Posting Past and Present

The Posting of Workers Directive –
Genesis and Current Contrasts

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# Posting Past and Present

## The Posting of Workers Directive – Genesis and Current Contrasts

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1 Introduction

The Posted Workers Directive (PWD)\(^1\) may be seen as a true offspring of the EU Single Market and the conjoined Social Dimension. 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.

Efforts to develop and expand the Single Market also engendered the idea of a ‘social dimension’, materializing i.a. in an Action Programme\(^2\) and the Community Social Charter,\(^3\) was to foster new dynamism and development in the social policy field.\(^4\) 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’.\(^5\)

The Posted Workers Directive belongs in this context. It was controversial from its inception and has remained controversial throughout, which is vividly illustrated as well as intensified with the recent case law of the European Court of Justice in the “Laval Quartet”.\(^6\) In the wake of Rush,\(^7\) preceding the Directive, one commentator opined that the Court through its \textit{dictum} held Article 59 EEC (now Article 49 EC) to strike at regulations on the provision of services that place foreign undertakings in a situation less favourable than that of nationals, but not to go “so far as to put foreign undertakings in a better position”.\(^8\) That interpretation, quite benevolent, in hindsight


\(^2\) COM(89) 568 final.

\(^3\) Community Charter of the Fundamental Social Rights of Workers, 1989.


\(^5\) E.g. Vogel-Polsky 1990, 75.

\(^6\) I use this as a joint denomination for the 2007 decisions in \textit{Viking Line} (C-438/05) and \textit{Laval} (C-341/05) and the 2008 decisions in \textit{Rüffert} (C-346/06) and \textit{Commission v Luxembourg} (C-319/06).

\(^7\) Case C-113/89, [1990] ECR 1417.

\(^8\) Marenco 1992, 134.
anyway, has been proven emphatically wrong by the later evolvement of case law, in particular, but with the PWD playing a part as a piece in the puzzle.

As indicated, the PWD was not drafted in a legal vacuum. Community law on free movement, in particular the freedom to provide services, and private international law, more specifically the 1980 Rome Convention, are essential elements of the backdrop. Measures of implementation of the free movement of workers were adopted at an early stage, with Regulation (EEC) No. 1612/68 and subsequently Regulation (EEC) No. 1408/71 as key instruments, and forcefully followed up by the ECJ in the decisions, i.a., in 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 (now Article 39 EC) the decision in Commission v France emphasized 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.

This point is important, also by its contrasting with predominant ideas underpinning the notion of free movement of services. Posit that the freedom to provide services is deemed to be subject to a restriction within the meaning of EC Treaty provisions if the 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. Considering the basic principles applicable to the free movement of workers, this was not per se a cogent inference. But in the field of cross-border provision of services it was nonetheless accepted as one, and a key, point of departure however it might encroach upon labour and

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10 Convention on the law applicable to contractual obligations, of 19 June 1980.
11 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.
13 See Laslett 1990, 1.
14 This point is strongly made by Hellsten 2007, 8.
15 See Däubler 1997, 615 with fn. 37.
employment law and their tenets in the Member States. This is reflected in the Posted Workers Directive. It purports to be, to some extent, a worker protection measure. But the Directive has mixed objectives. It shall also serve to promote the transnational provision of services and to facilitate cross-border competition.

The irony lies in the duality. The two dimensions were key pieces in the shifty 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.\(^\text{16}\) Considering the Directive as it was adopted, but also in the long run, as events have unfolded, it is fair to say that the economic has taken precedence over the social.\(^\text{17}\) A cross-border service provider must abide by certain host country labour standards for its employees. But this is of limited reach and in no way does it involve labour and employment law in its entirety. The bottom line is simple. A foreign service provider shall be spared the realities of industrial relations in the country it provides service using home-state employees.

This sketch provides a backdrop for the present study, which has three main limbs. First, the object is to map the background against which the elaboration of the Posted Workers Directive is set. This consists largely of (re)assembling already familiar materials and the aim is essentially to provide a condensed overview. Second, the task is to cast a longitudinal look at the PWD adoption process, again essentially in the form of an overview, to serve as a bridge to the third main part. The third limb is multi-pronged. Here the object is to analyse more in-depth a number of the key issues which the PWD raises. Drawing on a wide range of materials including a significant amount of primary sources the aim is to amplify discussions on topics that are both original and current. Here the approach is not linear but issue oriented. In conclusion, the current state of the law and the PWD in a governance perspective are considered.

\(^\text{16}\) Cf. Menz 2008, V.

\(^\text{17}\) See Barnard 2008a, 23, commenting on the impact of Laval and Viking Line. See also, in the same vein, Cremers et al. 2007, 538-39, Malmberg and Sigeman 2008, 1136-40, Orlandini 2008, 538.
2 Genesis – some starting points

Many have pointed to the ECJ’s decision in Rush as instrumental to the subsequent adoption of the Posted Workers Directive.\(^{18}\) The Rush decision no doubt is important in the overall context, but the Directive’s lineage is longer and more complex. Two main lines can be identified, one stretching further back in time than the other, both converging with the initiatives accompanying the implementation measures of the Single Market at the end of the 1980s.

2.1 The conflict of laws dimension

The first line of development leading towards the PWD is one of private international law, on the choice of law applicable. Early secondary legislation saw two different approaches being employed. The non-discrimination principle in Article 48(2) EEC (now Article 39(2) EC) and Regulation 1612/68 entails in principle the application form “day one” of host state labour law to persons utilizing the right to free movement of workers. In the social security field, pursuant to Regulation 1408/71 a posted worker is at the outset still subject to “home state” law – a “country of origin principle”, in more recent terminology. Host state law shall however apply if a posting lasts more than twelve months (Article 14(1)).

The 1968 Regulation however left issues of private international law unresolved. A common point of departure would be that of party autonomy, meaning 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, to the extent domestic law recognized a freedom of contract. Here again, there are vast differences 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,\(^{19}\) in other Member States the concept is unknown or plays merely a minor role in the labour law field. Here is a distinction also between “unilateralism” and

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\(^{18}\) E.g. Kolehmainen 2002, 112 (“the prologue to the adoption saga”), Barnard 2004, 345 (“the green light”), Dølvik and Visser 2009, 7 (“a model”). Myself, I have dubbed the decision a “booster”, given that the first foundations had already been laid (Evju 2008b, 4).

\(^{19}\) 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.
“bilateralism”. While a unilateralist approach emphasizes 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 limited duration. In this context bilateralism and a broad notion of *ordre public* are two sides of a coin.

Those 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, to which ECOSOC adopted an opinion later the same year. Further to this there was no immediate progress but in 1976 an amended proposal was put forward by the Commission. This proposal also did not materialize into an actual piece of secondary legislation. Both proposals were regarded critically, in some Member States at least and within the Council.

It may attest to the initial concern with regulating freedom of movement in the labour markets that the task was taken up and pursued for some time. When the first proposal was tabled in 1972, the preparatory work leading to the Rome Convention was already underway. With time political constellations and priorities changed and in 1980 the Rome Convention was adopted. The regulation proposal was ultimately withdrawn, in the fall of 1981.

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21 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.
22 COM(76) 653 final, Explanatory Memorandum, 3.
23 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.
24 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.
25 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.
27 While the initiative was taken in 1967 the actual work commenced in 1969; see Giuliano and Lagarde 1980, 1.
28 Commission 1981 [item 8].
This early initiative nonetheless merits a certain attention. Both a distinction to and a link to the later PWD are evident. The distinction lies in the Treaty base and thematic reference. Deriving from Articles 48, 49 EEC (now Articles 39, 40 EC) and Regulation 1612/68 the proposed regulation was aimed at the free movement of workers, not at the freedom of services. It would however encompass also “posting” of workers in the current sense.

The link shows in the proposed scope and in the provisions on applicable law. 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.\(^{29}\) The perspective was still that of the freedom of movement of workers.

The point of departure of the proposed regulation was that an employment relationship is governed by the law of the State in which work is normally performed.\(^{30}\) With regard to posted workers this was modified in two main ways. Certain mandatory provisions of the host state’s law were to have application even if the law governing the employment contract was another one. The applicable elements of host state law were enumerated by reference to topics, encompassing in particular maximum working time, provisions on time off and public holidays, minimum holidays, “minimum guaranteed wages”, etc., safety and health at work, special protection for specific categories of workers, and “provisions concerning the business of hiring out workers”.\(^{31}\) The 1976 amended proposal also included a provision to the effect that more favourable provisions under home state law would take precedence (Article 8(3)).

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”, however within the bounds of the Treaty Articles 48 and 49.\(^{32}\) 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

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\(^{29}\) COM(75) 653 final, Article 4. The reach of the Article was, by way of referring to Article 51 EEC, linked to that of Regulation 1408/71.

\(^{30}\) 1972 proposal Article 3(1) (lex loci contractus or seat of the undertaking), COM(75) 653 final, Article 3(1) (“normally carry out their employment”).

\(^{31}\) See 1972 proposal Article 4(1)(2), 1976 proposal Article 8(1). The latter included also protection of employees’ representatives, public authorization of dismissals, and rules on restrictive covenants. See further Houwerzijl 2004, 54.

\(^{32}\) 1972 proposal Article 4(2).
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.33

Both facets reappear, as we shall see, and are easily recognizable when it comes to the elaboration of the PWD.

2.2 The public procurement link

Looking back at this the debate on regulating the situation for posted workers can not be said to have started in the mid 1980s,34 but it may well be said that it was brought back to life and onto the political arena in connection with the legislative efforts to liberalize the rules on public procurement. After the publication of the Commission’s White Paper on Employment Growth (Commission 1986) in late 1986 European trade unions, among others, pressed for the inclusion of a “social dimension” into the political and legislative agenda.35 The more active among those actors was the European Federation of Building and Woodworkers (EFBWW), who lobbied intensively for the inclusion of a “social clause” into the directive on liberalization of public procurement, for which a first proposal was tabled in late 1986 (COM(86) 679 final). A clause of that kind, requiring the application of terms and conditions of employment equal to those prevailing at the place of work, mustered solid support in the European Parliament but was not met with full approval in the Council of Ministers. The clause, intentionally similar to ILO Convention No. 94, was made optional, dependant on the decision of the public contractor.36

Having failed in this endeavour the EFBWW turned to lobbying for a more extensive measure, pressing for legislation covering posting of workers generally, not only in the building industry, and based on the application of host state law, subject to a “principle of favourability”, from “day one”. On this count the EFBWW was more

33 COM(75) 653 final, Explanatory Memorandum, 11; my italics.
34 Eichhorst 2000, 143.
successful, insofar as its ideas coincided in principle with initiatives already under way in the Commission, to be included in the 1989 Action Programme.\(^{37}\)

### 2.3 The 1989 Action Programme

The development of a “social dimension” to the Single Market, foreshadowed by Jacques Delors in 1986,\(^{38}\) began during the Belgian Presidency in 1987 and, buttressed by Delors’ 1988 resolve to start drafting a “Social Charter” forked into two interlinking documents adopted in November-December 1989, the Community Charter of the Fundamental Social Rights of Workers\(^{39}\) and the accompanying Action Programme for the implementation of the Charter.\(^{40}\)

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”.\(^{41}\) The gist of this proposal was that there was a need to ensure the application of *host state* legislation on “public order” \(\text{and}\) 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

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37 Opinions differ as to who was first with the idea for a directive on posting; see Kolehmainen 2002, 150. Jan Cremers, General Secretary of the EFBWW at the time, indicates that the initiative originated in the Commission, see Cremers 1994, 25, 1996, 170; Eichhorst (1998, 17: 2000, 146), on the other hand, suggests that the Commission “reacted” to the EFBWW’s call for legislation. Corbey (1995, 279-80) is non-specific.

38 “Tenth anniversary of the European University Institute, Speech given by Mr Delors”, *Bulletin of the EC* 11-1986, 12-16.


41 The following proposal dealt with ”labour clauses into public contracts” with reference to i.a. Directive 89/440/EEC; this proposal was however essentially a suggestion of a possible course to take upon later analysis.
Articles 14, 39-42 EC), to the right of establishment (Articles 52-58 EEC; Articles 43-48 EC), 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.

3 Intervening factors – *Rush* in context

A few months later, in March 1990, the ECJ came down with its decision in *Rush*. It is common ground that *Rush* has a prominent place in the saga of the Posted Workers Directive. The decision was proclaimed in a formative phase and came to serve as a catalyst, in part also a model, in the subsequent wider process.42

In *Rush*, a Portuguese entrepreneur had won a contract in France. Pursuant to the Accession Act its workers, Portuguese nationals, at the time did not benefit from the freedom of movement of workers; they were in that sense “third country” workers. France was nonetheless precluded from applying its immigration laws, etc. The Court held that 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” (para. 12). The Court tacked on to this a *dictum* concerning the possible application of host state labour laws (para. 18).

3.1 The free movement dimension

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 placed the problem soundly within the domain of Treaty law on the freedom to provide services. That approach was visible in the earlier decisions in *Webb*43 and *Seco*44 but it was only with *Rush* that it was forcefully

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44 Joined cases 62 and 63/81, [1982] ECR 223.
established and the full potential impact for labour law and social dumping became clear.\(^{45}\)

The Court’s key argument to separate posted workers from the free movement of workers domain, the “labour market argument” that posted workers “return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State” (para. 15), is in no way convincing. 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.\(^{46}\) Still, without elaborating on the legal basis or the arguments the Court’s reasons were of a general reach, and in general it was construed accordingly.

There were no cogent legal foundations in advance to force 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. Otherwise, employees of the service provider should fall within the ambit of the freedom of movement of workers, his general point of departure being that the “rules laid down in Regulation No 1612/68 … undoubtedly extend to protect workers of a supplier of services such as Rush”.\(^{47}\) This view finds evident support in the fourth recital of the Preamble to Regulation 1612/68.\(^{48}\) 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.\(^{49}\) The Treaty provisions, primarily Articles 48, 49 EEC (Articles 39, 40 EC), aim to promote the free movement of workers requiring that migrant workers have full access to host state protection. Relocating moving workers instead to the domain of free movement of services deprives them of this stronger protection and entails potential deregulatory impact on national regimes of labour law.\(^{50}\)

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\(^{45}\) See Davies 1995, 73, and for a view on Webb and Seco, Druesne 1982.


\(^{47}\) Rush, Opinion of Mr. Advocate General Van Gerven, paras. 17, 14.

\(^{48}\) The recital reads “Whereas such right must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services” (my italics).


\(^{50}\) See Davies 1997, 588, conversely Kolehmainen 2002, 168.
By rejecting a distinction the Court took a stronger economic market integrationist stance than 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 39, 40 EC and conjoint secondary law.\(^{51}\) However, it is the Court’s position in *Rush* that has prevailed in subsequent case law and thus is the more solid ground to build on.

### 3.2 The dictum – a licence to regulate?

The national labour law and labour market concerns were attended to in *Rush* by the Court’s well-known *obiter dictum*. Throwing the French authorities a crumb of comfort\(^ {52}\) the Court stated:

> “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. The Court offered no explanation or reasoning to underpin this sweeping statement.\(^ {53}\) By answering a question that was not requisite to the decision it may be that the Court can be seen to have committed “a basic error of the craft of judicial decision-making”.\(^ {54}\) 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.\(^ {55}\) 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

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\(^{52}\) Paraphrasing Gormley 1992, 66. See also Davies 1997, 589.

\(^{53}\) See e.g. Davies 1995, 74, Barnard 2008b, 147.

\(^{54}\) Davies 2002, 300.

national labour law regimes.\textsuperscript{56} This could be countered by adapting, if need be, domestic legislation and other regulatory measures.

3.3 \textit{A three-pronged follow-up}

Several Member States, and candidate countries, took the cue and passed new legislation or adopted other measures to adapt to the new legal environment, e.g. France in 1991 and 1993, the Netherlands in 1991 rather informally, Austria and Norway both in 1993, Luxembourg in 1995, and Germany in early 1996 after a protracted legislative process.\textsuperscript{57}

The \textit{Rush} decision also boosted and fertilized the process leading to the adoption of the Posted Workers Directive.

Moreover, \textit{Rush} became a foundation stone for the further development in case law in the field of cross-border provision of services and labour law. In its subsequent decisions the Court however clearly retreated from its general and unreserved position in \textit{Rush}, adopting and building further on the \textit{Säger}\textsuperscript{58} market access formula,\textsuperscript{59} a development that in part took place alongside the elaboration of the PWD.

The \textit{Rush} doctrine makes a significant difference for service providers and workers alike. Locating workers moving cross-border in the framework of their employer providing a service within the ambit of Community law on the freedom to provide services – equalizing the employees with the undertaking, so to say – has a fundamental impact on their position. The Court’s dictum entails no change in this regard. It does not imply a right for posted workers to equal treatment with host state workers, it merely opened up the possibility for states hosting posted workers to extend domestic labour law norms to them. What would have been a subjective right under Articles 39, 40 EC was turned into conditional and delimited rights, with correspondingly diminished obligations on the part of their employer, the cross-border service provider. Thus moving away from labour law and workers’ individual rights the market integration dimension is unmistakable.

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 foundation and the wide-ranging \textit{dictum}, the Court in \textit{Rush} did not at all touch on or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{56} See Davies 1995, 73-74, Hepple 2005, 166.
\item \textsuperscript{57} See to this generally Eichhorst 1998, 20-26, 2000, 185-272, Menz 2005, Evju 2008a, 12-15.
\item \textsuperscript{58} Case C-76/90, [1991] ECR I-4221. On the “market access” notion see Barnard 2004, 19.
\end{itemize}
\end{footnotesize}
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 that were given.

4 A longitudinal look at the adoption process

4.1 The first phase

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 i.a. with 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 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”.

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

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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.

4.2 The second phase – new proposal, progress and stalemate
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 “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

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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.

profile than its predecessor and 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 i.a. 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 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.65 Following a series of meetings in September and October Germany then put forward a new revised draft, “a compromise suggestion”, in early November.66 Two subsequent Working Party meetings and thereafter Coreper mainly discussed technical issues, leaving the controversial “political” issues to the up-coming Council.67 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.

4.3 The third phase – renovation, 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,

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65 Council 1994b.
66 See Council 1994d.
67 See Council 1994e.
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.68

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 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.69 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 towards defending her national labour law regime. 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. Beside 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.70

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

69 This was a consistent French view; e.g. in July 1993 France insisted that the proposed threshold provision be deleted, as this was “a fundamental political issue”, a statement that was repeated over again. See Council Working Party 1993a, 1993 b.
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.\textsuperscript{71} 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 26\textsuperscript{th} he circulated a memo sketching proposals,\textsuperscript{72} 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\textsuperscript{73} it was put, with some amendments, to the Council for its meeting on 29 March.\textsuperscript{74} 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 German in November 1996 and finding its final form in March 1995,\textsuperscript{75} 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.\textsuperscript{76} 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 enactment of the Posted Workers Directive.\textsuperscript{77} The threshold provisions, one mandatory (the “assembly clause”) were carried through to Article 3(2) – (5) PWD.

\textsuperscript{71} See to the following also Biagi 1996, 1997.
\textsuperscript{72} Council 1996a. The proposals had been informally discussed earlier the same day with DG V by his collaborator, see Biagi 1996, 98.
\textsuperscript{73} See Council 1996c – f.
\textsuperscript{74} See Council 1996g, 1996h.
\textsuperscript{75} See Council 1994e and Council 1995f.
\textsuperscript{76} This provision can be traced back to a Portuguese proposal from November 1994 to stipulate an exception in Article 1 from the scope of application of the directive. See Council Working Party 1994d.
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.

4.4 Summary observations in transition

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. 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.

The following parts of the paper will not deal with all of the many issues involved but will focus on some that are of a general or topical in the light of more recent case law developments and discuss those issues also in view of the drafting history of the PWD.

78 See e.g. FIEC – EFBWW 1993.
5 What is the PWD about? Objectives and functions

5.1 Introduction. The conflict of laws dimension

Article 3(1) is one of the key provisions of the PWD. Correspondent with the 1972 and 1976 regulation proposals (cf. 2.1, above) it lays down a list of basic standards that shall apply to posted workers and stipulates that Member States must ensure their application “whatever the law applicable to the employment relationship”. In that respect, the PWD is a conflict of laws instrument. It is however not primarily a conflict of laws regulation. The link to the objective of the Directive is essential. The PWD can be said to have a dual objective (cf. 5.2, below) with the promotion of transnational provision of services as the overarching aim. On this basis the Directive is primarily concerned with clarifying which terms and conditions of employment may be imposed by a host state. Seen in this context the conflict of laws dimension is a means to an end, it ensues from but is secondary to the basic function of the Directive. Nonetheless, the conflict of laws dimension is considerably important.

At the outset, the provision on applicable law in Article 3(1) can be seen to supplement the Rome Convention (RC), which is extensively referred to in the Preamble to the PWD. It is implied in Recital 11 of the Preamble, which refers to Article 20 RC. It follows from that provision that in case of conflict the PWD takes precedence over the rules of the Convention. It is clear from the PWD that the individual posted worker shall be able to rely on the basic standards listed in Article 3(1), which thereby prevails over both Article 3 and Article 6 RC.

How far this holds is however arguable. Article 3(1) PWD by its wording imposes obligations on host states (towards workers posted to “their territory”). On a strict construction it leaves open which terms can be invoked if a posted worker sues in its home country. The jurisdiction clause in Article 6 PWD and the “measures” provision in Article 5 provide no substantive arguments on this point. If the PWD is inapplicable Article 6 RC steps in, the “default” rule leading to home state law usually

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79 The point can be seen to be illustrated by the ECJ in Laval, paras. 57-59.
80 Whether Article 3(1) PWD genuinely is a conflict of laws rule is debatable, see Kidner 1998, 115-16. This is however not of immediate importance and can be left aside here.
81 The same applies in relation to the superseding Rome I Regulation (entry into force 17 December 2009), see Article 23.
82 Host state courts will usually have jurisdiction under the Brussels I Regulation, Article 19(2)(a) (previously the Brussels Convention Article 5(1)(a)) or the Lugano Convention Article 5(1)(a).
being the applicable law.\(^{83}\) One may turn to Article 7 RC for support; this provision allows a court to apply the mandatory rules of another country than that of the otherwise applicable law. Article 7 RC is however discretionary and does not go all the way towards solving the problem. At the outset, then, the matter is left with the conflict of laws rules of the home state. The clear thrust of the Directive anyhow is that a posted worker should be able to benefit from its enumerated (minimum) standards independently of where he files suit. The consequence is that a home state government has an obligation to take appropriate steps to ensure legislative implementation or for home state courts to apply as far as possible domestic law in an EC conform way.\(^{84}\)

5.2 Legal base and objectives

The Treaty bases of the PWD are Articles 57(2) and 66 EEC (now Articles 47(2) and 55 EC). More than likely the choice of legal bases was a strategic move on the part of the Commission, it having the merit that the Directive required only a qualified majority for its adoption.\(^{85}\) The Commissions choice was controversial from the start and remained so throughout the adoption process. Several States, in particular France, wanted to include Article 49 EEC (now Article 39 EC, on the freedom of movement of persons).\(^{86}\) The Commission initially agreed to consider this but came back in August 1992 with a “non-paper” strongly maintaining its position and referring i.a. to Rush to underpin it.\(^{87}\) Called on for counsel the Council Legal Service was non-committal in September 1992 but came down clearly on the side of the Commission considering, i.a., that the main objective of the proposed instrument was to facilitate the free movement of services, whereas improved protection of workers was not an objective as such but an incidental effect that could not affect the main objective.\(^{88}\) The fronts remained largely as they were. In the Working Party deliberations the majority of States would hold the issue in abeyance, first settling the content of the Directive and the leaving the legal bases to be decided on at the political level. Italy, who insisted on adding Article 100 EEC (Article 94 EC), remained vigilant for a

\(^{83}\) Article 6(2)(a), "the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country”.


\(^{86}\) Also Articles 100, 100a, 118a, and 253 were pointed to.


while but joined the majority in 1995. The UK, Ireland and Portugal kept maintaining that the proposed legal base was inadequate and subsequently, in the final phase, invoked Article 100 EEC which required unanimity in the Council. At the adoption stage in 1996 things fell into place and the legal bases did not occasion much debate.

The issue remained controversial nonetheless. In the legal doctrine many have argued that the PWD and, as the case may be, national implementation measures are incompatible with the Treaty, and there has been considerable discussion on the issue among scholars. But after all, the issue must now be considered safely settled. Since the expiry of the implementation deadline for the Directive the European Court of Justice consistently has referred to and applied the Directive’s provisions without raising doubts of it being legitimate under the Treaty, prettifying somewhat in the context when stating that the Court’s prior case law on a host state being permitted to require a service provider “to pay its workers the minimum remuneration laid down by the national rules of that State” in order to secure the objective of “protection of posted workers”, is “enshrined in Article 3(1)(c) of Directive 96/71”.

The link between legal base and objectives is evident and one key factor to comprehend the differing opinions on the former. Being enacted under Articles 57(2) and 66 EEC the Directive should, as its primary objective, serve to facilitate the freedom to provide services and the economic demands of the single market, improving the position of home state employers wishing to provide cross-border services. The situation is however rather more complex. In its first official proposal the Commission set out the aims of the Directive as four:

- To remove uncertainty and attain greater legal certainty so as better to achieve realization of the principles of free movement, in particular of services;
- to coordinate, but not to harmonize, Member States’ laws by establishing a list of mandatory standards to applicable to posted workers;
- to abolish any kind of practice that may be detrimental to fair competition and the realization of economic freedom rights, however accepting the ECJs construction of Article 60 EEC permitting the application towards a foreign service provider of the major part of host state labour law; and

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89 The key argument being that the Directive must be seen as primarily a worker protection measure.


91 Case C-341/02, [2005] ECR I-2733, paras. 24-25.
- to protect workers who are affected by practices utilizing external work and employment opportunities in a internationalizing context.  

The second of those items appeared however more as a means than an end, which left three key elements, legal certainty, fair competition, and ensuring respect for the rights of workers.  

These aims were expressed accordingly in the draft Preamble, Recitals 5 and 6, which were retained throughout and are part of the Preamble to the PWD.  

The three key aims are easily contradictory. The wording of the Preamble, Recital 5, suggests a hierarchical relationship between, it is “promotion of transnational provision of services” which is the primary objective, fair competition and respect for the rights of workers are secondary, by being instrumental to the primary objective. That is also how it was conceived at the outset, e.g. in Denmark where it was noted early on that it was the free movement of services that was the primary objective of the proposed directive.  

And even if it hesitated in 1992 this was the conclusion also reached by the Council Legal Service in 1994. The later absence of real discussion by the majority of Member States on the legal bases of the Directive may suggest that there was some form of tacit acceptance of this conception of its objectives. On the other hand, there was no further clarification and no firm indications of how the inherent contradiction between the market integration rules of the EC and worker protection and Member States labour laws possibly should be resolved. The lack of transparency and a sound basis for construction has left the issue contentious since the adoption of the Directive.

One should make a distinction here between manifest and latent objectives and functions. Even if they are not expressly stated the Directive may well be considered to encompass several inherent, or latent, rationales. If fair competition is an express objective, a latent one may be to protect host state labour law regimes or institutions. Guaranteeing respect for workers rights is non-committal. The purpose might be to protect posted workers by improving their employment conditions. But if so, this conversely implies to impair the position of their employer in cross-border competition. Another rationale might be to protect host state workers from competition from workers from home states where labour costs and worker protection

92 See COM(91) 230 final, Explanatory Memorandum, 13-14.
93 Ibid., 2.
94 The wording of Recital 5 was changed with the 1993 proposal, COM(93) 225 final, from “measures ensuring respect” to “measures guaranteeing respect”, otherwise the two recitals are identical with the first proposal. So are Recitals 1, 2 and 3 PWD; Recital 4 was rewritten and expanded with the 1993 proposal
95 See Arbejdsmarkedsministeriet 1991, 2.
96 Cf. above, at note 88.
97 Drawing on, but not adhering to Merton 1968.
is lower. Fraught with the uncertainty that pervades the Directive on the whole the apposite conclusion must be that probably all of these different rationales are comprised in the instrument.

The functions of the Directive – how it actually impacts on economic and social conditions – may be consonant with one or more of the rationales or differ from them. Given that the purposes concerned are internally contradictory all cannot be served at the same time or in equal measure. And opinions differ on the likely functions of the Directive. Some have asserted that the PWD creates legal certainty and transparency and will facilitate the provision of cross-border services.98 Others have argued that the Directive amounts to an encroachment upon the freedom to provide services in that it effectively restricts this freedom,99 or that home state workers stand to lose out in competition the more they are brought up to the level of terms and conditions in the host state.100 Further to this it has been asserted that the primary beneficiaries of the Directive are in fact the labour law regimes of the host countries, even identified as “the predominantly northern host states”.101 Considering later ECJ case law one must say there is room for a second opinion on the last point.

As for the objectives of the Directive the Court has effectively settled the score, primarily by the relevant trio of the “Laval Quartet”.102 It has definitively determined that the market integration objective is the prevailing purpose, in part explicitly as when stating in Rüffert that the purpose of the Directive is “in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty” (para. 36), in part by placing Article 49 of the Treaty at the forefront,103 and moreover by circumscribing the scope for host states to lay down provisions pursuant to Article 3 PWD, adding the rider that a different interpretation

99 This was pointed to e.g., and already, in the Danish Ministry of Labour’s Memo 1991 (Arbejdsministeriet 1991, 4), where it was noted that the main problem for the Council would be whether the EC should restrict the freedom to provide services by introducing rules on minimum terms and conditions and controlling their observation. See also, less directly, Davies 1997, 573, Barnard and Deakin 1997, 151, Hepple 2005, 169, Syrpis 2007, 124, Hanau 1996, 1373 w. note 17, Schlachter 2002, 1243 (implicitly), Reich 2007, 395-96.
100 E.g. Davies 1997, 573
101 See Davies 1997, 573, and concurring e.g. Hepple 2005, 169, Syrpis 2007, 124; and for the quote Barnard and Deakin 1997, 151.
102 Excluding Viking Line which concerned freedom of establishment and Article 43 EC.
103 E.g. Laval paras. 58-61, 74, 80, 93, Rüffert para. 36, with the proviso that the provisions of the Directive must be “interpreted in the light of Article 49 EC”, and Commission v Luxembourg paras. 33, 41, 43 and 49.
“would amount to depriving the directive of its effectiveness”.\textsuperscript{104} It is some sort of an irony, one may say, that not long before these decisions the Commission had stated that the Directive has a dual objective, “to reconcile companies’ rights to provide transnational services under Article 49 EC, on the one hand, and the rights of workers temporarily posted abroad to provide them, on the other”, emphasizing that this includes “a clear social objective”.\textsuperscript{105} It is the Court’s case law that defines the current state of the law, certainly, and it goes to illustrate the observation in the Introduction, that “the economic has taken precedence over the social”.\textsuperscript{106}

6 The scope of the Directive. Transnationality

6.1 Introduction. Scope of activity
Article 1- brief observations. Noting the Commission’s circumvention risk argument on now Article 1.3.b.

Observations on the shipping exemption (Article 1.2) – one of i.a. Denmark’s special concerns.

6.2 The “geographical scope” – what is cross-border?
It is well established that the free movement provisions of the EC Treaty do not come into play in regard to “activities whose relevant elements are confined within a single Member State”.\textsuperscript{107} Their application presupposes a cross-border element.\textsuperscript{108} That is true for Article 49 and for Article 43 on the freedom of establishment, and it applies similarly for the Posted Workers Directive, as indicated also by its Article 2. Recent ECJ decisions however give rise to serious issues as to the “geographical” reach of these provisions. The issue was brought to the fore in \textit{Laval} but is no less conspicuous in \textit{Viking Line}.

Starting with \textit{Viking Line}, the point in debate is easily illustrated. The possible industrial action that took centre stage in the case was not the possible support (or solidarity) actions of the ITF, but the collective action which the Finnish trade union had warned might be undertaken. If it were to materialize, the strike action in question

\textsuperscript{104} \textit{Laval} para. 80, \textit{Rüffert} para. 33.
\textsuperscript{105} COM(2006) 159 final, 2.
\textsuperscript{106} See in 1, above, at fn. 17.
\textsuperscript{108} The points addressed below are discussed more extensively by Orlandini 2008.
would have been directed against the Finnish employer of the trade union’s members. A cross-border element thus did not pertain to the parties or their location; it was represented only by the intended re-flagging of the vessel Rosella, that is to say the relocation of a workplace from Finland to Estonia. The Court held this to be clearly sufficient to come within the reach of Article 43.109

Considering also its decision on Laval it is obviously likely to presume that Court’s approach in Viking Line is designed to apply also outside of the specific, maritime, setting. If so, the borderline between transfers of undertakings and non-transfers loses in importance in this particular context. It will nonetheless remain important in that where the Transfers Directive comes into play, the protection of individual terms and conditions afforded to employees concerned certainly must be expected to impact on the proportionality assessment of collective action in regard to the norm imposed by the Court on whether “jobs or conditions of employment … are in fact jeopardised or under serious threat”.110 In a number of national contexts, this extends and accentuates the gap between domestic and transnational situations as regards possible recourse to collective action.

If the situation is transplanted across to land-based activity; relocation can well have the form of a transfer of undertaking. In the case of a transfer of undertaking, the employees concerned are provided a measure of protection by national laws in pursuance of the EC Directive on transfers of undertakings.111 Whether in the individual case a transaction qualifies as a transfer within the meaning of the Directive may however be a difficult question. Moreover, as the Directive does not safeguard the continued existence or binding effect of collective agreements applying at the transferor’s to the transferee, the employees concerned and their trades union may have a strong interest in securing a like position. This is not eliminated if a transfer, as will often be the case, involves a relocation of the undertaking in which the employees are not, or do not choose to be, relocated. Their primary interest then as a rule is to prevent relocation and the loss of jobs involved. This applies equally to relocations nationally or cross-border.

The cross-border issue emerges also, but perhaps not so sharply, from Laval. The party to the main proceedings was a Latvian company, Laval un Partneri Ltd (Laval). It was however not Laval that had a contract for building work in Sweden. The contract was between the municipality of Vaxholm and L&P Baltic Bygg AB (Baltic). Baltic was a subsidiary of Laval but formally a Swedish registered joint stock company. The works was undertaken by Baltic, employing workers that had in May 2004 been posted to Sweden from Latvia by Laval. At the outset, then, the situation appears to be one where the building service provider, Baltic, was established in

109 See Viking Line paras. 67-74 in particular.
110 Ibid., para. 84.
111 Directive 2001/23/EC.
Sweden and not in a Member State other than that in which the service concerned was being supplied. This picture was blurred, however, by the fact that demands for a collective agreement were made to both Baltic and Laval, apparently jointly. The ECJ rejected the Swedish trades union’s arguments that the case should be dismissed on the grounds that it did not involve a *bona fide* transnational situation.112

It is not eminently clear just what kind of a situation the Court reckoned to be dealing with. To start with, Laval could hardly be considered as providing services to the municipality of Vaxholm. From this, at least three different avenues of analysis seem possible.113

- Laval and Baltic might be considered as one and the same undertaking by way of ‘identification’ of companies within the same corporate group and ‘piercing the corporate veil’. Considering the Court’s rejection of the defendant unions’ arguments to identify the two, this seems the least plausible construction of the decision.
- It may be that it was sufficient to amount to a cross-border dimension merely that Laval, as Baltic’s parent company, was involved in the collective bargaining and subsequent proceedings, or that Laval itself was faced with the prospect of encountering Swedish industrial relations actors and practices.
- Or it is possible that the Court relied on the special provision on the Directive’s scope in Article 1(3)(b). By this provision it is a “transnational measure” if an undertaking posts workers “to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting”. This point was broached by the Advocate General, maybe as one expression of his later observation that the Directive’s provisions are one form of emanation from the general principles of Article 49 EC.

The Court was only vaguely in touch with the third alternative when rejecting to dismiss the case but did not elaborate on either of the three.114 Which approach to settle on is however of considerable importance. The third one suggests a narrow construction of what is a relevant transnational measure or situation in the *Laval* context. The others imply a quite wide reaching construction of Article 49, to cover many situations that can not immediately be seen to be caught by the wording of the provision.

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112 *See Laval* paras. 42-50.
The Court certainly does not shy away from expansive interpretation of what is transnational under Article 49 when it sees fit. This is demonstrated in case law, e.g. by the Carpenter decision.\footnote{Case C-60/00, [2002] ECR I-6279.} In view of the consequences to labour law regimes and industrial relations in Member States ensuing from Article 49 EC and the PWD in their current construction in the “Laval quartet” of ECJ case law these issues decidedly merit further attention and discussion.

7 Mandatory and permitted standards

7.1 Introduction

Was the PWD intended as a “minimum directive”? A widespread opinion in the affirmative. E.g.: “In combination [Article 3(1), (7) and (10)] gave rise to the understanding of the PWD as a minimum, allowing Member States to go beyond the minimum standards listed in Art. 3.1.” (Dølvik and Visser 2009, 8.) (Also Biagi 1996, 1997.)

But then, what means “minimum”? The notions presented are frequently opaque. One needs to make an analytical distinction between, on the one hand, which kinds of standards can be stipulated and, on the other hand, the levels at which standards can be set.

7.2 The “list”, and more. Article 3(1) and (10)

When asking which kinds of standards can be laid down the starting point obviously is the “list” in Article 3(1) PWD. A host state is obliged to make the majority of enumerated topics applicable. Two are however voluntary, the regulation of temporary work, and minimum wages. Both are topics that would not necessarily be the subject of regulation in a given country. [References]

The question is if that list is exhaustive. From the very start the answer was no, but the conceptions of the notion were occasionally fuzzy. (WG 1, D 6, WG 4 and 7) The prevailing view is a non-exhaustive list – but where then to draw the line? From open to restricted approach, the notion of “public policy” in Article 3(10). (Council 1994h etc.) What is intended by that? The exemplification in the draft Council Minutes declaration and Denmark’s objection. Conceivably an idea of a national law concept but in any case enclosed by the bounds ensuing from the Treaty (wording of Article 3(10)).
The European Court of Justice has now decisively settled the issue. 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 49. Pursuant to Article 3(1) it is only such rules on this “limited list of matters” that may be imposed (also) on a transnational service provider posting workers to the host state. 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 is more comprehensive. The list in Article 3(1) is *exhaustive*, save for the sole exception prescribed in Article 3(10) PWD. By its first indent para. 10 permits 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’. The crucial point then is the construction of the concept of “public policy”.

In *Laval* the Court did not comment on the thematic scope of this concept. This was not at issue in the case. The Court’s concern seems rather to have been to lay down another hallmark of the concept: Public policy provisions must be emanations of government (“national authorities”). Trade unions and employers’ associations “not being bodies governed by public law” hence cannot invoke Article 3(10) to attain public policy status for collective agreement rules or arrangements. Building on this in the *Luxembourg* case the Court goes on to underline the very significant view that “public policy” in the PWD is a Community 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”. From this the Court proceeded to render 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 on what in its labour law is so important that everyone should abide by it.

### 7.3 Levels – minimum or more?
Different from the thematic is at which level a standard may be fixed. Case law provides some guidance but this is still a not fully charted terrain.

Article 3(1) PWD is a starting point but not more. The “list” includes “minimum paid annual holidays”, “minimum rates of pay”, and “maximum work periods and minimum rest periods”. In *Laval* the Court, setting off from Article 3(1), stated that inasmuch as the Directive does not “harmonise the material content” of rules on

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116 To the above, see *Laval* paras. 60 and 73-84.

117 See *Commission v Luxembourg* paras 26-33. The “strict interpretation” clause is of course familiar from ECJ case law in general.
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 the level of protection thus at the outset. The words “freely defined” can not be taken at face value, however. Continuing, the Court underlined that the standards which may be imposed are such that are mandatory minimum rules (“mandatory rules for minimum protection”). The Court made very clear that pursuant to Article 3(1) it is solely domestically mandatory minimum standards on topics listed in items (a) to (g), and Article 3(10) as the case may be, which a cross-border posting employer can be required to comply with.118

A first follow-up question is whether Article 3(7) can lead to a different conclusion. Laying down a “principle of favourability” the provision states that the preceding paragraphs of Article 2 “shall not prevent application of terms and conditions of employment which are more favourable to workers”. Paragraph 7 has a long, but largely straightforward drafting history. Initially it was clear from the wording of the proposed provision that it referred only to more favourable terms and conditions in a worker’s home state (under the law applicable to the contract of employment) [D 2, Parliament, COM-93 – ctr WG 11 – Council 1994h). There is no indication that the change of wording was intended to fundamentally depart from this. On the contrary, the subsequent concern was how to compare and the Statement in the Council Minutes on pay comparison (231/96) must be understood to presuppose that it is more favourable terms in the State of “the law applicable” that should be the yardstick.

In Laval, the ECJ explicitly rejected to interpret Article 3(7) differently. Article 3(7) was held to apply to “more favourable” terms and conditions applicable in a worker’s home state. Hence it 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”.119 This stance was forcefully repeated in Rüffert.120 Notwithstanding the drafting history, considering various opinions on the issue, also inside the ECJ, the Court’s construction of Article 3(7) was not a matter of course.121 With the two decisions it is nonetheless no avoiding it as the matter now stands.

118 See to this also Laval paras. 60 and 73-84.
119 Cf. Laval paras. 79-81.
120 Cf. Rüffert paras. 32-34.
121 Both points may well be illustrated by the fact that in both cases the Advocates General argued that the PWD should be interpreted in such a way that it did not prevent imposing
In the larger picture, *minimum wage* is an essential element. The concept of ‘minimum rates of pay, …’ in Article 3(3)(c) was not in issue in *Laval*; nothing of the kind obtained in Sweden. It was brought up in *Rüffert* but broached only tangentially, however also involving Article 3(7), touching on the matter of the level of protection. The Niedersachsen statute at issue entailed a higher minimum wage than that already applying federally according to the collective agreement declared “universally applicable” in pursuance of the German Act on Posting of Workers (Arbeitnehmer-Entsendegesetz). When the Court turned to Article 3(7) in its reasoning that had precisely the effect of emphasizing that a higher rate of pay than the nationally applicable rate could not pass muster. Had it wished to do so, the Court could have passed by this particular point. It had already held that the means by which the state pay rate was fixed did not conform to the PWD’s requirements.122

The second follow-up question flows from this. It is significant to note that the Court did not expound on the permissible level of a minimum wage properly fixed. Neither *Rüffert* nor *Laval* is capable of supporting inferences to there being certain minimum levels that can not be exceeded. In this regard it still holds true that it is for the host Member State to decide the level of protection to be observed. This also implies that it is not out of the question to set a higher level than a nationally applicable mandatory minimum, e.g. for pay or holiday entitlements, if done by proper means. Such arrangements on a sector or industry basis, etc., are well known from several Member States and have figured in a number of ECJ cases.123 Better minimum standards than the national mandatory minimum have been accepted, i.a. explicitly in *Finalarte* concerning holiday entitlements.124 What is still a moot point is whether a higher standard than the national mandatory minimum requires some specific justification. The decision in *Finalarte* is capable of being construed to that improved protection in the host state. See the opinion of AG Mengozzi in *Laval* and the opinion of AG Bot in *Rüffert*.

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122 See *Rüffert* paras. 32-34 and 23-30.


124 See *Finalarte* paras. 55-58. In *Mazzoleni* and *Portugaia* acceptance of pay standards can be considered implicit, as no questions were raised on the actual pay levels, the issue being whether imposing the standards were “necessary [...] or proportionate to the objective pursued” (*Mazzoleni*, para. 30). In *Wolff & Müller* there is acceptance by implication, in that it was only the liability for wages, not the wage levels, that were seen as an issue.
effect if emphasis is placed on the Courts references to “public interest” and “necessary for the social protection”.\textsuperscript{125} A further query is if there is no mandatory minimum standard, nationally or in a sector, such as is the case for wages in several countries, whether a standard that is set will be subject to review on a broader basis of considerations of what is “necessary or proportionate” with a view to “the protection of the workers concerned”. The indications that can be gleaned from case law thus far are inconclusive.

\section{Means of regulation}

While (permitted) content is of the essence content alone is not decisive. Form – that is, the means of regulation – is prerequisite. Article 3(1) allows of setting relevant minimum standards by law, regulation or administrative provision, and/or by collective agreements\textsuperscript{126} “which have been declared universally applicable within the meaning of” Article 3(8). The latter provision sets out different alternatives and conditions.

First indent – the Danish proposal, second indent, Italian. All in place by end of 1994. The bone of contention was “erga omnes” applicability or something less. The insertion of the equal treatment as a safety net (?).

Even in view of the drafting history both alternatives are contentious and beg elaboration and clarification. In \textit{Laval} the Court however did not address these issues. The starting point in that regard was simple. Sweden has no system for declaring collective agreements “universally applicable”. The options remaining under Article 3(8) then are either to rely on collective agreements that are “generally applicable to all similar undertakings in the industry concerned” or to make use of agreements “which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout the national territory”. Article 3(8) stipulates that Member States may, “if they so decide, base themselves on” one or the other alternative. In Sweden there is no minimum wage legislation. Wage setting is essentially a (collective) bargaining matter. The Swedish Act on implementation of the PWD is based on this but contains no provision to that

\textsuperscript{125} In \textit{Finalarte} para. 58 the Court stated: “It is therefore for each Member State to determine the period of paid leave which is necessary in the public interest. Since the Federal Republic of Germany has determined that a period of paid leave equal to 30 days worked per year is necessary for the social protection of construction workers.”

\textsuperscript{126} “or arbitration awards”; nothing is lost, however, by leaving this out here.
effect or any explicit stipulation that existing collective agreements may be applicable. [References] This is precisely where the Court focussed its attention. Its reasoning is less than clear, however. The only, cursory, observation offered, three times over, is that Sweden “has not made use of the possibility provided for in the second subparagraph” of Article 3(8). The requirement implicit in the reasoning on this point would seem to be that if a State wishes to “so decide” pursuant to Article 3(8) some form of statutory means must be employed. Perhaps the underlying consideration is to facilitate “transparency” or something in that vein. Without any explication by the Court one is essentially left to speculate.127

The subsequent decision in Rüffert offers no assistance on this point. The instrument in question there was a state law. It was common ground that the collective agreement to which the law made reference was not a “generally applicable” agreement within the meaning of Article 3(8) PWD. What then remained was the law itself. This the Court held to not be a “law” within the meaning of Article 3(1) of the Directive, since it did not itself fix any minimum rates of pay.128

It needs to be noted that the measure at issue in Rüffert corresponded fully to the general requirement stipulated in ILO Convention No. 94. By this States are obliged to include clauses in public works contracts to ensure that workers enjoy terms and conditions not less favourable than those established by laws, collective agreements, etc., for ‘work of the same character in the trade or industry concerned in the district where the work is carried on’ (Article 2). Germany has not ratified ILO Convention No. 94; only ten Member States have. Nonetheless it is remarkable that the Court failed to even touch on the Convention. It was brought to the fore in submissions by a number of States intervening, and the Court’s reasoning entails a challenge, if not an outright conflict, for States being contracting parties to the Convention.129

The issue is topical. In the wake of Viking Line and Laval both Denmark and Sweden have taken steps to amend their legislation in order to attain conformity with the PWD and Community law as seen by the Court. In the absence of better guidance it may be difficult to hit the mark properly from a standpoint from which the ways of thinking one is up against are more or less alien.

127 To this, see Laval paras. 62-72.
128 See Rüffert paras. 21-30.
129 See for some further comments on this Evju 2009, 134-35.
9 The PWD, the Treaty, and industrial action

9.1 The PWD and strike law from a drafting history perspective
A key topic for Denmark in the drafting process. Raised in WG 1, the discussion on whether appropriate to include in some way, Commission’s stance and the “Flynn letters”, accept for a Recital 1994 II; Denmark’s understanding of the situation; the Statement proposal (re 3.10), Denmark’s objection, Biagi’s disappointment. Reflections on the ideas and consequences.

9.2 Possible industrial action – a restriction under the Treaty
The simple starting point the Community is not empowered under the EC Treaty to regulate “pay, the right of association, the right to strike or the right to impose lock-outs” (Article 137(5) EC). The unsolved issue was whether industrial action, lawful under domestic law, could still be caught by Community law. The Court resolutely answered this in the affirmative in Viking Line and Laval. The mutual point of departure and a common denominator to the two decisions is that industrial action – strike, etc. – is considered a “restriction” under Articles 43, 49 EC. The prospect of being met with industrial action in the host state as a means for a trade union to impose demands on an employer amounts to a restriction on the freedom of movement. The Court effectively held to suffice that a transnational service provider may be met by collective action as a means to be forced to sign a collective agreement or to be forced to enter into collective bargaining of “unspecified duration” with a host country trade union. It can hardly be said more emphatically that the state of domestic law as such is a restriction in Community law; to threaten to take action or to actually exercise the lawful recourse to collective action is not a prerequisite. The Court did pay 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 Community law, namely those pertaining to the safeguarding of the freedom of movement.

The issue of whether the right to take collective action is outside the reach of Community law or the free movement provisions was a precursor. In both cases it was argued on several grounds that this right is beyond that reach. This line of

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130 Or the “state of departure” as in Viking Line.
131 See paras. 96-100, 99 and 100 in particular.
132 Cf. Viking Line paras. 43 et seq., Laval paras. 90 et seq.
133 For a broad overview of positions and arguments in the litigation, in particular in Viking Line, see Bercusson 2007.
reasoning was concisely refuted by the Court. Article 137(5) EC appears to have been the Court’s main focal point. The outcome, then, was hardly surprising. The line of reasoning on which the Court relied is one of long standing, and the Court’s decision from September, 2007, in Del Cerro Alonso\textsuperscript{134} – a case on “pay” under the fixed term workers directive 1999/90/EC – can well be seen as an immediate foreboding of the approach that prevailed also in Viking Line and Laval. In Del Cerro Alonso the Court emphasized that as “Article 137(5) EC derogates from paragraphs 1 to 4 of that article, the matters reserved by that paragraph must be” interpreted strictly so as not to undermine paras. 1 to 4 of Article 137(5) or the aims pursued by Article 136 EC. The key element in this reasoning is that matters on which the Community legislator pursuant to Article 137(5) cannot regulate directly are not therefore beyond the reach of Community law. The basic principle 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 Community law.\textsuperscript{135}

9.3 The justification problem

Having been placed squarely within the reach of Community law the right to take industrial action is immediately subjected to the general principles of “justification” for restrictions on free movement to be permissible. This, in short, is a two-pronged issue. First, the question is for what purposes may collective action 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.

In both Viking Line and Laval the Court may appears to suggest a wide scope for potentially acceptable objectives. In Laval, protecting workers of the host state “against possible social dumping” is recognized as an “overriding reason of public interest”, and Community social policy objectives are pointed to in connection with this. Similarly, protection of posted workers is a legitimate objective.\textsuperscript{136} It must be noted, though, that the Court does not explain what it understands by “social dumping” which in itself is a divinely vague concept. In Laval it is near at hand, however, to perceive the concept as one referring to the mandatory minimum rules applicable in pursuance of the PWD, both as a floor and as a ceiling.\textsuperscript{137} Similarly, in Viking Line the Court recognizes protection of jobs and employment conditions

\textsuperscript{134} Case C-307/05, [2007] ECR I-7109.

\textsuperscript{135} See Del Cerro Alonso paras. 39-41, and in particular Viking Line paras. 39-47, and Laval paras. 86-88.

\textsuperscript{136} See Laval paras. 103-107.

\textsuperscript{137} See in particular para. 108 and the reference to paras. 81 and 83 therein.
against being adversely affected by a re-flagging of the ship concerned as a form of protection of workers, which again is a legitimate “overriding reason”. But this comes with the proviso that it is no longer tenable if the jobs or employment conditions are actually “not jeopardised or under serious threat”.138 That is quite a consequential reservation and one that immediately links in with the problem of proportionality.

The proportionality issue was dealt with differently in Viking Line and Laval, but the difference lies more in form than in substance. In Laval action had been commenced and the Court proceeded to take a definitive stand on the industrial action issue before it. The objectives pursued might have passed muster in principle but in the particular circumstances they did not. Several factors came into play. As Sweden had not availed itself of Article 3(8) PWD no relevant minimum wage regulation was applicable. Hence the State had no basis for requiring a transnational service provider to comply with any minimum standard on this point. The Court’s subsequent reasoning forcefully suggests that the same applies to host state trade unions. What the Court said 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”.139 In addition, the Court made a point of noting that provisions included in the trade union’s demand for a collective agreement in the Laval case however 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 ensuing, in the Court’s view, from the Directive. The way the Court worded its reasons this “excessiveness” of bargaining demands in itself is sufficient to render collective action disproportionate.140 That is indeed a far-reaching stance.

In Viking Line there was a possibly legitimate objective but the situation had not yet matured and collective action had not physically been commenced. The Court thus was confined to laying down guidelines for the referring court. It did so emphasizing not only the point of the objective to be pursued but also stressing that it must be assessed whether or not the collective action in question “goes beyond what is

138  See Viking Line para. 81.
139  See Laval paras. 69, 71, 100, 110.
140  See Laval para. 108 and paras. 81 and 83 referred to therein.
necessary to achieve the objective pursued”. 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.\textsuperscript{141} Coupled with the “serious threat” clause\textsuperscript{142} this too is a requirement of vast import.

9.4 A summary note

Summing this up, the Court in Viking Line and Laval, shored up by Rüffert and Luxembourg, has adopted and applied a quite restrictive attitude towards industrial action as such and a quite strict proportionality test. The effects of this case law are vastly significant, on several levels.

10 Consequences to collective bargaining the Scandinavian way

An immediate reflection is that the Court effectively employs a distinctly etatist approach. Although the PWD accepts standard setting not merely by statutory law the application of collective agreements presuppose some preceding state intervention. This is in itself alien to an “autonomous collective bargaining model”\textsuperscript{143} where reliance on State involvement in the bargaining process or for the extension of agreements has no place. The further consequences are far reaching.

A first point pertains to which terms and conditions that can be imposed on a cross-border service provider for the purpose of being applied to posted workers. The Court’s restrictive approach to the kinds of terms and conditions that can be encompassed and to the permissible levels narrows the field. This effectively disallows collective agreements “as is” in the Scandinavian tradition, which all predominantly encompass a quite wider scope of employment terms and conditions as well as procedural rules, etc. Moreover, the Court’s clearly negative attitude to workplace level bargaining for wage fixing collides head on with well established schemes in a large number of collective agreements in different sectors and for different categories of workers. Both points are amply illustrated in Laval. Trade unions are at the outset left with a situation where themes and levels must be narrowed down from the wider scope of prevailing collective agreements. The true effect is that it is impossible to seek to impose or to make applicable a normal collective agreement

\textsuperscript{141} Cf. Viking Line para. 87 (emphasis added).
\textsuperscript{142} See above at fn. 138.
\textsuperscript{143} Malmberg and Sigeman 2008.
which is “generally applicable to all similar undertakings …”, in the words of Article 3(8) PWD. A national agreement for a sector or industry unfailingly will contain provisions that are well beyond the scope permitted by the Court under the PWD and Article 49 of the Treaty. Hence it is of no avail to lay down in legislation that “generally applicable” collective agreements shall apply. One would have to construct a novel kind of agreement limited to themes and levels that are within the bounds of Article 3 PWD. Both doing so and achieving “general applicability” within the meaning of Article 3(8) is however quite inconceivable.

An additional twist is that as minimum rates of pay are not set by legislation in Denmark and Sweden the ‘transparency’ requirement the Court emphasized in Laval entails considerable uncertainty. The problems in issue here are evident in those countries but do not impact on the situation in Norway in the same way, as Norway employs a particular form of fixing minimum standards by public law regulations. Taking recourse to statutory regulation in some form is evidently the simpler alternative, if not the only one.

A second aspect of considerable proportions is that the state of law ensuing from the case law of the ECJ encroaches upon freedom of collective bargaining more broadly. By the decisions in issue the Court has constructed a specific “protection” for transnational service providers or cross-border establishment. No such protection obtains for domestic employers. This amounts to a striking case of reverse discrimination. Obviously, trade unions may take recourse to collective action in (interest) disputes with the employer side, and this right is not restricted to pursuing demands that do not go beyond statutory minima. On the contrary, one of the fundamental functions of collective bargaining and the concomitant right to collective action since the dawn of day has been to attain more favourable terms and conditions. The mere thought of this being not permissible is so alien it is absurd. This is of course not unique to the Scandinavian or Nordic countries. But from the Scandinavian perspective, anyway, the Court’s approach in Laval and Viking Line, in particular, lends itself to be criticized for a flawed understanding of the industrial relations context and reality.

144 Notwithstanding the somewhat enigmatic statement in Laval para. 68. It is difficult to appreciate how this could substantially alter the requirements and restrictions otherwise obtaining.

145 This is not to say that the statutory instrument concerned, Act of the 4 June 1993 No. 58 on Making Collective Agreements Generally Applicable, etc., or the practice of the Board issuing regulations in pursuance of the Act are devoid of potentially contentious issues. That must however be left aside here, but see e.g. Hjelmeng og Kolstad 2006, Kolstad 2008, and Evju 2006.
Thirdly, and no less significant is the introduction of a proportionality principle in collective action law. In the Scandinavian context this is essentially alien, in part anathema.\footnote{A certain reservation applies for Denmark, where a limited doctrine of “rimeligt fagligt formal” (reasonable professional purpose) obtains. The ECJ’s notions of proportionality are however considerably more far-reaching.} The common basic principle is that as long as strictly formal rules on notices, etc., are abided by collective action is lawful. Its lawfulness is not subject to review by any judicial body on substantive grounds of reasonableness, proportionality, or the like. This applies to primary action as well as to sympathy (secondary, solidarity) action. Thus the Court’s doctrine here too cuts into the sphere of autonomy of labour market parties and fundamentally changes the prevailing ground rules. Arguably, this has little or no importance within the sphere of the PWD, as any demand for terms and conditions not pre-defined by some form of statute law prescription is unlikely to pass the test of transparency and no “unspecified duration” of negotiations expressed in Laval. The doctrine still will have an impact, if only in part, i.e. vis-à-vis cross-border establishment.

In conclusion it can safely be said that the ECJ has rocked the boat by its four recent decisions. Some like it, some not. Regardless, the current case law entails a wide range of problems.\footnote{There is no lack of problems and contentious issues also with regard to public international law and human rights instruments, at Community level as well as at the level of Member States. \textit{See} e.g. Evju 2009, 134-138.} In simple terms, the opinion that “the further limitation of the right to strike by the ECJ could have disastrous implications for its survival as a meaningful entitlement of European workers”\footnote{Novitz 2006, 245.} rings painfully true, not as a hypothesis but as a description of the current situation.

11 Perspectives on law and governance

The PWD in context: Rush as shift in policy and a challenge. If taken literally it could entail extensive barriers to the free movement of services.

In a governance perspective – shifting the upper hand to Member States. Why then the Directive? Three thinkable links:

- Conflicting policy interests, within the Commission and among Member States.
- Social partners’ intervention (EFBWW in particular)
- A well established “floor” of private international law and national laws which made the “leap” (or the “value added”) to the Directive smaller than it might appear (Streeck 1998, 27).

In the adoption process: Strong involvement by several Member States with conflicting ideas and interests.

Was the PWD a “radical innovation” by the manner in which it seeks to reconcile European harmonization and diversity across Member States? (Duker and Dupre 1998)

Has the PWD been successful? (Streeck 1998, 28).

That depends on point of view and assessment of objectives.

Is utilizing relative cost advantages per se social dumping? What is involved in the concept of fair competition? Is the PWD protectionist rather than protective?

If a purpose was to protect and preserve national labour law/IR regimes there is an obvious mismatch at least as far as the Scandinavian countries are concerned.

The ECJ has been a consistent integrationist actor. When drafting and adopting the PWD, the potential for “negative integration” was clearly underestimated. (Negative integration in the meaning of establishing common rules that prohibit or restrict national policies or intervention – cf. e.g. Corbey 1995, 264, Streeck 1999, 49.)

With the approach the Court has employed, more generally but specifically in the “Laval Quartet” it has appropriated broad powers to impose “negative integration”.

The bottom line may be:

The market had the upper hand, it was regained and has been strengthened.

But also:

The prevailing state of Community law as per the Court poses considerable challenges for many domestic legal orders as well as for Community law itself. Member States are faced with the prospect of maybe having to enact legislative change in order to fall into line with state of Community law as decreed by the ECJ. 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. This is obviously an issue of some importance. The EU cannot credibly insist on “Decent Work” standards in external relations if core standards are disallowed internally.
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