point. Or does this mean that the posted worker will not stay in the country long enough to disrupt access to the job market by those actually resident in the host state? Arguably, that assertion by the Court is rather a narrow-minded one. It is hardly to be contested that the posting of workers impacts on the labour market situation of a host state, and more so the longer the duration of the posting. 50

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

3.5 Labour market backgrounds, responses of Member States to Rush

As Monika Schlachter has observed, ‘[s]ince the ruling of the ECJ annulled the intended effects of restricting the applicability of some fundamental freedoms of the EC Treaty for workers from the new Member States, the ‘old Member States’ tried to regain control by implementing a directive about posting of workers’. This was, however, very

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50 The actual duration of the contract period in that case cannot be gleaned from the decision in Rush. It appears from the proceeding in France that the contract was for a longer period than one year.
much the response of those States who were net labour importers. For example, the UK, as a net labour exporter took a different approach.

From 1990–1996, the UK exported cheap labour, often in the construction industry, through the provision of services in other European countries.51 There was no political call for protection of UK labour standards from encroachment by cheap labour from other European states. Rather, emphasis was placed (in a time of UK recession) on the ability of UK workers to find employment ‘in Europe’. At that time, UK labour legislation placed strict jurisdictional limitations on the applicability of the labour standards contained therein. You had to be ‘ordinarily working’ in the UK to claim those statutory rights. UK workers posted abroad for lengthy periods with a new employer were not, subject to conflicts of laws principles, usually considered to come within the scope of UK labour legislation (and the protections that it offered). This allowed such workers to work in conditions abroad which would have been in contravention of UK labour law. Workers posted to the UK also did not receive any protection by virtue of these statutory provisions, insofar as they were expected to return to work for their employer again in another country. The aim was, as Tony Blair stated, when he came to power in 1997, to have the most lightly regulated and competitive labour market in Europe. The UK initially opposed the 1991 draft for a Posting of Workers Directive on the grounds that it might prove costly to UK business, particularly the construction industry. It was described in the UK Parliament as: ‘bureaucratic, anti-competitive and protectionist in nature, and that it would erect barriers to a free market and damage the effective operation of the Single Market’. The fear was that a PWD would encourage countries to reduce the demand for British workers. UK labour was already very cheap. It would be difficult for workers from other states to undercut those rates, even if ‘posted’ to the UK.

The net labour importers pursued a different approach. Following Rush, there would seem to be at least three ways in which to impose significant controls on conduct of foreign service providers. The first is by ensuring that the wages of posted workers do not undercut those operating in the domestic labour market. The second was to use legislation or collective bargaining to impose other labour standards (such as health and safety or working time). The third would seem to be to use systems of registration, work permits or other bureaucratic controls as a deterrent. The latter arguably comes under scrutiny by virtue of the first statement in Rush, but the first two mechanisms would seem to be open to Member States. It is interesting that when countries anticipated introduction of a PWD by taking advance legislative measures (such as Germany and Norway), their focus in part was primarily on wages. Wages can be controlled through a

number of means, such as imposition of a national minimum wage, a nationally arbitrated ‘award’ rate of pay or collectively agreed rates of wages. In terms of the FORMULA study, four countries, Germany, the Netherlands, Finland and Sweden are of interest in this respect.

During the German presidency of the European Council, in the second half of 1994, Germany tried to advance adoption of a PWD. However, the Government also sought to anticipate the adoption of such a directive and its eventual implementation, by addressing the crisis then arising in the German construction sector.52 Foreign undertakings paid their workers only half of the amount that German employees earned or even less while deploying them on German construction sites. This meant that foreign undertakings could undercut German competitors’ prices easily by 25%. The result was that the number of insolvencies of domestic construction companies rose dramatically. In the area of Berlin, the number had tripled from 1991 to 1994. The aim was therefore to regulate wages paid to posted workers. A draft bill was tabled in September 1995. When drafting the bill for an Arbeitnehmer-Entsendegesetz (AEntG), the German legislator relied specifically on the second statement in Rush (which anticipated the PWD) and covered the whole construction sector. The proposed legislation aimed at establishing minimum wage levels in the German construction sector by introducing ‘uniform minimum working conditions’, thereby diminishing the comparative cost advantage of foreign undertakings. Such minimum standards were considered as important to preserving public interests as to function as mandatory norms in the meaning of the private international law rule in Article 34 EGBGB,53 thus overriding the labour law norms of the sending country otherwise governing the contract of employment.54 The material scope of the draft bill was limited to the construction sector,55 as this was the economic area where immediate action was needed the most. In addition to providing the substantive minimum working conditions, foreign undertakings must participate in the German social contribution system for the construction sector, unless they already participate in a comparable system in their

53 Einführungsgesetz zum Bürgerlichen Gesetzbuche
54 § 1 AEntG gov. draft: ‘… zwingend Anwendung, wenn …’.
55 § 1 I AEntG gov. draft.
home country, in which case the German system allowed for consideration of the already granted benefits.\textsuperscript{56}

The first draft bill, by the Government, drew criticism from different quarters. The Bundesrat (Upper House of Parliament) decided by a majority to reject the draft bill and to introduce its own proposal to the Bundestag, shortly before the opposition party in the Bundestag (Lower House of Parliament) came up with another alternative. All of the drafts pursued the same intentions but the measures of implementation were highly controversial. A compromise solution was hammered out by the Bundestag’s Committee on Labour and the Social Order and the Arbeitnehmer-Entsendegesetz was adopted in February 1996, entering into force on 1 March 1996. Essentially, the substantive features noted above were intact but measures of control and enforcement differed from the first draft bill were altered an reinforced. The success of any such regulation demanded that posted workers need to be notified to the German authorities, and undertakings would be liable for administrative offences. Collective agreements could be made generally applicable where there was consent by a majority in the Committee on Collective Agreements.

A similar trend to that experienced in Germany took place in the Netherlands construction sector:\textsuperscript{57} ‘Isles of foreign labour law were observed at big construction sites as a consequence of chains of cross-border subcontracting’. Belgian building companies quintupled their turnover on the Dutch construction market between 1983 and 1996. The European Federation of Building and Woodworkers (EFBWW) pleaded for a solution in Community law analogous to the ILO Convention 94 on ‘labour clauses’ in public procurement contracts in the directive on liberalisation of public procurement, for which a first proposal was tabled in late 1986 (COM(86) 679 final). The Dutch trade union FNV Bouw & Hout supported this stance, but it did not emerge on the domestic agenda as a very pressing issue. Houwerzijl suggests that this was because, in practice, the operation of cartels in the Dutch construction industry meant that there was no significant undermining of Dutch companies or the terms and conditions of Dutch workers. There was little or no experience of ‘social dumping’.

For posted workers on the territory of the Netherlands before the implementation of the PWD, the application of private international law meant that not all, but only some provisions of extended collective labour agreements (CLAs) could be applied to them, namely when these provisions due to their nature and purpose should be classified as rules of an overriding mandatory character. However, as Houwerzijl observes, this was

\textsuperscript{56} § 1 II AEntG gov. draft.

\textsuperscript{57} This part draws on M. Houwerzijl, \textit{Implementation of the Posting of Workers Directive in the Netherlands}. Oslo: FORMULA Working Paper No. 16 (2010).
only a possibility and not a duty and it seems that this was left to the social partners to decide for themselves. Until 1995, the Dutch CLA for the construction sector excluded posted workers from its scope. Although already on the bargaining agenda of the union side from 1990 onwards, as a consequence of the *Rush* judgment, this situation only altered five years later following the example of Belgium. ‘In fact, this is all that can be said about the reception of the *Rush* judgment in Dutch labour law with regard to the application of host state labour law.’ Legislative measures were only taken to address the issue of posting in the course of implementation of the PWD in 1999. The Posting of Workers Directive was officially implemented by means of the *Wet arbeidsvoorwaarden grensoverschrijdende arbeid* (Terms of Employment (Cross-Border Work) Act), which entered into force on 24 December 1999. Albeit that limitation was controversial, the Act was limited to the construction sector; it was only in 2005 that it was amended to cover all sectors.

Why then were Germany and the Netherlands different in their approach? Arguably, various factors can be identified including the scale of impact in construction sector, the extent of trade union pressure and the degree of public concern and engagement.

Like Germany, Finland acted initially prior to the adoption of the PWD.\(^{58}\) In 1995, the same year as Finland joined the European Community, the key labour market organisations and the government agreed on the introduction of a specific regulation aiming at addressing ‘posting’ of workers to Finland. The law was changed to ensure that the pre-existing ‘*erga omnes*’ system in Finnish labour legislation applied to foreign service providers so that, with the exception of short time installation work (and similar situations), foreign service providers have to apply generally binding Finnish collective agreements in accordance with Finnish legislation. This would be mandatory and would apply regardless of any individual or collective contracts between a posted worker and his/her employer. This measure was taken in reliance on *Rush* and following the debate on the draft Directive on posting of workers. ‘The promise to regulate the issue of social dumping was clearly one of the measures taken in order to secure a favourable attitude from the trade unions towards EU-membership and the referendum on membership’.

The ECJ decision in *Rush*, 1990, and the subsequent first draft for a posting of workers directive tabled by the Commission in the summer of 1991 set wheels in motion in the Nordic countries. With the exception of Finland, none of the countries had a system of ‘*erga omnes*’ or general applicability of collective agreements. A Nordic conference in December 1991 on European Integration and Nordic Labour Law focussed especially

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\(^{58}\) The text on the Nordic countries draws on the contributions by M.G. Lind (Denmark), N. Bruun (Finland), S. Evju (Norway), and K. Ahlberg (Sweden), FORMULA Working Papers nos. 24, 15, 19, and 21 (2010) respectively.
on prospective issues in collective labour law in view of European law developments. At the time, Denmark was the only member of the EC (EU). For Finland, Norway and Sweden negotiations for an EEA agreement were under way. The countries later went different ways. Just a year after the entry into force of the EEA Agreement, on 1 January 1994, Finland and Sweden joined the EC, while Norway remained in the EEA. The four Nordic countries also took differing approaches to the posting of workers issue.

Among the Scandinavian countries, Norway adopted a different course from Denmark and Sweden. While the latter held the matter in abeyance, action was swift in Norway. Towards the end of 1991 the Norwegian Trade Union Confederation (LO) turned to the Government with what was effectively a demand, as a precondition to lend political support for an EEA agreement, to have legislation put in place with the aim to counteract ‘social dumping’. There was a simple reason for this. Trade union density is lower than in Denmark and Sweden, and being well aware that collective agreement coverage in the private sector is also not so high, it could easily be anticipated that posting of workers to Norway might fall outside of the scope of existing agreements. In case the union had no members among workers being posted, which obviously was the likely situation, the scope and effectiveness of industrial action, however lawful, would be limited. The Ministry of Labour tabled a first draft for a bill, on minimum wage setting, in mid 1992. It did not meet with the approval by the LO and some other trade union confederations who wanted instead an act allowing for the possibility of declaring collective agreements ‘generally applicable’. In December the same year a bill on this was put to Stortinget (Parliament). It immediately became highly controversial, in particular on account of the fact the bill proposed a wholly different solution from that included in the earlier draft, with no public consultation having taken place. Following a protracted procedure in Parliament the Act was adopted, largely as proposed, in June 1993. It established an independent administrative law body with tri-partite membership, Tariffnemnda, which is empowered pursuant to certain procedural rules to adopt decisions on ‘declaring a (part of a) collective agreement generally binding’. In legal terms, decisions are delegated legislation issued in the form of Regulations, setting minimum terms on the basis of a limited selection of provisions of the relevant collective agreement. The Act was dormant in its first ten years but was revived with the EU enlargement in 2004. Since then it has been in part fully accepted, in part contentious, by both sides of industry.

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

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

3.6 The PWD drafting process

3.6.1 Introduction. The social dimension of the single market

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


The PWD purports to be, and is to some extent, a worker protection measure. But the Directive has mixed objectives. It also serves to promote the transnational provision of services and to facilitate cross-border competition. The two dimensions were key pieces in the shifty drafting and elaboration of the PWD. The Directive has in reality been ridden with ambiguity since its inception. The conflict between economic interests and social cohesion has exacerbated with the enlargement of the EU and EEA.
In the section on ‘new initiatives’ concerning freedom of movement the Action Programme included an outline on a ‘Proposal for a Community instrument on working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a sub-contracting undertaking’. The gist of this proposal was that there was a need to ensure the application of host state legislation on ‘public order’ and national ‘generally binding collective agreements’. The Action Programme curtly stated that the Commission would ‘resort to the appropriate Community instrument to ensure respect for’ those two ‘principles’.

The Action Programme offered no further suggestion of the kind of instrument to make use of. The Programme also did not indicate which legal bases the Commission could rely on when launching its proposals. The options had to be found in the Preamble to the Community Social Charter to which the Action Programme was linked. A wide array of alternatives was then available. The Preamble to the Charter refers, i.a., to the freedom of movement of workers (Articles 7, 48-51 EEC; now Articles 25, 45-48 TFEU), to the right of establishment (Articles 52-58 EEC; now Articles 49-54 TFEU), but not to the provisions on the freedom to provide services. This may, but not cogently, be seen as indicating that at the time it was host state domestic law, not service providers’ and market interests that held precedence, albeit the risk of ‘distortions of competition between undertakings’ was also mentioned. The perspective conveyed by the sole mention of ordre public and generally binding collective agreements was anyhow rather narrow and suggestive of a certain legal-cultural bias. All of these are aspects that reappear in new forms in the PWD elaboration process.

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

3.62 The first phase – the first draft, 1991
A few months after the Action Programme was presented, in March 1990, the ECJ came down with its decision in Rush. As we have noted already, Rush has a prominent place in the saga of the Posted Workers Directive. The Court in Rush may at the outset be taken to follow the lead from the Commission Action Program. There is an important difference, however. Whereas the Action Programme made no reference to a legal basis and could be taken to refer to the free movement of workers, the Court as we have seen placed the problem firmly within the domain of Treaty law on the freedom to provide services.
This, then, set the tone for the framing of a Posted Workers Directive. It should be noted, also, that adding to the uncertainty flowing from the choice of legal basis and the wide-ranging dictum, the Court in Rush did not at all touch on or discuss issues of ordre public or mandatory norms in private international law. The conflict of laws dimension was conspicuously absent from the rather cursory reasons given by the Court.

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

The 8 June draft was somewhat more extensive than the DG V draft from May, expanding on the Preamble with, i.a., references to the Rome Convention and to ILO Convention No. 94, and including from the DG V draft what can be seen as a precursor to Article 3(7) PWD in the provisions proper. The latter was not included in the 17 June draft, in which the infamous ‘erga omnes’ notion made its first appearance. All drafts proposed, for the purpose of achieving a certain flexibility, a threshold of three months for the application of host state rules on minimum wages and holidays. Moreover, the proposal maintained the essential approach of the conflict of laws regulation proposals of 1972 and 1976 with a list of host state terms and conditions to be applicable, but it did not include any reference to or delimitation by a notion of ‘public order’.

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

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

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61 COM(91) 230 final, Preamble, recitals five and ten to thirteen. Article 20 is paralleled by Article 23 of the Rome I Regulation.
The structure of the proposed substantive provisions was similar to that of the 1976 draft regulation. Article 3(1)(b) set out a list, albeit less extensive than in the 1976 draft, of topics on which host state law should apply, ‘whatever the law applicable to the employment relationship’. The Commission proposal did not contain a ‘favourability clause’ of the kind that appeared in previous drafts and later made its way into Article 3(7) and Recital 17 PWD. This quickly became an issue in the legislative process, however; see further in XX, infra.

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

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

The basic structure and approach of the 1991 draft was maintained throughout the legislative process but expanded and elaborated on. So were the Preamble recitals.

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

63 EP Com 1. The tri-partite ECOSOC had delivered its opinion on 18 December 1991, essentially welcoming the proposal but suggesting a number of concerns and amendments, see ECOSOC 1991.

referring to the Rome Convention, with the addition of a reference to the Convention’s Article 7 stating that under certain conditions effect may be given to mandatory rules of the law ‘of another country, in particular the law of the Member State within whose territory the worker is temporarily posted’, concurrently with the law applicable pursuant to the Convention.\textsuperscript{65} This underlines the relation between ‘home state law’ (as a proxy for the law applicable at the outset) and the law of the host state (place of work). Rules that are mandatory in the host state irrespective of the law otherwise applicable to the contract, can be applied in that country (\textit{lex fori}, the law of the forum), cf. Article (72) of the Rome Convention. Article 7(1) on so-called internationally mandatory rules allows for the ‘inverse’ application, of mandatory rules of another country.

\textbf{3.63 The second phase: new proposal, progress and stalemate between Member States}

Following the EP’s adoption and informal consultations with Member States the Commission circulated a draft revised proposal on 10 May (D 12), which was essentially identical to the amended proposal adopted on 16 June, COM(93) 225 final. The proposal included the one month threshold and a number of other amendments, i.a., the scope of application should not be linked to undertakings but to employment relationships, the ‘\textit{erga omnes}’ clause was removed and a new Article 3(4), precursor to Article 3(8) PWD, was included. So was a ‘favourability clause’ (Article 3(3)), some additions were made to the ‘hard core’ list, and new provisions on information, cooperation and remedies were brought in. Overall, the proposal had a stronger social profile than its predecessor and appeared as being more in the line of flexibility towards different legal orders.

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

Two main points of controversy quickly crystallized, the threshold issue and the means to lay down ‘hard core’ provisions (laws, etc., and collective agreements). In addition, Germany raised the question of limiting the scope of a directive to the building sector only. The collective agreements issue was of special concern to Denmark, who engaged actively on this, but also to Italy, who presented a proposal in October to include

\textsuperscript{65} Directive 96/71/EC, Preamble, Recital (10), cf. Recitals (6) to (9), (11), and (12),
agreements concluded by ‘the most representative’ organizations. Germany, on the other hand, had tabled a proposal that possible collective agreement regulation should only be applicable to the building sector. Following a series of meetings in September and October Germany then put forward a new revised draft, ‘a compromise suggestion’, in early November. Two subsequent Working Party meetings and thereafter Coreper mainly discussed technical issues, leaving the controversial ‘political’ issues to the upcoming Council. The Council met on 6 and 21 December but did not reach a common position. The three main issues that remained unresolved were the scope of application of a directive and means of stipulation (laws, collective agreements), whether the list of topics in Article 3(1) should be exhaustive, and the threshold period. While six states favoured a ‘zero threshold’, six insisted that there should be a threshold, of one three or four months. On this point, the Commission also insisted that a threshold of minimum one month was essential out of consideration for the free movement of services.

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

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

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66 Comité des représentants permanentes (Committee of permanent representatives).
towards defending her national labour law regime (as a net labour importer). That said, is must be added that obviously, France was not the only player acting on that kind of motivation.

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

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

On that occasion Italy, taking over the Presidency for the first half of 1996, and who for a long time had maintained a somewhat reserved position to the directive proposals, indicated a will to be flexible and take the file forward. The Italian Minister of Labour, Tiziano Treu, had clearly resolved to attempt to bring the matter to a successful close. He unfolded an exceptionally active diplomacy, touring the European capitals and consulting with his counterparts in the various Member States, in addition to meeting with the EP Committee on Social Affairs on 24 January. On the 26th he circulated a memo sketching proposals, with a view to have it discussed at the informal Council meeting on 3 February. The European Parliament adopted a resolution supporting the new draft on 14 February. A consolidated proposal was tabled on 16 February (Council 1996b), and after discussions in the Council Working Party and Coreper it was put, with some amendments, to the Council for its meeting on 29 March. There were three main topics in addition to the threshold issue. First, a rather technical point on the scope of the directive (Article 1(3)(a)), second, the nation of ‘minimum pay’, and third, the matter of an ‘open list’. On the latter, the proposal’s Article 3(6), initially introduced by Germany in November 1996 and finding its final form in March 1995, appears substantially unchanged in Article 3(10) PWD. The proposal on threshold provisions was quite complex, with a ‘zero threshold’ as a point of departure but including also, i.a., an ‘assembly clause’ with an eight day threshold. This compromise, ‘brilliantly suggested by the Commission’ in the words of Marco Biagi who took part in the events, eventually made it possible to attain political agreement in the Council, leading to the adoption of the Posted Workers Directive. The threshold provisions, one mandatory (the ‘assembly clause’), three not, were carried through to Article 3(2) – (5) PWD.
There were still contentious issues and discussion on possible adjustments but in May agreement was reached on a draft Common Position which was subsequently adopted on 3 June 1996, the UK voting against and Portugal abstaining. The Common Position was approved by the EP Committee on Social Affairs, rejecting a number of amendment proposals, on 24 July, and subsequently by the European Parliament on 17 – 18 September. The final adoption by the Council took place on 24 September (again with the UK voting against and Portugal abstaining). The finalization of the legislative act was protracted somewhat, due to objections from the side of the EP to not having been presented the declarations to the Council minutes. Once this was resolved the Posted Workers Directive was duly signed on 16 December 1996, with a three year implementation deadline.

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

a) Legal basis and objectives
The Commission in its first formal draft, COM(91) 230 final, put forward Article 57(2) EEC (Article 47(2) EC, Article 53(2) TFEU) on the right of establishment as the legal basis for a new directive and underlined that the purpose was not to harmonise Member States labour law (p. 16). This met with immediate objections in the Working Group. Several Member States argued that the relevant legal basis would be Article 49 EEC (Article 40 EC, Article 46 TFEU) on free movement for workers. The Commission budged no further than to indicate that it would consider whether Article 49 EEC might be added as an additional legal basis. This position remained essentially the same throughout 1992. The Commission backed down from its suggestion to include Article 49 in August and instead introduced Articles 59, 60 and 66 EEC (Articles 49, 50 and 55 EC, Articles 56, 57 and 62 TFEU) on free movement of services in addition to Article 57(2) EEC. In the second draft directive, COM(93) 225 final, tabled in June 1993, Articles 57(2) and 66 EEC were specified as the legal basis. A majority of Member States were still opposed to this and wanted the legal basis to be Article 49 EEC, France in particular. It took until December 1994 before the issue was effectively settled. The Commission Legal Service then had submitted an extensive opinion (D 14) arguing that the main objective of a directive was the free movement of services and therefore Articles 57(2) and 66 EC were the proper legal basis. The UK objected, but to no avail. That legal basis was accepted and eventually adopted. The UK objection however
illustrates a point made by Kolehmainen (2002, 150), that the Commission's choice of legal basis was strategic in order to enable qualified majority voting in the Council. The UK demurred in part based on her view of the content of the proposed directive but also precisely on the point of voting procedure. Although settled in the end by the adoption of the PWD, its legal basis has been an issue in debate also subsequently.67

b) Personal scope and forms of posting
The directive appertains to the cross-border posting of workers. The definition of worker in Article 2(2) devolves on the host state, it is the definition that applies in that Member State that is decisive. This solution was proposed by Belgium in October 1994 and met with little opposition.68

A second aspect pertains to the concept of ‘posted worker’. Pursuant to Article 2(1) PWD this means a worker who, for a limited period, performs work in the territory of a different Member State than the one in which he normally works. It is striking that the notion of ‘a limited period’ was not discussed to any appreciable extent. It is also not discussed in the seminal ECJ decision in Rush. The definitions encompassed in Article 2 was brought into the drafting process at late stage, by the German presidency in October 1994. The proposal that was made was for a more detailed provision and used the expression ‘a specific period’ (Council 1994b). The later reformulation appears to not have given rise to debate or dissents. The overriding concerns were with the threshold issue and the scope of a directive in terms of undertakings and activities to be covered. As regards what is a ‘limited period’, that notion is perhaps as vague and open as suggested by Rollason (2000, 12), that it covers ‘the duration of the contract, however long that may be’.

The third aspect of the notion of a posted worker is the requirement in Article 1(3) PWD that ‘there is an employment relationship between the undertaking making the posting’, or ‘the temporary employment undertaking or placement agency’ as the case may be, and the worker ‘during the period of posting’. This requirement has a model in Article 14(1)(a)(i) of Regulation 1408/71,69 which pertains to the choice of applicable law, as does the PWD.

The threshold issue is discussed above (in 3.62–3.64). Suffice it here to note that the move from a three months threshold, as considered requisite by the Commission to not unduly impede free movement of services, to a ‘zero threshold’ as the main rule was

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67 See e.g. Preis/Temming 2006, 83–89, and 115 ff with extensive references. For case law examples see, e.g., Case 18/95 Terheuve, [1999] ECR I-345 (posted worker vs. home state, application of Article 48 EEC and Regulation 1612/68), and Case C-202/97 Fitzwilliam, [2000] ECR I-883 (Regulation 1408/71).

68 The UK however argued that the definition should be that applicable in the home state (sending state).

obviously quite significant for service providers and host state undertakings and labour markets alike.

The other side of the personal scope is that set out in Article 1 PWD on undertakings and activities covered. In the Commission’s initial proposal what is now Article 1 was divided between Articles 1 and 2, the latter being the more extensive one. Essentially, just three issues gave rise to debate in the drafting process. Where Germany moved to limit a directive to the construction industry (see supra, XX). In May and June 1992 Greece, followed by Denmark Denmark pressed for exempting merchant shipping (WG 3, WG 4). That proposal met with considerable opposition but was backed by the EC Shipowners’ Association in a direct application to Commissioner Flynn in May 1993. The issue however remained contentious and it was not until the German compromise draft in November 1994 that a substantive solution was found (Council 1994d, WP 14). The major concern of those in favour was to exclude sailing personnel from the scope of the directive, which was achieved and is reflected in Article 1(2) PWD, according to which the directive ‘shall not apply to merchant navy undertakings as regards seagoing personnel’.

The body of Article 1 is in paras 1 and 3. The directive covers undertakings in one Member State posting workers to another Member State ‘in the framework of the transnational provision of services’, in three categories of situations. First, it covers posting on the posting undertaking’s own account to perform a contract between that undertaking and a party in the host state for whom the services are intended (para 3(a)). Second, intra-group postings (para 3(b)). Third, the hiring out of workers by a temporary work undertaking or a placement agency to a user undertaking in another Member State are within the scope of the PWD (para 3(c)). These provisions correspond essentially to those proposed in the Commission’s first formal draft for a directive, in 1991. In the Explanatory observations to the proposal on hiring out of workers, the Commission emphasized that all three situations should be covered, otherwise the directive would become prey to circumvention. In conjunction with this it should be noted that the directive as adopted contains two provisions specific to temporary work agencies and hiring out of labour, in Article 3(1)(d) and Article 3(9) PWD. Moreover, it is worth noting that from the outset the Commission emphasized that the inclusion of temporary work agencies would not entail an obligation for Member States to legislate on hiring-out services (WP 1). Some states were still concerned and in particular France wanted to have a guarantee that Members States could apply their existing legislation also to foreign temporary work agencies posting workers to their territory, a stand the Commission at first was in favour of but two months later expressed reservations to (WP 3, WP 5; May and July 1993). This issue remained a point of debate until the final stages, but at the adoption of the PWD a Statement in the Minutes was also adopted on the issue, which essentially set out three points:70

70 Council 1996t, Statement 231/96.
• A Member State having no legislation on temporary agency work should not be obligated to adopt legislation;
• a Member State prohibiting hiring-out of labour (labour only contracting) should not be obligated to permit such activity; and
• this should not preclude Member States from applying their statutory law on temporary work or the hiring-out of labour to businesses established in a different state involved in the provision of a service pursuant to the [EC] Treaty.

Considering the scope of the PWD in this regard as well as the above reservations, some uncertainty exists concerning the relation between the PWD provisions on temporary work and the more recent temporary work directive of 2008. That is however an issue we will not deal with here.

c) **Forms of collective agreements**

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

The draft put forward in COM(91) 230 final included collective agreements ‘covering the whole of the occupation or industry concerned’ and having an ‘erga omnes’ effect and/or being made legally binding in the occupation or industry concerned. This particular framing, building on *Rush*, seemingly was modelled on the French legal institution of ‘extension du convention collectif’. It was novel to the first formal draft; it did not appear in DG V’s preliminary draft from April 1991 or in the revised preliminary draft 8 June. It first appeared in the 17 June draft immediately preceding the formal proposal in COM(91) 230 final. A number of Member States reacted by enquiring what was the meaning of ‘erga omnes’, to which it was replied in February 1992 that the intention was to make clear that a collective agreement needed to be legally binding on all employers and employees in a giver occupation or industry. The Commission emphasized that it could not be required of a foreign service provider to comply with a collective agreement that was not binding on all domestic undertakings.

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72 We leave out the alternative ‘arbitration awards’, it is of no independent significance here.

73 See Code de Travail Article L2261-15 *et seq.* and e.g. Bercusson 1993, 258.
concerned; that would amount to discrimination. This corresponded with its opinion expressed in the Working Group some two weeks earlier in response to a suggestion that a collective agreement coverage of at least 80 per cent should be sufficient (WG 2). The Commission however conceded that the expression ‘erga omnes’ might well be deleted. Denmark anyhow saw the Commission’s stance as rejecting to solve the problems of states having a high collective agreement coverage rate. By the end of May the ‘erga omnes’ clause was gone but the substantive issues remained.

On home turf, Denmark framed a formulation, inspired by Article 2 of ILO Convention No. 94, referring to collective agreements ‘that have to be observed or are generally observed by undertakings ...’ with the aim to obtain acceptance for this alternative formulation in the drafting process (cf. WG 6). It did not succeed, however, and in October 1992 Denmark put forward an alternative proposal, according to which a posted worker should be entitled to at least as favourable terms and conditions as those prevailing in the district where work was to be performed. (see WG 8). This was strongly opposed by Germany, however, on grounds of regional differences that would entail less favourable treatment of German workers, and Germany insisted that only collective agreements that were declared generally binding should be accepted. At the first reading in the European Parliament in January 1993 several different proposals for a wording of Article 3(1) were put forward but were rejected by the Commission, sticking to its already formulated opinion. It may be noted, still, that the proposal tabled from Denmark set out a ‘collective agreement which is the most representative in the sector in the area where work is performed’.

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

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74  See D 06, Commission ‘non-paper’ 27 February 1992, responding to questions raised by Member States.

75  See PE 152.299/2/Am. 37, 12 January 1993.

76  See PE 170.124 [Am. 33], 10 February 1993.
The Commission responded to this by suggesting that should comply with a collective agreement if comparable Danish undertakings also had to do so.\textsuperscript{77}

The Commission’s second formal draft for a directive, COM(93) 225 final, tabled on 15 June 1993 gave a new twist to the issue. The starting point remained that a collective agreement should ‘be observed by all undertakings in the geographical area and in the occupation or industry concerned’. If such an agreement was not at hand, however, a Member State ‘in the absence thereof’ might include collective agreements ‘which are generally applicable in the area or in the profession or industry in question, provided that their application ... ensures equality of treatment on matters itemized ... between that undertaking and national-level undertakings being in a similar position’. As can be seen from this, the final formulations in Article 3(3) were slowly emerging. There were still hurdles to be passed, however. To start out with, several Member States balked at the inclusion of collective agreements not covering everyone in a region or industry. While Germany under her Presidency in the second half of 1994 attempted to frame a comprise, Portugal and later also the UK were adamant on only accepting agreements legally binding on ‘all’. Denmark drew support only from Italy, who emphasized that it should be acceptable to include ‘collective agreements concluded between the most representative organisations in the sector’ (WP 11). Later in September, at the Council meeting on 22 September 1994, Sweden also joined in, arguing the essential importance of finding a solution that would allow Sweden to maintain her collective bargaining and industrial relations traditions (cf. AM 94). The positions remained essentially unchanged throughout 1994 and into 1995 even though a number of more technical points were addressed, Ireland joining in with Portugal and the UK and Italy drawing criticism for tabling diverse proposals of more of an extreme nature (WP 14). It would seem that Italy at this stage did not succeed in explaining her position sufficiently lucidly. It was only in 1996, under the Italian Presidency, that real progress was made. Soliciting an additional alternative deliberations in January and February resulted in a text, supported by the majority of Member States, officially presented to the Working Party in March (WP 21). It included a first indent (to then Article 3(4)) on collective agreements ‘which are generally applicable to all similar undertakings ...’ (the Italian alternative) and a second indent on collective agreements ‘which have been concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory’ (the Danish alternative). Effectively, what was to become Article 3(8) PWD was then settled.

The rather drawn out and conflictual process of settling what kinds of instruments that should be permitted as means to prescribe terms and conditions of employment applicable to foreign service providers and their posted workers primarily reflects

\textsuperscript{77} See Denmark’s AM 93/2, 10 March 1993.
different legal cultures and industrial relations systems. While any form ‘extension’ or ‘Allgemeinverbindlichkeitserklärung’ were alien to the Scandinavian countries and also Italy, these were familiar and important institutions to France, Germany, and others. Not just the coverage of collective agreement based regulation was involved, so were the fundamental tenets of collective bargaining and the conjoint law on industrial action. This would surface even more clearly later on, with the Laval case and its repercussions.

d) Favourability – and a Minimum Directive?

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

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

A passage in the Explanatory memorandum to COM(91) 230 final might lend itself to be read to that effect. It was however emphatically contradicted by the preceding informal drafts as well as by later draft texts. In the draft of 8 June 1991 the text explicitly referred to more favourable conditions according to the law applicable to the employment relation, that is, as a rule, the worker’s home state law, and not that of the host state (see D 04). While the text was not included in the first formal draft the substance remained uncontested and, moreover, was emphasized by Member States in the ensuing process (see WP 2, 11 February 1992). It was equally emphasized by the European Parliament (see EP Com 1, EP Com 2). Likewise, the explicit text appeared in the revised formal draft of June 1993, COM(93) 225 final, in Article 3(3) and the twentieth recital of the Preamble. The reference to ‘the law applicable’ was removed from the draft discussed by the Coreper in November 1994 but there is nothing to suggest that a fundamentally different conception of the provision was intended. What was primarily the focus of discussion concerning the provision was criteria for comparing whether terms and conditions in the home country were more favourable than those prevailing under the directive in the host country. This we leave aside here, however.

The other side of the coin was the provision that in the end became Article 3(10) first indent, whereby a Member State may stipulate terms and conditions of employment to

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78 With the exception at that time of Norway, for which the same essential features however applied prior to the act of 1993 on declaring collective agreements generally applicable (see supra, XX).
apply to foreign service providers and their posted workers ‘on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions’ (emphasis added). As noted already (in 3.64, supra) this was a contentious issue, perhaps the most contentious one as otherwise regards Article 3(1) and 3(7) PWD. The overarching issue was whether the list of terms and conditions set out in what was to become Article 3(1) was exhaustive. This was continually a bone of contention, albeit the first textual proposal was put forward by Germany in November 1994, but without the ‘public policy’ clause. It was the Commission that then insisted that the provision must be limited to terms and conditions that ‘have the character of ‘ordre public’’. If not, free movement of services would be impeded. A narrow majority of Member States supported an amended proposal by Germany, in December 1994, opening up for host country regulation as far as mandatory provisions under Article 7 of the Rome Convention were concerned (see Council 1994h). Under the French Presidency in the first half of 1995 the positions of Member States essentially remained unchanged. Portugal however insisted that only ‘public order provisions’ should be encompassed (WP 17). The wording on ‘public policy provisions’ appeared first in the minutes of the Labour and Social Affairs Council of 27 March (Council 1995f). It then remained unchanged throughout the subsequent process, in the end opposed only by Ireland, Portugal, and the UK.

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

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

(Biagi 1996, 104.)

This view can be seen to find some support in the Council’ Statement to the Minutes adopted alongside the PWD, albeit the wording is non-committal. The Statement pertaining to Article 3(10) PWD reads
‘The expression “public policy provisions” shall be understood to cover the mandatory rules that cannot be derogated from and by virtue of their nature and objective meet some invariable requirements of public interest. In particular, this may be prohibition on forced labour or the participation of public bodies in the supervision of compliance with conditions of work.’  

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

3.66 Summary observations

a) On the instrument

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

The Directive can be said to ‘compensate’ in favour of the worker as the weaker party by encompassing also a principle of favourability. As we have seen, Article 3(7) PWD entails that host state rules are not applied separately if that would be to the disadvantage of the worker. The rules of the law otherwise governing the employment relationship still apply if they are more favourable to the worker.  

In so doing, the PWD strikes a form of balance between a host state’s interest in having national terms and conditions of employment

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79 Council 1996t, Statement 232/96, translated from the Danish by S.E.

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

applied to all employment relations involved in performing work on its territory, and a Community, now EU, interest in harmonisation of basic standards with a view to reduce obstacles to the free movement of services, as well as the safeguarding of workers’ interests. The Directive provides a protection for posted workers and respects national labour law regimes – up to a point – without imposing substantive harmonisation or a general principle of equal treatment.

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

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

3.7 PWD implementation in the States in study
As we have seen (in 3.5, supra) the countries in our study reacted differently to the Rush decision of 1990 and the prospect of a directive on posting of workers being adopted. There is seemingly no simple correlation with industrial relations systems to explain this. In Germany, the state of private international law was a key factor behind the adoption of a special law on general applicability of collective agreements, the AEntG 1996. In Finland and Norway trade union density and collective agreement coverage can be identified as key reasons for the adoption of legislative amendments to the existing general applicability system in Finland in 1995 and the novel act on extension of collective agreements in Norway in 1993. The Netherlands, on the other hand, already had a comprehensive system of universally applicable (generally binding) collective agreements but no need was felt to require that all or a part of its employment regulations and (extended) collective agreements would be applicable to posted workers.
on its territory. Thus what remained once the PWD was finally adopted, in the Netherlands as well as in Germany, Finland and Norway, was merely to adjust, for the most part in technical terms, to the provisions of the directive and, in particular, its Article 3(1), which in all countries was done through legislative amendments in 1999.

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

There were still concerns that EU membership would affect the Swedish collective bargaining system. Denmark shared similar concerns in relation to the Maastricht Treaty on European Union and its Social Protocol (which was to make greater provision for social policy and labour market regulation than previously). In response to this, with a view to secure the Danish trade unions’ support in the second referendum on the Maastricht Treaty, the then Commissioner for social policy, Padraig Flynn, wrote a letter to the Danish Trade Union Confederation (LO) and also visited Denmark. In his letter Flynn foresaw that the Social Protocol would open up new prospects for implementation of EU legislation through Danish model collective agreements. He also declared that, as far as he was concerned, he would include collective agreements as implementation instruments in all new directives. As regards the Posting Directive, the Commission would present an amended draft, where it would add what is today the first indent in Article 3(8) and gave his assurance that the Directive would have no impact whatsoever on the Member States’ legislation on industrial action or social partners’ practice in this respect. The only decisive circumstance was that foreign employers are treated equal with national employers who are in a similar position.

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82 AD (the Labour Court Law Reports) 1989 no. 120.
83 A proposal along such a line appeared in the Commission’s second draft directive, COM(93) 225 final, but was displaced by later proposals by Denmark and Italy.
84 Letter of 11 May 1993 from Padraig Flynn to Bent Nielsen, President of the Danish LO (Trade Union Confederation) (D 11 Commission 1993b).
As regards Denmark and Sweden, there was explicit reliance on Flynn’s statements that their respective collective bargaining systems and law industrial action would not be affected by accession to the Maastricht Treaty on European Union. Both countries continued to rely on this and their wish to maintain the well embedded collective labour law systems when later faced with the implementation. Neither country has mechanisms to set minimum wages or means of granting collective agreement regulation general applicability. Instead, they relied on the existing high union density rates and the strength of trade unions to obtain collective agreements also with foreign employers posting workers to their countries. Legislation attending to the minimum requirements of the PWD was adopted in both countries in 1999, shortly prior to the implementation deadline. The decisive factor behind this ‘minimum approach’ in both countries was their strong commitment to and reliance on their industrial relations and collective bargaining systems.

The UK also opted for a minimal approach, albeit on different grounds, collective agreements in the continental sense playing no role. There was no specific legislation introduced which sought to give particular regulatory effect to the PWD but this was done, by amendments in 1999 through the Employment Relations Act and to the Trade Union and Labour Relations (Consolidation) Act 1992, by simply extending the application of UK legislation, that is, by removing jurisdiction clauses. It was understood that the UK then was in full compliance with the terms of the PWD, on the basis that the Directive was understood to specify a ‘floor of rights’ for posted workers as opposed to a ‘ceiling’. UK legislation operates to protect posted workers to the extent that such workers can enforce their statutory rights by recourse to the UK employment tribunals system and the domestic courts. In this way, it could be said that UK law prevents the undercutting of UK statutory labour standards (going beyond mere minimum levels of pay), thereby preventing social dumping and unfair competition. Completing the loop, like in Germany private international law conceptions played a major role.

3.8 The Services Directive

The Services Directive – Directive 2006/123/EC on Services in the Internal Market\(^85\) – went through a number of incarnations before its adoption in 2006. In the process, it stirred considerable concern among trade unions in particular with regards to its possible impact on national industrial relations regimes and its relations to the Posting of Workers Directive. In this part, we examine the institutional dialogue which resulted in significant modifications to its content and therefore implications for national labour laws and transnational labour. In so doing, we link EU developments concerning

services to political divisions within and between Member States, which had their effect on the dynamics of deliberations among EU institutions.

For older Member States (the EU-15), the achievement of popular support in referenda for the Lisbon Treaty reforms was likely to be conditional on restricting the scope of the Services Directive, protecting established labour standards and their usual mode of regulation. However, their position was complicated by the views of employers’ associations within their countries who saw the clear advantages of establishing subsidiaries in newer Member States so as to take commercial advantage of the benefits of free movement. Newer Member States were eager to benefit from their new status within the EU and therefore favoured the removal of extensive obstacles to free movement of services, which would aid entrepreneurs established within their jurisdiction (whether as parent companies or subsidiaries) so that they could compete effectively for service contracts in other States. Newer Member States clearly preferred the ‘country of origin’ principle, which would allow the provision of services to be regulated by the law of the country of origin of the service provider, but were ultimately prepared to compromise upon its application, so that the Services Directive could still be adopted.

Trade unions, in the form of the European Trade Union Confederation (ETUC), campaigned actively for the abandonment of a ‘country of origin’ principle contemplated in the first draft of the Directive, but appeased their full membership base (in both old and new Member States) by not opposing the adoption of a Directive facilitating free movement of services per se. Similarly, the Swedish Trade Union Confederation (LO) favoured the free movement of services, but did express fears ‘that the Services Directive would transform the Posting Directive from a ”floor” to a ”ceiling”’, a result arguably achieved in any case through the Laval litigation, which we discuss subsequently.

The compromise eventually agreed by the Council, Commission and European Parliament clearly sought to resolve tensions arising between social actors in old and new Member States in the context of enlargement. The end result, as we shall see, leaves the issue of labour relations to the courts, so that they will decide ultimately whether collective bargaining and industrial action (or indeed the imposition of a

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86 Barnard 2008c, 329; Novitz 2007, 358.
89 See infra, section 3.9.
variety of labour standards) is in conformity with EU law. These political
developments were, therefore, very much the precursor to the *Laval* litigation.

### 3.81 The First ‘Bolkestein’ Draft Services Directive

In 2002, the Commission had identified extensive impediments to a free market in services.91 In 2003, the Commission stated its intention to propose a Directive on Services, which was very much welcomed by the European Parliament.92 It was little surprise then, when in 2004, Commissioner Bolkestein stated his ambition to ‘remove obstacles to economic activity’, ‘solve cross-border problems’ and to ‘utilise economies of scale’.93 The Commission Proposal for a Directive emerging in 2004 therefore aimed to reduce restrictions to freedom of establishment under what was then Article 43 EC (now Article 49 TFEU) and to promote the exercise of freedom to provide services under what was then Article 49 EC (now Article 56 TFEU). Given the new focus of European economies on services, rather than industry or agriculture, further integration in this field has been described as ‘simply indispensible’.94 There is no doubt that there were significant and extensive calls for reform in the field of law relating to services; the fierce debate surrounding the Services Directive concerned the manner in which the ‘red tape’ was to be removed.95

The Commission initially envisaged that this would be achieved by the application of a ‘country of origin’ principle, such that service providers would be subject only to the laws applying in the country where they were originally based, as opposed to the host State in which they were currently operating.96 As Schlachter and Fischinger have observed, ‘[t]he original version of the … Bolkestein draft … could have heavily influenced national labour law by a strict realisation of the country of origin principle’.97 This was welcomed by governments of many new Member States, such as Poland, which saw this legal reform as ‘an opportunity [for] market liberalization in the European Union which would contribute to … growth and development’.98 In this, they were joined by employers’ and entrepreneurs’ associations (BCC, Lewiatan). Indeed,

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92 European Parliament Resolution, 13.2.03. Reported in Dølvik and Ødegård (fn. 88, supra), 5.
94 Majone 2007, 73.
95 Barnard 2008c, 357.
98 Świątkowski, Addendum to FORMULA Working Paper No. 18 (2010), para. 1. XX
often employers’ organisations in the older Member States saw the advantages for them in operating in another EU Member State and simply following their home country’s legislation.\textsuperscript{99} Presumably, this appealed because they could, with ease, establish a subsidiary in another new EU Member State, which would then be able to operate under the laws of that country, undercutting established labour law protections.

However, trade unions were not necessarily so sympathetic. Major unions in Poland questioned the country of origin principle, which they saw as a potential threat, such that employers could reduce costs and labour standards at the expense of workers and consumers.\textsuperscript{100} Similarly, Danish trade unions objected strongly. The Chairman of HK/Private commented: ‘It seems completely grotesque that work performed at an IT company in Copenhagen should be carried out following for example Indian or Greek rules. We cannot have the lowest standard applied to the labour market in Denmark or the EU. Therefore, a company must meet certain minimum requirements in order to provide services in another country …’\textsuperscript{101}

Indeed, the European Trade Union Confederation (ETUC) expressed the anxiety of unions from old and new Member States that the proposed Services Directive (as then drafted) ‘would encourage organisations to relocate to Member States with lower standards, and could spur a downward spiral in working conditions’, referring to the effects of enlargement.\textsuperscript{102} The ETUC also stated its concern that commercial services and services of more general economic interest, such as healthcare and social services, were to be regulated under the same directive. While the ETUC was prepared to accept the need for the Services Directive, it became fiercely opposed to this\textit{ modus operandi}.

The initial Bolkestein draft did state that the Posted Workers Directive would be exempt from the country of origin principle under the Services Directive. Nevertheless, fears were expressed that the proposed directive would indirectly affect posting, insofar as it ‘would have virtually destroyed the host country’s scope effectively to monitor compliance with the stipulated conditions for posted workers ([by providing a] ban on demanding notification, registration, representation and keeping of employment documentation by posting firms)’.\textsuperscript{103} This was because the original draft would have

\textsuperscript{100} \textit{Ibid}.
\textsuperscript{101} \textit{Ibid}.
\textsuperscript{102} ETUC comment on ‘Draft Directive on Services in the Internal Market’ available at \texttt{http://www.etuc.org/a/499}. See also Slachter and Fischinger (fn. 98, \textit{supra}) at 11 who also observe that Member States would thereby be placed under commercial pressures deliberately to reduce the labour standards and national competition law regulation otherwise applicable. For inconsistency of such an outcome with the Lisbon Treaty, see 13.
\textsuperscript{103} Kowalsky 2006, 238. See for useful elaboration on the problems, Cremers 2006, 180.
placed responsibility for compliance with statutory conditions of work within the host state with the state of origin, which was unlikely to be ineffective in terms of the capacity of posted workers to bring complaints to host state authorities and legal tribunals.  

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

The view expressed by Giandomenico Majone was that:

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

In other words, the Services Directive would have been a viable proposition prior to the fifth enlargement, but was rendered unworkable by stark differentials in the cost of labour in different Member States. Donaghey and Teague regarded these developments in a rather different light, as they doubted that such differences in income would have led to mass labour migration. Instead, they considered that the effect would not have been so much a downward spiral in labour standards due to export of services, but the xenophobic preoccupation with this possibility:

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

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104 Slachter and Fischinger (fn. 98, supra), 8 and at 12-14.
105 Slachter and Fischinger (fn. 98, supra), 9-10.
106 Majone 2007, 74.
As it was, trade unions across Europe responded with intensive lobbying and opposition. The first protest took place in Brussels on 5 June 2004.\textsuperscript{108} Investigation into the drafting process has indicated that this began to have political repercussions within the European Parliament, for example, in terms of Belgian and Swedish representation.\textsuperscript{109} By November 2004, it emerged that, internally, within the European Parliament, the Internal Market Committee and the Employment Committee took sharply opposing views regarding the adequacy of the Bolkestein Directive.\textsuperscript{110} It is notable that, at this time, Fritz Bolkestein stood down as Commissioner, to be replaced by Charlie McCreevy who had less commitment to the original draft. This change of personnel left the space for reconsideration of the draft of the Services Directive.\textsuperscript{111} Moreover, the protests led by the ETUC continued to add pressure.\textsuperscript{112} In March 2005, the ETUC reported that over 75,000 people had attended demonstrations in Brussels against the Directive and there were also extensive demonstrations which took place in front of the European Parliament on 14 February 2006, just before the Parliament was due to vote on its first reading under the co-decision procedure on 16 February.

### 3.82 The Compromise Reached on the Services Directive

It was perhaps no surprise then that in those circumstances the country of origin principle was abandoned in the amendments made by the European Parliament to the original Bolkestein Directive. The Parliament also removed sensitive sectors such as temporary work agencies and private security services, as well as services of general interest and general economic interest from the scope of the Directive.\textsuperscript{113}

One development, which may have indirect relevance for posted workers, is the provision made under Article 7 of the final Services Directive for a ‘Point of Single Contact’ (PSC) through which all service providers are to apply for information and satisfy any regulatory formalities which are reasonably imposed by the host State, whether at central, regional or local level.\textsuperscript{114} This is to the advantage of service providers insofar as the PSC will expedite and rationalize previously slow and complex procedures. Yet, it is also potentially helpful to local or national administrations, labour inspection bodies and trade unions as a means by which information regarding service providers (and posted work) is registered and collated. ‘Liaison points’ established under Article 28 may also assist labour inspectors and trade unions in terms of

\begin{itemize}
\item \textsuperscript{108} Dølvik and Ødegård (fn. 88, supra), 10.
\item \textsuperscript{109} Ibid., 9.
\item \textsuperscript{110} Ibid., 11.
\item \textsuperscript{111} Ibid., 12.
\item \textsuperscript{112} Ibid., 15.
\item \textsuperscript{113} For a useful summary, see Kowalsky 2006, 243.
\item \textsuperscript{114} Barnard 2008c, at 388 et seq.
\end{itemize}
representing the concerns of ‘competent authorities’, such as professional service associations, within the host State. Mutual assistance is to be provided through communication between ‘liaison points’, which may be aided by the operation of the new ‘Internal Market Information System’. But, these developments have to be read in the light of the intentional exclusion of posted workers and labour law from the ambit of the Directive.

This is because the European Parliament followed the precedent by the Monti Regulation, seeking to exclude specifically ‘the field of labour law’ from the scope of the Directive. In particular, [the Directive] shall fully respect the right to negotiate, conclude, extend or enforce collective agreements, and the right to strike and to take industrial action according to the rules governing industrial relations in Member States ... [and]… shall not be interpreted as affecting in any way the exercise of fundamental rights as recognised in the Member States and by the Charter of the European Union, including the right to take industrial action.” The ETUC greeted this new text as ‘a major victory for European workers’. Governments and employers in newer Member States were not so pleased. This compromise by the European Parliament was accepted by McCreevy, despite objections from his DG, which then presented its own amended text of the Directive, which was subtly but nevertheless significantly different. The Directive was then sent back to the [European Parliament] for its second reading 24 October 2006, with an unambiguous message that the compromise was “untouchable”.

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

‘This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to

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117  Ibid., Amendments 72, 233/rev, 403, 289, 290, 292, 297 and 298, Article 1(7) and (8).
118  Kowalsky 2006, 246. This change was also greeted with enthusiasm by Danish trade unions. See Lind (fn. 100, supra), at 3: ‘It is a victory for the Danish model’.
119  Swiatkowski, addendum to working paper, para. 2.
120  Dølvik and Ødegård (fn. 88, supra),15.
121  Ibid., 16.
negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.’

What is notable is the insertion of the reference to ‘Community law’, not found in the Monti Regulation (where what was deemed significant were fundamental rights ‘as recognised in Member States’).\(^{122}\) This wording omits reference to the ‘right to strike’, referring instead only to ‘industrial action’, although it does suggest that this may also be a ‘right’. More curiously, Article 1(7) indicates that a right to take industrial action is only a legitimate exception to a freedom to provide services insofar as this is consistent with Community law, which opens up the possibility that industrial action which the Court would deem inconsistent with Community law will be covered by the Services Directive. This wording is similar to that of Article 28 of the 2000 EUCFR, which, unlike the relevant provisions of the 1989 CCFSRW, states that the right to strike can be circumscribed with reference to Community law.

There were attempts to amend this wording in the second reading before the Parliament, so that the provision would read: ‘This Directive does not affect the exercise of fundamental rights as recognized in the Member States and by the Charter of Fundamental Rights. Nor does it affect the right to negotiate, conclude and enforce collective agreements, the right to strike and to take industrial action in accordance with national law and practices.’\(^{123}\) It is not clear from the records of the debates why the amendment failed, but it may have been due to the more generous wording of the Preamble to the Services Directive, which at least refers explicitly to the ‘right to strike’ in Recital 14, even though it does still contain the formula requiring ‘respect’ for ‘Community law’. Perhaps more persuasive may have been the undertaking made by Commissioner McCreevy at the European Parliament Plenary Session on 15 November 2006, who stressed that:

‘Concerning the impact of the Services Directive on labour law, the European Parliament and the Council wanted to avoid that the Services Directive affects labour law or the rights of the social partners to defend their collective interests. The Commission wants to state unambiguously that the Services Directive does indeed not affect labour law laid down in national legislation and established practices in the Member States and that it does not affect collective rights which the social partners enjoy according to national legislation and practices. The Services Directive is neutral as to the different models in the Member States


\(^{123}\) Amendment 11 by Francis Wurtz et al, 8 November 2006, A6-0375/11.
regarding the role of the social partners and the organisation of how collective interests are defined according to national law and practices. … However, Community law and in particular the Treaty continue to apply in this field.¹²⁴

This last statement perhaps serves as a reminder that this same Commissioner indicated that he consider that the actions of Byggnads in the Laval case constituted a breach of free movement provisions under the EC Treaty.¹²⁵ Moreover, we know that the distinction between provision of services as an independent contractor and as a worker can be a difficult distinction to make. In this way, as has been observed by FORMULA researchers, ‘impacts on employment relationships still remain possible’.¹²⁶

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

It might seem, at least, that the final Services Directive as finally adopted seems to pose very little danger to the PWD as negotiated, or indeed continued national regulation of labour law.¹²⁷ Nevertheless, as we shall see, the CJEU has responded by taking the obligation upon itself to enforce what it sees as the true meaning of freedom of services under the Treaty, as manifested under the PWD. The result is that the Court has acted to curtail collective labour relations, industrial action and the application of labour law to posted workers.

### 3.83 Implementation in the Member States

By way of contrast, national level implementation of the Services Directive does not seem to have been taken to have any obvious detrimental effects on national labour laws or provision made for posted workers. This is because implementing legislation tends to exclude coverage of labour-related issues, and has usually been accompanied by

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¹²⁵ Reported, for example, in I. Ekman and D. Bilefsky ‘EU Service Sector: East-West Rift’ International Herald Tribune, 22 November 2005.

¹²⁶ Slachter and Fischinger (fn. 98, supra), 26.

¹²⁷ Ibid., 21.
political reassurance that national labour law and industrial relations systems would remain unaffected by the Services Directive. It is perhaps interesting that in Nordic/Scandinavian countries, this reassurance has been reinforced by participation of the social partners in the national level implementation process, countering fears that there will be significant flow-on effects for labour. Elsewhere, mere political rhetoric has been deemed to be sufficient.

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

a) Nordic/Scandinavian Approaches

We can get a flavour of Nordic/Scandinavian approaches by considering the approaches of Denmark, Norway and Sweden to the implementation of the Services Directive. These follow a familiar trend in terms of reassurance that the new services legislation would not have effects on the existing labour law system, arguably reinforced by involvement of national labour and employer representatives, seeking ensure that there were not any unintended effects. Further, in these states, use has been made of the point of single contact to improve enforcement of labour standards for posted workers.

The first legislation implementing the Services Directive was the Act on Services in the Internal Market which was adopted in Denmark on 7 May 2009 and came into force on 28 December 2009. Alongside this legislation, ‘the Danish implementation model includes that each national authority is responsible for implementing parts of the directive through the alignment of sectoral legislation both at the legislative and administrative level’ 128. There has therefore also been implementing action by various ministries, such as the Ministry of Justice and of Environment, including adjustment or composition of executive orders. This was done with the consultation and input of a wide range of organizations (217 in all) including key social partners. The central Act on Services does make clear that it does not relate to labour law (Article 1, sec. 2, no. 9). The EU Commission has noted that, following implementation, various administrative obstructions to free movement of services had been addressed. 129 The one significant development, comparable to that of Swedish implementation, is an Executive Order on an electronic point of contact (Single Point of Contact Executive Order) which enables service providers to be held accountable in the host Member

128 Lind (fn. 100, supra) at 1.
129 Ibid., at 5.
Rather than obstructing operation of posted worker controls, it is arguable that, in this way, implementation of the Services Directive has been used to bolster labour law protections (such as they are permitted to be under EU law) for posted workers.

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

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

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130 Ibid., at 5.
132 Ibid., 29.
133 Sjödin (fn. 89, supra), 2.
134 Ibid., 2-3.
135 Ibid., 3.
b) **Labour Importing States: Germany and the Netherlands**

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

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

c) **Labour Exporting States: UK and Poland**

It is now perhaps a matter of doubt whether the UK is a net labour importer or exporter of labour to other EU Member States. Recent events indicate a shift to the former, but there is still no firm statistical basis for such a supposition, which is more a matter of

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136 Schlachter (fn. 52, supra), 53.
137 Ibid., 54.
138 Houwerzijl (fn. 57, supra), 24-25.
139 Ibid., at 24.
conjecture than certain fact.\textsuperscript{140} In the UK, the House of Lords Select Committee took the view that:

\textit{`The Services Directive would not change the present situation for posted workers in the UK or any other Member State where statutory minimum employment standards are set. Just as now, under the services directive there would be some workers employed with collective agreements above the statutory minimum and others who were not and were therefore cheaper to employ. The Commission told us that there was a need to make clear that the directive could not “lead to a situation where companies can bring their labour force from a cheaper country and create a sort of unfair competition.. for instance on a building site (Q447). We do not believe, however, that it is for the directive to get involved in issues of labour–employer collective bargaining relations or in matter such as minimum wage legislation. These are matters for individual Member States and their institutions.'}\textsuperscript{141}

It now seems accepted in the UK that the Services Directive has no bearing on the PWD and the two are seldom referred to in conjunction by the Government. Rather, the UK Government is now determined to encourage UK employers to utilise the opportunities that the Services Directive can afford, and has set up ‘an online ‘Point of Single Contact’ for service providers to find out about doing business in the UK and apply for licences online’.\textsuperscript{142} The Provision of Services Regulations 2009, which implements the Services Directive, contains provisions which may make it easier to scrutinise the treatment of posted workers, such as the duty placed on service providers to make contact details and other information available (Regulations 7 and 8), but otherwise provides explicitly that the freedom to provide services (guaranteed in Regulation 24) does not apply to matters covered by the PWD (Regulation 25(c)). In this sense, the measures taken in Denmark and Sweden (albeit with more input from the social partners) have some resonance in the UK.

In Poland, the Act on providing services on the territory of Republic of Poland 3 March 2010 does not contain regulations concerning labour law and labour law issues. These were also not of concern in the public consultation procedure.\textsuperscript{143} Indeed, that legislation specifically contains a reservation that its provisions do not exclude the application of labour law and social security regulations (Article 3, sec. 4). Instead, posted work is governed by provisions implementing the Posted Workers Directive incorporated into

\textsuperscript{140} Novitz (fn. 51, \textit{supra}), 31.

\textsuperscript{141} House of Lords, Select Committee on European Union, Sixth Report, Chapter 7: ‘Will There be a Race to the Bottom?’, 2005, para. 202 (Select Committee’s emphasis).

\textsuperscript{142} http://www.bis.gov.uk/policies/europe/eu-services-directive.

\textsuperscript{143} Świątkowski (fn. 99, \textit{supra}), para. 3.
the Polish Labour Code on 5 August 2006. In formal terms, the two are kept very separate; but arguably, this is not very different from Norwegian, German and Dutch approaches.

What is unspoken in this analysis of national implementation is however the scope of the exemption provided for national labour law in the Services Directive. The relevant clause states that the Directive does not affect the right to ‘negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law’ (our emphasis). It is this final proviso which opens the door for a potential services-based challenge to collective bargaining or industrial action considered by the CJEU to be in breach of Community law. It should raise, in the minds of national social and political actors, what are the conditions in which such a breach could be said to arise. It is possible that, in this respect, the ongoing interest of the social partners in countries such as Denmark and Sweden to the content of the legislation implementing the Services Directive (and its potential effects on labour laws and industrial relations systems) was very much framed by the context of the Laval dispute. Discussion of that case follows in section 3.9.

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

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

The prevailing opinion at the time of adoption was one of liberal construction, memorably epitomised by Marco Biagi in his account of the final stages of the adoption process, when noting that the Directive is based on the principle of a non-exhaustive list and that Member States have the ‘discretion to extend (unlimitedly?) the concept of

\[144\] Ibid., para. 4.
“public policy provisions”.145 The ECJ has, however, decisively settled the issue in a different vein. The message in *Laval* is abundantly clear, in the Court’s analysis of the Directive as well as in its assessment of the compatibility of industrial action with Article 56:

a) The list in Article 3(1) is *exhaustive*, save for the sole exception prescribed in Article 3(10) PWD. The host State is barred from going beyond the thematic scope described in Article 3(1), regardless of whether the law applicable to domestic employers and employees is more comprehensive. It is only those rules that fall within the scope of this ‘limited list of matters’ that may be imposed (also) on a transnational service provider posting workers to the host State.

b) By its first indent, Article 3(10) permits Member States, ‘on a basis of equality of treatment’ to apply provisions on terms and conditions of employment on matters other than those referred to in Article 3(1) ‘in the case of public policy provisions’ (emphasis added).

As suggested already, the crucial point here is, what falls within the ambit of ‘public policy’. In *Laval* the Court did not comment on the thematic scope of the concept but emphasised that public policy provisions must be emanations of government (‘national authorities’). Trade unions and employers’ associations ‘not being bodies governed by public law’, consequently cannot invoke Article 3(10) to attain public policy status for collective agreement rules or arrangements.146

Building on this in *Commission v Luxembourg*, the Court went on to underline the very significant view that ‘public policy’ in the PWD is a Union law concept. Its scope cannot be determined unilaterally by a Member State; and it must be regarded as an exception clause derogating from the basic free movement principles and must therefore be ‘interpreted strictly’.147 From this the Court proceeded to give Article 3(10) a fairly narrow scope in assessing a number of statutory measures in Luxembourg law, thereby also demonstrating that a Member State is not at liberty to decide what, in its labour law, is so important that everyone should abide by it.

A different matter from the thematic scope is the question of the level at which a standard may be fixed. Here, Article 3(1) PWD is no more than a starting point. The ‘list’ includes ‘minimum paid annual holidays’, ‘minimum rates of pay’, and ‘maximum work periods and minimum rest periods’. In *Laval* the Court, starting with Article 3(1), held that inasmuch as the Directive does not ‘harmonise the material content’ of rules

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145  See Biagi 1996, 104, *supra* at XX.
146  See *Laval*, above n 2, paras 60 and 73–84.
147  See *Commission v Luxembourg*, above n 2, paras 26–33. The ‘strict interpretation’ clause is of course familiar from Court of Justice case law in general.
on matters covered by it, the content of such rules may ‘be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law’. Thus in principle, it is for the (host) Member State to decide on the level of protection. The words ‘freely defined’ cannot be taken at face value, however. Continuing, the Court underlined that the standards which may be imposed are mandatory minimum rules (‘mandatory rules for minimum protection’). The Court made very clear that, pursuant to Article 3(1), it is solely domestic mandatory minimum standards on topics listed in items (a) to (g), and Article 3(10) as the case may be, with which a cross-border posting employer can be required to comply.148

The starting point of freedom to set levels is nonetheless important. Article 56 TFEU and the PWD do not preclude a State from fixing higher standards for a branch or industry than would otherwise be the national mandatory minimum standards. This is a matter of State autonomy within the general bounds of Union law. This is brought out by the ECJ’s decision in Finalarte,149 in which it was accepted in principle that Germany had fixed paid annual leave for construction workers at 30 days, whereas the general minimum was 24 days. Similarly, where minimum wage legislation does not exist, permissible wage levels are not restricted to a subsistence minimum, or unemployment benefit levels or the like. This is still tenable after the ‘Laval Quartet’. Dismissing a complaint against Norway, the points in substance were stated explicitly by the EFTA Surveillance Authority (ESA),150 in a decision that was closely consulted with the EU Commission, mirroring in fact practices in a number of EU/EEA Member States.

In conjunction with this, the construction of Article 3(7) is a crucial point. The issue is whether host States may impose standards that are more favourable to posted workers than the mandatory minimum standards otherwise applicable. Laying down a form of ‘principle of favourability’, Article 3(7) states that the preceding paragraphs of Article 3 ‘shall not prevent application of terms and conditions of employment which are more favourable to workers’. Many have held this to imply that the PWD is a ‘minimum directive’, meaning that host States have a freedom to impose higher standards than the domestically applicable minima.151 It is emblematic of this, and of differing views within the Court of Justice, that the Advocates-General in both Laval and Rüffert argued

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148 See also Laval, paras 60 and 73–84.
149 Finalarte, paras 55–58.
150 ESA decision of 15 July 2009, Case No 63734, Event No 5211127, 3.
151 See, e.g., Biagi (1996 and 1997), and Dølvik and Visser, 8.
that the PWD should be interpreted in such a way that it did not prevent the imposition of improved protection in the host State.\textsuperscript{152}

Read in isolation, or in conjunction with recital 17 of the Preamble, the wording of Article 3(7), first paragraph, may invite that interpretation. From the drafting history, that interpretation would nonetheless be untenable; cf. in section 3.65(d) \textit{supra}. In any case, the ECJ decisively refused to interpret Article 3(7) as allowing the host State to impose higher standards. In \textit{Laval}, Article 3(7) was held – in keeping with its drafting history – to apply to ‘more favourable’ terms and conditions applicable in a worker’s home State. The provision grants no opening to a host State to ‘make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection’.\textsuperscript{153}

This interpretation is forcefully repeated in \textit{Rüffert}.\textsuperscript{154} This stance could hardly come as a surprise. Quite apart from the drafting history, from a free movement of services perspective host State freedom on this point could easily undermine the effective exercise of the freedom.

\textit{b) Means of regulation}

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

The first of the two became relevant in the Laval case. Wage fixing in Sweden is essentially a collective bargaining matter. The Swedish Act on implementation of the PWD was based on this, but did not contain any provision to that effect nor any explicit stipulation that existing collective agreements could be applicable. The Court’s – however cursory – observation (offered three times over) was that Sweden ‘has not made use of the possibility provided for in the second subparagraph’ of Article 3(8). The requirement implicit in this reasoning evidently is that if a State wishes to ‘so decide’ pursuant to Article 3(8), some form of explicit mention of this must be made in the legislation implementing the PWD. This should hardly be surprising. The Court’s stance coincides with that of the Working Party of national experts on the


\textsuperscript{153} See \textit{Laval}, paras 79–81.

\textsuperscript{154} See \textit{Rüffert}, paras 32–34.
implementation of the Directive. The underlying consideration surely is to ensure ‘transparency’, a notion that figures prominently in the Laval decision on other points. The approach is alien to Scandinavian legislative traditions, but the end result is clear. To leave norm-setting to collective bargaining without explicit State regulation is not acceptable. This is simply another illustration of étatisme having precedence over collective autonomy.

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

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

The state of EU law impinges upon traditional and fundamental collective bargaining autonomy, and on the very tenets of the industrial relations systems. Moreover, the narrow interpretation of permissible standards and means of regulation adopted by the Court in Laval, Rüffert, and Luxembourg links up with the Court’s stance in Viking Line and Laval on possible recourse to industrial action. Concisely, a common denominator to the two decisions is that the prospect of being met with industrial action—strike, etc.—in the host State,155 as a means for a trade union to impose demands on an employer, amounts to a restriction on freedom of movement under

155 Or the home State or ‘State of departure’ as in Viking Line.
Articles 43 and 49 EC (Articles 49 and 56 TFEU).\textsuperscript{156} It can hardly be said more emphatically that the \textit{state of domestic law as such} is a restriction in EU law. It is not a prerequisite that there be an actual threat or application of collective action. The basic principle on which the Court rests implies that even if positive regulation of such matters is the prerogative of Member States, the state of national law cannot be such as to counteract or conflict with otherwise applicable EU law.\textsuperscript{157}

\begin{itemize}
  \item[b)] \textit{The right to strike in harness}
\end{itemize}

In both decisions, the Court paid homage to the right to strike as ‘a fundamental right which forms an integral part of the general principles of Community law’ But this was immediately subjected to the reservation that such a right still must be within the bounds of general principles of EU law, namely those pertaining to the freedom of movement.\textsuperscript{158} Thus, having been placed squarely within the reach of EU law, the right to take industrial action is consequently subject to the general principles of ‘justification’ for restrictions on free movement to be permissible. This, in short, is a two-pronged issue. First, The first question is for what purposes may collective action may be used, or, in the standard language of free movement law, which objectives may constitute ‘an overriding reason of public interest’. The second question is how the proportionality test is to be conducted.

Effectively, restrictive limits apply on both counts. The \textit{Laval} decision invites us to perceive the notion of ‘overriding reasons’ as one referring to the mandatory minimum rules applicable in pursuance of the PWD, both as a floor and as a ceiling.\textsuperscript{159} Similarly, in \textit{Viking Line} the Court recognises protection of jobs and employment conditions from being adversely affected by a reflagging of the ship concerned as a form of legitimate protection of workers. But this comes with the proviso that it is no longer tenable if jobs or employment conditions are actually ‘not jeopardised or under serious threat’.\textsuperscript{160} This is an important reservation and one that immediately links in with the problem of proportionality. That issue was dealt with differently in \textit{Viking Line} and \textit{Laval}, but the difference lies more in form than in substance. In \textit{Laval}, the ECJ took a definitive stand on the industrial action that had been implemented. The Court’s reasoning forcefully suggests that the host State trade unions had no basis for making wage demands inasmuch as no relevant minimum wage regulation was applicable. What the Court said

\begin{itemize}
  \item[156] See \textit{Viking Line}, paras 32 et seq, and \textit{Laval}, paras 96–100, 99 and 100 in particular.
  \item[158] Cf \textit{Viking Line}, paras 43ff, and \textit{Laval}, paras 90ff.
  \item[159] See in particular \textit{Laval}, para 108 and the reference to paras 81 and 83 therein.
  \item[160] See \textit{Viking Line}, para 81.
\end{itemize}
explicitly is that this applies if pay-setting is a matter for ‘negotiation at the place of work, on a case-by-case basis, having regard to the qualifications and tasks of the employees’, negotiations which, moreover, might be of ‘unspecified duration’. This amounted, in the Court’s view, to ‘a national context characterised by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for [a service provider] to determine the obligations with which it is required to comply as regards minimum pay’. 161

In addition, the Court made a point of noting that the provisions included in the trade union’s demand for a collective agreement in the Laval case went beyond what the transnational service provider was required to observe in terms of mandatory rules for minimum protection applicable in pursuance of the PWD. Thereby it linked the proportionality assessment with the limitations flowing, in the Court’s view, from the Directive. Moreover, given the way the Court framed its reasons, this ‘excessiveness’ of bargaining demands in itself was sufficient to render collective action disproportionate.162 In Viking Line there was a possibly legitimate objective, but as the situation had not yet matured the Court was confined to laying down guidelines for the referring court. It did so, emphasising that collective action must not go ‘beyond what is necessary to achieve the objective pursued’ (emphasis added). This includes considering whether other, less restrictive measures might be used and an ‘ultima ratio’ standard framed to the effect that all such other means should be exhausted before recourse is had to collective action.163 Coupled with the ‘serious threat’ clause,164 this is a requirement of vast import.

c) Clashing with fundamental rights

There is a paradox inherent in this case law. Whereas collective action is recognised in principle as a fundamental right, at the same time it is qualified as a ‘restriction’. Thereby the issue is turned into whether the exercise of this fundamental right in EU law may actually be lawful in EU law. Put differently, the exercise of the fundamental right needs to be justified vis-à-vis the fundamental freedoms. Arguably, this is turning the issue on its head; conventionally, a legal right takes precedence over a freedom. The more serious discord is with public international law and human rights. The way in which the Court has chosen to limit possibly legitimate objectives by its construction and use of the PWD, and with the ‘serious threat’ clause, the application of the proportionality test and the use of an ‘ultima ratio’ standard, imposes considerably more strict limits on the right to strike than those ensuing from ILO Conventions Nos 87 and

161 See Laval, paras 69, 71, 100 and 110.
162 See Laval, para 108 and paras 81 and 83 referred to therein.
163 Cf Viking Line, above n 2, para 87.
164 See the text to n XX above.
98 and relevant case law. The inconsistency has been emphasised by many, including the ILO itself.\textsuperscript{165} It is confirmed by the ILO Committee of Experts in its recent Report to the 2010 Labour Conference, noting with reference to the UK and the BALPA case\textsuperscript{166} that

‘The Committee thus considers that the doctrine that is being articulated in these ECJ judgements is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention [No. 87]’.\textsuperscript{167}

In \textit{Viking} and \textit{Laval} the ECJ merely took note of Conventions Nos 87 and 98 and refrained from elaborating. The same is true as regards the European Social Charter (1961),\textsuperscript{168} to which, as the Court duly noted, express reference is made in Article 151 TFEU. By the stance it adopted, the Court of Justice has framed a fundamentally different conception of the right to collective action from that obtaining pursuant to Article 6(4) ESC. The ESC recognises that the right to collective action may be restricted, but solely on narrow grounds.\textsuperscript{169} Under Article 6(4) it is deemed unacceptable, \textit{inter alia}, to subject the exercise of this human right to a proportionality standard or otherwise construe the right as relative in domestic law.\textsuperscript{170}

The Court’s failure to take further account of these human rights instruments is remarkable. First of all, it places EU law in conflict with public international law obligations incumbent on all, or the vast majority of, Member States. Further, it thereby raises the prospect of Member States being compelled to denounce fundamental human rights instruments, pursuant to Article 351 TFEU. That would amount to nothing less than an outrage and be devastating to human rights efforts in the field of working life, if not beyond. Conventions Nos 87 and 98 belong to the list of core conventions included

\begin{itemize}
\item \textsuperscript{165} See further, e.g. Evju 2009, 134–35. Further, the Court’s stance in \textit{Rüffert} is not reconcilable with ILO Convention No 94. An infringement case on the ground of Norway’s implementation of Convention No 94, pending with the ESA (February 2012), is illustrative of this point.
\item \textsuperscript{166} Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No.87. London, 5\textsuperscript{th} October 2009.
\item \textsuperscript{168} And equally the European Social Charter (revised) 1996. Hereafter both Charters are referred to jointly with the acronym 'ESC'.
\item \textsuperscript{169} See ESC 1961 Art 31, and Art G of the 1996 revised Charter; the exception clauses are similar to that of Art 11(2) ECHR.
\item \textsuperscript{170} See, eg, ESC, European Committee of Social Rights, \textit{Conclusions XVIII-1} (Council of Europe, Strasbourg, 2006), vol. 1, 74–75 (Belgium) and 306–307 (Germany).
\end{itemize}
in the ILO Declaration on Fundamental Principles and Rights at Work (1998).\textsuperscript{171} It would seriously undermine the credibility of international standards and the ILO’s efforts in this field should the EU legal order be seen to condone de-recognition of these fundamental standards. Moreover, it would also be in sharp contrast to EU policy commitments and statements on international and EU law, in particular during the past 10 years and in conjunction with the Decent Work Agenda.

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

3.10 National responses to the CJEU case law
At the outset, the implications of the Posting of Workers Directive on domestic law at first seemed to be manageable for most countries. But this changed in a dramatic way by the CJEU’s interpretations of the directive limiting the Member States’ discretion. Still, the immediate problems faced by national jurisdictions in consequence of the ‘Laval Quartet’ rulings evidently would differ in form and degree. Unsurprisingly, there is a strong relation between the state of national law preceding the CJEU decisions and their immediate impact on the domestic scene.

Germany saw a revision of the Arbeitnehmer-Entsendegesetz in 2009 but the objective of the amendments was only to a very limited extent a reaction to developments on EU-level. The primary cause and objective pertained to the domestic situation and the absence of a statutory minimum wage, the solution being to extend the scope of the AEntG to six new branches.\textsuperscript{172}

In the Netherlands also, the repercussions of the ‘Laval Quartet’ decisions are largely negligible. The Viking and Laval decisions may in principle have a discouraging effect

\textsuperscript{171} This Declaration has subsequently been reinforced by the ILO Declaration on Social Justice for a Fair Globalization 2008.

\textsuperscript{172} I.e., in addition to the construction sector the sectors nursing care, private security business, coal mining operations, laundry services for property client services, waste management, apprenticeship and retraining.
on the readiness of trade unions to call solidarity strikes in cross-border situations, but so far there is no evidence to underpin this observation. Similarly as with Germany, a 2006 amendment to the Extension of Collective Agreements Provisions Act aimed at closing a loophole in its exemption policy for extended CLAs was predominantly motivated by shielding organised labour from domestic ‘social dumping’, since no service provider from another Member State had ever used the loophole in practice. Although the Netherlands ratified ILO Convention No. 94 as early as 1952, ironically, the Rüffert judgment did not have any impact because in practice the Convention’s provisions are not applied. As for the Commission v Luxembourg judgment, this had no impact because the PWD was implemented as if it is a ‘maximum’ directive right from the outset.

Essentially the same is true for Finland and Norway. The ‘Laval Quartet’ decisions had no immediate impact on the domestic legal situation. There was a muted discussion in Norway, however, on the reach of Viking and Laval with regard to collective bargaining and collective action in situations where employees of a foreign service provider take up membership in a Norwegian trade union. This is a different type of situation from that in Laval, where the Swedish trade union taking primary action (in the form of a boycott) had no members in the Latvian firm. No firm conclusions have been drawn, however. As a more indirect effect, in this case of the Rüffert decision, the EFTA Surveillance Agency (ESA) in 2009 opened a case against Norway’s statutory rules on wage standard in public procurement, which implement ILO Convention No. 94. That case is still pending.

The late comer in this study, Poland joined the EU as of 1 May 2004. With regard to implementation of the PWD Poland apparently relied essentially on domestic legislation already in force, including minimum wage legislation. The general regulations pertaining to minimum wages are set by state authorities. 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 ‘Laval Quartet’ decisions of the CJEU has had no immediate impact on Polish law. The key point in this regard is that collective action in circumstances such as those involved in Viking and Laval would be unlawful pursuant to the Act on collective dispute resolution of 23 May 1991, which only recognises a dispute as a collective dispute if it deals with regulating working conditions, remuneration, social benefits, or the rights and freedoms of trade union workers. Under the Act collective action is permissible if such action is aimed at protecting the interests of workers whose contracts of employment are subject to Polish labour law. Collective action is however precluded if aimed at an existing collective agreement, including a collective agreement concluded
between a foreign trade union and a foreign employer but applicable (also) in Poland. Moreover, a duty to bargain in good faith prevails under Articles 241\(^3\)§1 and 242\(^1\)§3 of the Labour Code and a national trade union would not be permitted to appeal to an international trade union association, which taken together seemingly would rule out a conflict of the kind at hand in the *Viking* case. Further, the *Rüffert* and *Commission v Luxembourg* decisions had no repercussions, essentially on account of the minimum wage legislation and the reach of Polish collective agreements. Collective agreements in Poland regulate the working conditions, remuneration, and rights and responsibilities of all workers in an undertaking regardless of whether they are members of a trade union, it is enough that they are employees of an employer who is party to the collective agreement (Article 239§1 Labour Code).\(^{173}\)

Faced with the decisions in *Viking* and *Laval*, the latter in particular, Denmark recognized a need to amend its legislation on posting of workers, in that the prevailing on collective bargaining and collective agreements could not fully be relied on. Still, Denmark has maintained a strong collective bargaining-based approach. On the basis of a tri-partite committee report tabled in June 2008, a new provision was inserted into the Act on Posting of Workers.\(^{174}\) Explicit reference is made in the Act (section 6(a)) to the applicability of collective agreements concluded by the ‘most representative’ labour market organisations and having a nationwide geographical scope.\(^{175}\) A collective agreement will not, however, apply automatically to a foreign service provider. If it is sufficiently clear with regard to payable wages and the employer has been notified of the relevant provisions, a trade union is free to undertake collective action in accordance with the rules that apply on the domestic labour market, to press for the conclusion of a collective agreement. The solution arrived at is perhaps tenuous, and certainly controversial, but has not yet been put to the test.

When implementing the PWD in 1999, Sweden also relied essentially on the embedded system of collective bargaining and collective action, including the 1989/1991 *Lex Britannia*, as a means to counteract ‘social dumping’ and to maintain Swedish wage standards. As a result of the *Laval* decision some measure of reform urgent. Similar to

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\(^{175}\) There is a certain irony in this. The ‘most representative’ option in Art 3(8) PWD was an Italian proposal. The alternative that was proposed and insisted on by Denmark is the ‘generally applicable’ option in the first indent of Art 3(8); cf above n 92. The choice made in 2008 can be seen as a reluctant recognition of reality on the part of Danish industrial relations actors.
3.11 The Temporary Work Directive

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

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

The posting of temporary agency employees is at the outset subject to rules that differ from those applicable to posted workers otherwise, however. To be sure, a host state may impose the same minimum terms and conditions as apply to national employment relations, pursuant to and within the bounds of Article 3(1)(d) PWD. But Article 3(9) stipulates that Member States may provide that undertakings operating transnational temporary work services must guarantee their posted workers ‘the terms and conditions

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176 SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen Betänkande av Lavalutredningen.

177 Regeringens proposition 2009/10:48 Åtgärder med anledning av Lavaldomen.

which apply to temporary workers in the Member State where the work is carried out’. This provision conveys acceptance of a principle of equal treatment, which, as we have seen is not quite what the PWD allows for in general. Moreover, a host state may require a cross-border temporary work undertaking to abide by ‘the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings’, which, seen in isolation, may amount to a restriction on the freedom to provide services. This was however a conscious choice in the adoption process, in view of the considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union that were still prevailing.\(^{179}\)

In 2008, the EU adopted a separate directive on labour only contracting, the Temporary Work Directive (TWA).\(^{180}\) The TWA applies to strictly national cases but also to cross-border temporary work relations. In the latter capacity it intersects with the Posting of Workers Directive. This was clear from the start of the legislative process, the intention being that a new directive would not alter the scope of the PWD, or the possibilities for exemptions from it. A directive on temporary agency work should rather be seen as an ‘extension of arrangements already in force for transnational posting of temporary workers’, meaning that its special provisions would take precedence over the limiting provisions of the PWD.\(^{181}\)

The Temporary Work Directive has a mixed background. On the one hand, it embodies social policy aims by establishing protection and rights for temporary workers; on the other hand, it pursues employment policy aims, also as encompassed in the Lisbon Strategy, in the form of provisions expressly oriented towards improving the functioning of the labour market.\(^{182}\) The TWA explicitly rest on a principle of equal treatment,\(^{183}\) that being the headline of Article 5 which states the basic rule as being ‘The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply


\(^{183}\) Referred to in the travaux préparatoires also as a principle of non-discrimination.
if they had been recruited directly by that undertaking to occupy the same job’ (Article 5(1), first subparagraph, TWA, cf. also Recital 14 of the Preamble).

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

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

The Temporary Work Directive is discussed further and in-depth in Chapter 9.

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184 See Contouris and Horton 2009, at 332.
185 See supra. [specification to be added].
186 Cf. Recital 5 of the Preamble to the Directive.
188 Cf. the preliminary amended proposal circulated in March 2006, COM(2006) 160 (2006/0001 (COD)), 41, and subsequently COM(2006) 160 final of 4 April 2006. In the former, the exemption read simply ‘temporary work agencies’, the words ‘services of’ were added in the latter.
3.12 An observation in closing

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

A key question will be how these conflicting concerns are mediated by regulatory and judicial developments to come. As this paper is finalised, the long announced enforcement directive to the PWD and a ‘Monti II’ regulation addressing, i.a, the right to collective action are due to be tabled shortly. This should prove a first indicator of what may be in store in the time to come.
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Sweden


Social Partners Documents


