The evolving regulation: dynamics and consequences

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Introductory Comments

This draft consists in part of text written by Tonia Novitz and in part of text stemming from Stein Evju (me). Apart from a general discussion on how to compose the chapter we have not discussed the structure or content of the text in detail. Moreover, in piecing together the different parts of the text I have not, for very practical reasons, had the benefit of discussing the composition with Tonia.

The text as it is presented here is strictly a draft. For one, it is incomplete. In particular, I have not been able yet to write up the sections on national implementations of the PWD (3.7) or on the Services Directive (3.8). More needs to be done on the subsection on national responses to the Laval Quartet (3.93). Further, in order to better address some of the issues having arisen after the adoption of the PWD I envisage a section devoted to just those topics (3.65).

We would solicit your views on this and any other point; that is the essential role of the Workshop. One point in particular is the present section 3.10 on the Temporary Work Directive and its relation to the envisaged Chapter 9, for which a draft is presented by Monika Schlachter in WP 25 for this Workshop. Otherwise, some specific issues or questions are indicated, in red/green print (or shaded if printed in black and white).

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3 The evolving regulation: dynamics and consequences

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

What we are able to observe is that each stage of enlargement of the European project, and accompanied perceptions regarding differentials in labour costs, has spurred on legislative action (such as the adoption of a Posted Workers Directive\(^1\) and the Services Directive\(^2\)) and judicial intervention (regarding the scope of free movement of services). The political position taken by particular Member States in response to proposed legislation and court proceedings would seem to reflect their appreciation of whether they are in a position to benefit from competition on the basis of low labour costs, such that we see a State like the UK shift its position as it is transformed from a net exporter to a net importer of cheaper labour, while Germany has been more rigorous in maintaining its position and developing its mechanisms for self-protection. Similarly, we detect differences in the responses of Member States to EU instruments and judgments of (what is now) the Court of Justice of the European Union (CJEU), such that these are implemented in multifarious ways. We do not consider that such variety is necessarily a matter for concern, but we consider that such variety reflects the ways in which different EU States subscribe to different varieties of capitalism.\(^3\) This is not to say that differences reflect the desires of a given government in power for a set term, but rather the relative influence of social actors, such as employers and trade unions, and the domestic institutional framework within which they operate. What is clear is that both at domestic level and on the European stage, there is active contestation over the content of EU and domestic regulation of transnational labour, the mode of operation of any such regulation, and what would be their acceptable effects. Here, we endeavour in a modest way to track these processes of implicit and explicit conflict.

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Moreover, we detect evidence of conflict not just within and between EU Member States, but also competition for control between EU institutions. At a simple level, this could be seen as arising between the Council, which adopts EU legislation, and the Court, which applies such legislation and determines its validity in the light of the Treaties.\textsuperscript{4} However, the scope for conflict at EU level goes beyond this. Different parts of the Commission would seem to have proposed and supported different measures, such that DG Employment and Social Affairs has taken a much more socially oriented perspective, protective of the interests of labour, to that of the DG for Internal Market and Services, which tends to reflect the perceived business needs of EU transnational companies.\textsuperscript{5} There was also an interesting tussle between the Commission and Council on the one hand and the European Parliament on the other as regards the content of the Services Directive, including the treatment of posted workers and scope for protection of labour standards permitted thereunder.

This suggests that the content of the so-called ‘European social model’ remains unsettled, being shaped and reshaped.\textsuperscript{6} Efforts to develop and expand the Single Market also engendered the idea of a ‘social dimension’, materializing in an Action Programme\textsuperscript{7} and the Community Social Charter,\textsuperscript{8} to foster new dynamism and development in the social policy field.\textsuperscript{9} 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’.\textsuperscript{10} In other words, we are examining the evolution of regulation regarding transnational labour at an important juncture in the self-understanding of the aims and objectives of the EU.

\[TN: I would envisage further elaborating on this introduction to pick up on some other ideas that are bound to emerge as the process of writing continues. For example, we possibly need to think about where the notion of ‘fundamental market freedoms/human rights’ fits within this frame of reference. My sense is that it has currency in so far as there is appeal to such notions by particular interest groups (and institutions which favour those interests) but is this too much of a functionalist approach for this project? In any case, we can pick up on this later and think about how we want to change or elaborate upon my attempt at an introduction here.\]

\textsuperscript{4} Do we need to list or will this be done earlier in the book?
\textsuperscript{5} Insert evidence – or cross-ref. To that below..
\textsuperscript{6} ESM literature can be referenced here – or cross-reference to earlier treatment?
\textsuperscript{7} COM(89) 568 final.
\textsuperscript{8} Community Charter of the Fundamental Social Rights of Workers, 1989.
\textsuperscript{10} E.g. Vogel-Polsky 1990, 75.
3.2 Free movement of workers and early EEC legislation

[SE A comment to be inserted on ‘external’ regimes requiring third country workers to have a work permit, and the ‘internal’ free movement – point being that even if freedom, legal issues persist.]

Cross-border movement of workers, whether in their individual capacity or in the context of provision of services, entails conflict of laws issues. If a worker departs from country A to perform work in country B the question arises, simply put, whether that worker shall be covered by the law of its ‘home country’ A, or if the law of the place of work, B, shall apply, or if both legal regimes may apply in combination. This is an issue that surfaced in the EU context long before the first draft for a Posting of Workers Directive was tabled in 1991, yet it is a part of the legislative history of that Directive. The private international law dimension stands as the first line of development ultimately leading up to the Posting of Workers Directive and the regulations that were drafted in that early phase emerge, as we shall see, as precursors to essential elements of Article 3 PWD.

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

Concerning cross-border movement of workers, early EEC secondary legislation saw two different approaches to the choice of law problem being employed. The first legislative measure, Regulation 1612/68, was directed at the free movement of

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workers, focused on the right of nationals of a Member State to take up an activity as an employed person within the territory of another Member State. The Regulation proscribed limitations on recruitment by national employers of workers from another Member State (Articles 3 – 6) and, pertinent to the private international law dimension, laid down a requirement of equal treatment with national workers in respect of ‘any conditions of employment and work, in particular as regards remuneration, dismissal’, reinstatement or re-employment, and ‘social and tax advantages’. This applied in respect of legislation as well as any collective agreement or individual employment contract (Article 7; also Article 7 of the 2011 Regulation). The non-discrimination principle in Regulation 1612/68, in keeping with Article 48(2) EEC (Article 45(2) TFEU) on freedom of movement of workers entails in principle the application from ‘day one’ of host state labour law to persons utilizing the right to free movement of workers. A worker in cross-border employment is entitled to benefit from the law of the Member State where he or she performs work, from the very first day. On its wording, the fourth recital of the Preamble, Regulation 1612/68 could in principle be held to apply also to what is now understood as posted workers. It was only with Rush that the legal basis in their regard was vested in the rules on freedom to provide services (Article 59 EEC; Article 56 TFEU).

This context is even more evident as regards the early secondary legislation on social security, in which a different approach in part was adopted to the issue of applicable law. Regulation 1408/7113 was based on the Treaty provisions on free movement of workers (Article 51 EEC; Article 48 TFEU), its theme in general terms being co-ordination of national social security legislations to ‘secure mobility of labour under improved conditions’ (fourth and ninth recitals of the Preamble). Under this Regulation, also, the principle of equal treatment and a ‘day one’ principle applies, the starting point and general rule being that ‘persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State’ (Article 3(1), cf. Article 13). What sets the 1971 Regulation apart from its 1968 counterpart, however, is that a specific exception is made for ‘posted workers’. They shall continue to be governed by their home state law as regards social security if a

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posting lasts (or is anticipated to last) more than twelve months (Article 14(1)(a)(i)), now twenty-four months pursuant to the 2004 superseding Regulation (Article 12(1)). Thus Regulation 1408/71 was not merely an expression of a different stance on the scope of application of host state law, it was at the same time a clear manifestation of assimilating cross-border posting of workers the domain of Treaty rules on free movement of workers.

The 1968 and 1971 regulations, adopted at an early stage, were key instruments in the implementation of free movement for workers. This body of law was forcefully followed up by the then European Court of Justice (ECJ, now CJEU) in its decisions such as Commission v France, in Walrave, both 1974, and Boucherau, 1977, and a short decade later in Prodest. Little headway had however been made on the right to establishment and the freedom to provide services. Applying Article 48 EEC the decision in Commission v France emphasised the requirement of non-discrimination of workers making use of the right to free movement, and thereby readily lent itself to be construed to correspondingly lay down as a principle that host state workers shall not risk having to compete with cheap foreign labour.

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

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

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14 Article 14(1)(a)(i) of Regulation 1408/71 reads, ‘A worker employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months and that he is not sent to replace another worker who has completed his term of posting’.

15 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.


17 See Laslett 1990, 1.

18 This point is forcefully made by Hellsten 2007, 8.
in the labour market it gains access to,\(^{19}\) rather contrary to norm relied on by the ECJ in *Commission v France*.

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

Our starting point, when examining EU regulation of transnational movement of labour, is therefore the expansion of what was then the EEC in 1986 to include Portugal and Spain. This expansion presented the prospect of movement of cheaper labour from these two Iberian countries to the pre-existing Member States. Here, we look at the concerns which underlay the determination regarding ‘work permits’ by the ECJ in the *Rush Portuguesa* case,\(^{20}\) and the subsequent positions taken by Member States in response to *Rush*. The *Rush* decision was proclaimed in a formative phase of policy relating to posted workers and came to serve as a catalyst, in part also a model, in the subsequent wider process.\(^{21}\) As we shall see, the Member States who are the subject of this study viewed the Court’s judgment in that case as granting permission to extend national labour standards (including norms established through collective bargaining) to workers posted from one Member State to another. This shaped their bargaining position in respect of the subsequent Posted Workers Directive (PWD), but also, very significantly, the preparedness of certain States to join the EU and to be bound by that Directive under the mechanism of the EEA. However, our interest in this section lies primarily with anticipatory measures taken by certain Member States to regulate wages paid to posted workers.

We approach this by looking first at the private international law background and the Rush decision, before turning to the adoption process of the Posting of Workers Directive. In 1996, at the date that the PWD was adopted, there were 15 member states, including (in terms of countries who come within the scope of the FORMULA study) Denmark, Finland, Germany, the Netherlands, Sweden and the UK. In the analysis presented here, we are heavily dependent on the information which stems from the case studies presented by members of the FORMULA project, analysing the responses of each country to *Rush*. We have also take note of the similarly significant actions and

\(^{19}\) *See* Däubler 1997, 615 with fn. 37.

\(^{20}\) Case C-113/89 [1990] ECR 1417.

interventions by Norway, which as a member of the European Free Trade Association (EFTA) signed the European Economic Area (EEA) agreement in 1994. It was determined that the EEA would include the PWD in November 1998, but Norway had already taken national measures to address issues of posting and had entered into notable dialogue with the Commission. The only country represented in the FORMULA project not so engaged was Poland, the Eastern European representative of our study. Instead, this country has had to make accommodations subsequent to joining the EU in 2004 and is not discussed in the context of this part of our chapter.

3.3 The conflict of laws dimension – towards restriction of choice and national freedom

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

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22 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.

least for work assignments that are in some way temporary or of a limited duration.\textsuperscript{24} In this context bilateralism and a broad notion of \textit{ordre public} are two sides of a coin.

These problems were recognized at the outset. On the adoption of Regulation 1612/68 the Council instructed the Commission ‘to examine thoroughly the problems raised by conflict of law rules with regard to labour law, in order to find the most suitable solutions as soon as possible’.\textsuperscript{25} 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.\textsuperscript{26} In the light of opinions of the ECOSOC later the same year\textsuperscript{27} and of the European Parliament\textsuperscript{28} an amended proposal was submitted to the Council by the Commission in 1976.\textsuperscript{29}

At the same time, work was also on-going since 1969 with an instrument on the applicable law to contractual and non-contractual obligations,\textsuperscript{30} which ultimately resulted in the 1980 Rome Convention. A first draft Convention was tabled already in 1972.\textsuperscript{31}

The two efforts were obviously not coordinated and the rules proposed differed quite significantly.\textsuperscript{32}

The Convention, in draft and as adopted, essentially embodies the principle of party autonomy and, also, a principle of legal certainty. Further, the rules, applicable to contractual obligations, in principle are neutral to the sort of social and socio-economic interests with which substantive law is concerned, labour law in particular, inasmuch as the rules of the Convention are based on the assumption that national legal systems are interchangeable. Article 3(1) of the Convention stipulated free choice of law by contracting parties, also parties to employment contracts, as a general rule. This point of

\textsuperscript{24} 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.

\textsuperscript{25} COM(76) 653 final, Explanatory Memorandum, 3.

\textsuperscript{26} 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.

\textsuperscript{27} Avis de Comité économique et social sur une proposition de règlement du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l’intérieur de la Communauté, 29 et 30 novembre 1972. OJ C 142/5, 31.12.72.

\textsuperscript{28} OJ C 4, 14.2.73, 14..

\textsuperscript{29} COM(75) 653 final. Amended proposal for a Regulation of the Council on the provisions on conflict of laws on employment relationships within the Community, 28 April 1976.

\textsuperscript{30} While the initiative was taken in 1967 the actual work commenced in 1969; see Giuliano and Lagarde 1980, 1.

\textsuperscript{31} EEC Commission, XIV/398/72 –E.

\textsuperscript{32} For some pertinent observations on this, see Hepple 1978.
departure was restricted, however, in different ways based on the foundational notion in labour law of the worker being the weaker party.\textsuperscript{33} First, a choice of applicable law could not deprive an employee of protection flowing from mandatory rules of law that would be applicable to the employment contract in the absence of choice (Article 6(1)). In other words, notwithstanding the freedom of choice at the outset the Convention’s rule was that parties are free to chose the law applicable to their employment contract only insofar as the chosen law were more favourable to the employee than the mandatory standards of the law which would otherwise apply. Within the meaning of Article 6(1), mandatory rules that cannot be opted out of were not only provisions relating to the contract of employment itself, but also provisions such as those, e.g., concerning health and safety which are regarded in certain Member States as being provisions of public law.\textsuperscript{34} The Giuliano/Lagarde-report\textsuperscript{35} stated that

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

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

Second, in the absence of choice the contract of employment is governed as follow by the law of the country in which the employee habitually carries out his work in performance of his contract (Article 6(2)(a)). This would apply even if the worker is temporarily employed in another country, that is to say, also when he or she is on a temporary assignment abroad. Further, if the employee does not habitually carry out his or her work in any one country, the employment should was to be governed by the law of the country in which the place of business through which he was engaged is situated, in simple terms, the location of the employer’s business (Article 6(2)(b)).\textsuperscript{36} Once again simplified and in contemporary terms, in the absence of choice a ‘country of origin’ principle would apply also as far as posted workers are concerned.


\textsuperscript{34} Cf. ibid., 25.

\textsuperscript{35} Ibid., 24.

\textsuperscript{36} Both alternatives are subject to a reservation, ‘unless it appears from the circumstances as a whole that the contract of employment is more closely connected with another country, in which case the law of that other country applies’ Article 6(2) final paragraph.
Although the Rome Convention provided for fairly uniform law of conflict rules in the Member States, until 2004 the Convention could only be interpreted exclusively by national courts; the ECJ did not have any jurisdiction with respect to the Rome Convention. Therefore, in a number of Member States national private international law traditions still give their flavour to the application of the Convention, and now the Rome I Regulation in the Member States. This has been facilitated by the fact that the Convention does not provide a clear definition of the notion of ‘mandatory rule’, leaving a ‘margin of appreciation’ to states with regard to what should be treated as a mandatory rule and what not, an area where traditions differ considerably. The same may be true in states that are not a party to the Rome Convention, such as is the case for Norway, but the source material is too limited to permit conclusions to be drawn.

The now outlined provisions of the Rome Convention are replicated in the superseding Rome I Regulation, cf. Articles 3 and 8.

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

37 Not fully, since some Member States made a reservation to art. 7(1), implying that Member States may give different effect to internationally mandatory rules not belonging to the law of the adjudicating body (lex fori).

38 The first judgment of the ECJ on a (non-labour law) Rome Convention case was in 2009, Case C-133/08 Intercontainer Interfrigo [2009] ECR I-9687.

39 See extensively van Hoek 2000.

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

It is a paradox of sorts that the draft regulation seemingly would provide less protection than would the draft Convention. Whereas the latter would exclude free choice in respect of all mandatory rules for the protection of the employee, the regulation would restrict the application of mandatory rules applicable at the place of work to the topics specified in Article 8(1). On the other hand, Article 8(3) of the draft regulation stipulated that insofar as home state law ‘offer[s] better protection for the worker’ home state law would remain in force. That provision can readily be seen as a precursor to the much debated Article 3(7) of the Posting of Workers Directive.

The proposals for a regulation did not materialize into actual secondary legislation. Both proposals were regarded critically, in some Member States, at least, and also within the Council. With time political constellations and priorities changed and when in 1980 the Rome Convention was adopted, the still pending regulation proposal was ultimately withdrawn in the fall of 1981. This early initiative nonetheless merits a certain attention. Both a link to and a distinction to the later Posting of Workers Directive are evident. The distinction lies in the Treaty base and thematic reference. Deriving from Articles 48, 49 EEC (Articles 45, 46 TFEU) and Regulation 1612/68 the proposed regulation was aimed at the free movement of workers, not at the freedom to provide services. The link has been pointed to above. Further, a line was drawn to ordre public. The initial proposal of 1972 opened that door wide; it would permit states to impose as mandatory such rules in the domestic legal order as were founded on reasons of ‘ordre public, de securité publique ou de santé publique’, however within the bounds of the EEC Treaty Articles 48 and 49. This potentially far-reaching empowerment was

41 Cf. Hepple 1978, 43.
43 Commission 1981 [item 8].
44 1972 proposal Article 4(2).
however discarded in the amended proposal of 1976. The underlying idea was that the proposed Article 8(1) reflected the current state of law as regards the range of mandatory rules in conflict of laws settings in Member States. The proposed list in Article 8(1) therefore was a ‘comprehensive list of legal provisions’ that would take precedence in the host state over home state or other chosen law.\[45\]

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

### 3.4 Rush Portuguesa

The ECJ decision in *Rush*,\[46\] preceding the actual PWD process, however adds to this picture. The decision was proclaimed in a formative phase and came to serve as a catalyst, in part also a model, in the subsequent process. It is the catalyst function that belongs here.

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

The Court found, firstly, that Portuguese workers ‘posted’ for a short time to perform services in France should not be subject to ordinary work permit requirements, because such a worker returned after the completion of the service and did not at any time gain access to the labour market of the host state. The employer pursuant to Articles 59 and 60 EEC as a service provider was entitled to move freely on the territory of another Member State ‘with all his staff’. However, throwing the French authorities (and what

\[45\] COM(75) 653 final, Explanatory Memorandum, 11; our italics.

were then the ten ‘old’ Member States) a crumb of comfort, 47 the Court also made a second statement, by way of an obiter dictum, namely that Member States have some discretion in terms of imposition of labour standards on posted workers:

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

Expanding on the precursor in Seco (para. 14) the Court here widened the scope for national regulation from ‘minimum wages’ to the entire spectrum of labour law, seemingly granting a host state a wide licence to apply its national law to employees of cross-border service providers. The Court offered no explanation or reasoning to underpin this sweeping statement. 48 By answering a question that was not requisite to the decision it has been argued that the Court committed ’a basic error of the craft of judicial decision-making’. 49 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. 50

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. He considered that otherwise employees of the service provider generally fall within the ambit of the freedom of movement of workers. The Court however did not engage this line of argument or issues of distinction at all.

Thereby the Court effectively established a new legal basis for the movement of workers, while at the same time encroaching on another. The Treaty provisions, primarily Articles 48 and 49 EEC (Articles 45 and 46 TFEU), aim to promote the free movement of workers by requiring that migrant workers have full access to host state protection. Relocating moving workers instead to the domain of free movement of

48 See e.g. Davies 1995, 74, Barnard 2008b, 147.
49 Davies 2002, 300.
services deprives them of this stronger protection and entails potential deregulatory impact on national regimes of labour law.

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 45, 46 TFEU and conjoint secondary law. However, it is the Court’s position in *Rush* that has prevailed in subsequent case law. Indeed, the Court’s line of reasoning on the free movement issue laid the ground for a complex and uncertain situation assessing features of host state labour laws, their sustainability under Community law, and was obviously threatening to national labour law regimes. This could be countered by adapting, if need be, domestic legislation and other regulatory measures.

Yet, the reaction by the Member States to *Rush* was far from uniform. In particular, it is possible to detect a broad discrepancy between what we might term ‘labour exporter’ and ‘labour importer’ states. At the same time, there was some palpable difference between the ways in which different labour importing Member States chose to seek to regulate the terms of posted work, Germany possibly being the most interventionist, as opposed to the Netherlands which arguably had comparable concerns. Finally, we should note that *Rush* seemed to offer (false) reassurance in terms of accession (in 1995) for Finland and Sweden, and was also contributed to Denmark’s confidence in ratification of EU Treaty.

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

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

3.5 Labour market backgrounds, responses of Member States to Rush
As Monika Schlachter has observed, ‘[s]ince the ruling of the ECJ annulled the intended effects of restricting the applicability of some fundamental freedoms of the EC Treaty for workers from the new Member States, the ‘old Member States’ tried to regain control by implementing a directive about posting of workers.’ This was, however, very much the response of those States who were net labour importers. For example, the UK, as a net labour exporter took a different approach.

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

The net labour importers pursued a different approach. Following Rush, there would seem to be at least three ways in which to impose significant controls on conduct of foreign service providers. The first is by ensuring that the wages of posted of workers do not undercut those operating in the domestic labour market. The second was to use
legislation or collective bargaining to impose other labour standards (such as health and safety or working time). The third would seem to be to use systems of registration, work permits or other bureaucratic controls as a deterrent. The latter arguably comes under scrutiny by virtue of the first statement in Rush, but the first two mechanisms would seem to be open to Member States. It is interesting that when countries anticipated introduction of a PWD by taking advance legislative measures (such as Germany and Norway), their focus was primarily on wages. Wages can be controlled through a number of means, such as imposition of a national minimum wage, a nationally arbitrated ‘award’ rate of pay or collectively agreed rates of wages. In terms of the FORMULA study, four countries, Germany, the Netherlands, Finland and Sweden are of interest in this respect.

During the German presidency of the European Council, Germany tried to advance adoption of a PWD. However, the Government also sought to anticipate the adoption of such a directive and its eventual implementation, by addressing the crisis then arising in the German construction sector. Foreign undertakings paid their workers only half of the amount that German employees earned or even less while deploying them on German construction sites. This meant that foreign undertakings could undercut German competitors’ prices easily by 25%. The result was that the number of insolvencies of domestic construction companies rose dramatically. In the area of Berlin, the number had tripled from 1991 to 1994. The aim was therefore to regulate wages paid to posted workers. The German legislator relied specifically on the second statement in Rush when drafting the domestic posting of workers bill (which anticipated the PWD) and covered the whole construction sector – Arbeitnehmer-Entsendegesetz (AEntG) 1996. The success of any such regulation demanded that posted workers need to be notified to the German authorities, and undertakings would be liable for administrative offences. Collective agreements could be made generally applicable where there was consent by a majority in the Committee on Collective Agreements. It should be noted that Norway adopted a comparable (if under-utilised mechanism) as early as 1993, through the Act on Extension of Collective Agreements, although as we shall see there seemed to be a lack of urgency in its usage until EU enlargement in 2004.

A similar trend to that experienced in Germany took place in the Netherlands construction sector: ‘isles of foreign labour law were observed at big construction sites as a consequence of chains of cross-border subcontracting’. Belgian building companies quintupled their turnover on the Dutch construction market between 1983 and 1996.

The European Federation of Building and Woodworkers (EFBWW) pleaded for a solution in Community law analogous to the ILO Convention 94 on ‘labour clauses’ in public procurement contracts in the directive on liberalisation of public procurement, for which a first proposal was tabled in late 1986 (COM(86) 679 final). The Dutch trade
union FNV Bouw & Hout supported this stance, but it did not emerge on the domestic agenda as a very pressing issue. Houwerzijl suggests that this was because, in practice, the operation of cartels in the Dutch construction industry meant that there was no significant undermining of Dutch companies or the terms and conditions of Dutch workers. There was little or no experience of ‘social dumping’.

For posted workers on the territory of the Netherlands before the implementation of the PWD, the application of private international law meant that not all, but only some provisions of extended collective labour agreements (CLAs) could be applied to them, namely when these provisions due to their nature and purpose should be classified as rules of an overriding mandatory character. However, as Houwerzijl observes, this was only a possibility and not a duty and it seems that this was left to the social partners to decide for themselves. Until 1995, the Dutch CLA for the construction sector excluded posted workers from its scope. Although already on the bargaining agenda of the union side from 1990 onwards, as a consequence of the Rush judgment, this situation only altered five years later following the example of Belgium. ‘In fact, this is all that can be said about the reception of the Rush Portuguesa judgment in Dutch labour law with regard to the application of host state labour law.’ Legislative measures were only taken to address the issue of posting in the course of implementation of the PWD in 1999. Why then were Germany and the Netherlands different in their approach? Arguably, various factors can be identified including the scale of impact in construction sector, the extent of trade union pressure and the degree of public concern and engagement.

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

Sweden was well-aware of potential effects of competition from cheaper foreign labour. This was due to the Britannia case (1989), which led to adoption of the Lex Britannia statutory amendments, later challenged in Laval. Unions wished to ensure that Swedish collective agreements could cover foreign workers. Hence the Lex Britannia law allows industrial action against foreign employers where a Swedish employer would be
protected. The aim was to prevent ‘social dumping’ (or significant undercutting of labour standards established by the system of Swedish collective agreements). On the day that Lex Britannia was adopted, the Swedish Prime Minister made his application for EEC membership and in May 1992 Sweden signed the EEA Agreement. There were still concerns that EU membership would affect the Swedish collective bargaining system. Denmark shared similar concerns in relation to the Maastricht Treaty on European Union (which was to make greater provision for social policy and labour market regulation than previously). To both countries, the then Commissioner for social policy, Padraig Flynn, [TN: undertook to amend the PWD to include the second indent in Art. 3(8) and gave his assurance that the PWD would have no impact whatsoever on the Member States’ legislation on industrial action or social partners’ practice] [SE: does not ring familiar; what the May 1993 letter did was to give reassurances that the existing collective labour law regimes would not be affected. To be checked.]51

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

It is therefore possible to conclude, on a preliminary basis, that whether a state was a net importer or exporter of posted workers significantly influenced their political position in relation to regulation of posting. Also influential was the extent to which that state offered its workers significant protection under labour legislation and/or collective bargaining. Domestic measures were taken, in reliance on Rush or in reaction to the first draft for a directive, in advance of the PWD being adopted (in Finland, Germany, and Norway – even extension of CLAs to posted workers in the construction sector in the Netherlands). The pressure of the ‘old’ Member States for adoption of a Directive was to clarify Rush and ensure their ability to place controls on treatment of ‘posted workers’, so as to prevent ‘social dumping’. The notion that there would be less scope for control under the PWD was not (apparently) contemplated. There was explicit reliance on statements made by the relevant European Commissioner that industrial action would not be affected by accession to the Maastricht Treaty on European Union (for Denmark, Finland and Sweden). What is however lacking would seem to be appreciation or anticipation of further effects of future enlargement. [TN: Does this latter point need elaboration and some link to what comes later?] We will see these

51 Letter of 11 May 1993 from Padraig Flynn to Bent Nielsen, President of the Danish LO (Trade Union Confederation).
dynamics played out again in debates in the drafting of the PWD and later interpretation of the meaning of that text.

3.6 The PWD drafting process

3.6.1 Introduction. The social dimension of the single market

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


The PWD purports to be, and is to some extent, a worker protection measure. But the Directive has mixed objectives. It also serves to promote the transnational provision of services and to facilitate cross-border competition. The two dimensions were key pieces in the shifty drafting and elaboration of the PWD. The Directive has in reality been ridden with ambiguity since its inception. The conflict between economic interests and social cohesion has exacerbated with the enlargement of the EU and EEA.

In the section on “new initiatives” concerning freedom of movement the Action Programme included an outline on a ‘Proposal for a Community instrument on working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a sub-contracting undertaking’. The gist of this proposal was that there was a need to ensure the application of host state legislation on “public order” and national “generally binding collective agreements”. The Action Programme curtly stated that the Commission would “resort to the appropriate Community instrument to ensure respect for” those two “principles”.

The Action Programme offered no further suggestion of the kind of instrument to make use of. The Programme also did not indicate which legal bases the Commission could rely on when launching its proposals. The options had to be found in the Preamble to the Community Social Charter to which the Action Programme was linked. A wide
array of alternatives was then available. The Preamble to the Charter refers, i.a., to the freedom of movement of workers (Articles 7, 48-51 EEC; now Articles 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.

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

3.62 The first phase – the first draft, 1991
A few months later, in March 1990, the ECJ came down with its decision in Rush. As we have noted already, Rush has a prominent place in the saga of the Posted Workers Directive. The Court in Rush may at the outset be taken to follow the lead from the Commission Action Program. There is an important difference, however. Whereas the Action Programme made no reference to a legal basis and could be taken to refer to the free movement of workers, the Court as we have seen placed the problem firmly within the domain of Treaty law on the freedom to provide services.

This, then, set the tone for the framing of a Posted Workers Directive. It should be noted, also, that adding to the uncertainty flowing from the choice of legal foundation and the wide-ranging dictum, the Court in Rush did not at all touch on or discuss issues of ordre public or mandatory norms in private international law. The conflict of laws dimension was conspicuously absent from the rather cursory reasons that were given.

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”.

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

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

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

When receiving the Commission’s proposal the Council at its meeting in September referred the proposal to its Working Party for Social Affairs for discussion. Placing the matter on its agenda at a first meeting on 1 October 1991 the Working Group played an active and important role in the subsequent process, discussing the various issues

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54 COM(91) 230 final, Preamble, recitals five and ten to thirteen. Article 20 is paralleled by Article 23 of the Rome I Regulation.

55 This was subject to an exception for a period of up to three months for rules on holiday with pay and minimum wages, Article 3(2). This ‘threshold provision’ turned out to be highly controversial and figured prominently in the ensuing process.
involved in about 25 meetings, as the Presidency was able, when willing, to effectively take over to a considerable extent the initiative otherwise pertaining to the Commission. The European Parliament (EP) was also to play an important role, however.

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

The basic structure and approach of the 1991 draft was maintained throughout the legislative process but expanded and elaborated on. So were the Preamble recitals referring to the Rome Convention, with the addition of a reference to the Convention’s Article 7 stating that under certain conditions effect may be given to mandatory rules of the law ‘of another country, in particular the law of the Member State within whose territory the worker is temporarily posted’, concurrently with the law applicable pursuant to the Convention. This underlines the relation between ‘home state law’ (as a proxy for the law applicable at the outset) and the law of the host state (place of work). Rules that are mandatory in the host state irrespective of the law otherwise applicable to the contract, can be applied in that country (lex fori, the law of the forum), cf. Article (72) of the Rome Convention. Article 7(1) on so-called internationally mandatory rules allows for the ‘inverse’ application, of mandatory rules of another country.

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56 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.


58 Directive 96/71/EC, Preamble, Recital (10), cf. Recitals (6) to (9), (11), and (12),
3.63 The second phase: new proposal, progress and stalemate between Member States

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

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

Two main points of controversy quickly crystallized, the threshold issue and the means to lay down ‘hard core’ provisions (laws, etc., and collective agreements). In addition, Germany raised the question of limiting the scope of a directive to the building sector only. The collective agreements issue was of special concern to Denmark, who engaged actively on this, but also to Italy, who presented a proposal in October to include agreements concluded by ‘the most representative’ organizations. Germany, on the other hand, had tabled a proposal that possible collective agreement regulation should only be applicable to the building sector. Following a series of meetings in September and October Germany then put forward a new revised draft, ‘a compromise suggestion’, in early November. Two subsequent Working Party meetings and thereafter Coreper mainly discussed technical issues, leaving the controversial ‘political’ issues to the upcoming Council. The Council met on 6 and 21 December but did not reach a common position. The three main issues that remained unresolved were the scope of application of a directive and means of stipulation (laws, collective agreements), whether the list of topics in Article 3(1) should be exhaustive, and the threshold period. While six states favoured a ‘zero threshold’, six insisted that there should be a threshold, of one three or four months. On this point the Commission also insisted, that a threshold of minimum one month was essential out of consideration for the free movement of services.
3.64 The third phase: 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,\(^{59}\) however without any notable progress. The new feature in this period was that at its meeting in February the Working Party for the first time was presented and discussed the text of the proposed Preamble to the directive.

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

In June, pursuing an indication from Commissioner Flynn during the Council lunch in March, the French Presidency put forward a compromise proposal on the threshold issue, reducing the mandatory threshold period to a number of days, the number being left open. A Coreper meeting on 16 June revealed quite differing opinions, and again no agreement was reached at the subsequent Council meeting. 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.

Spain took little interest in the directive proposal and during her Presidency in the second half of 1995 there was no progress in the matter. An informal Council session on

\(^{59}\) Comité des représentants permanentes (Committee of permanent representatives).
27 – 29 November, attended also by the ETUC, the UNICE and the President of the EP Committee on Social Affairs, was unable to reach any agreement, and at the Council meeting on 5 December the matter was relegated to a brief discussion at lunch.

On that occasion Italy, taking over the Presidency for the first half of 1996, and who for a long time had maintained a somewhat reserved position to the directive proposals, indicated a will to be flexible and take the file forward. The Italian Minister of Labour, Tiziano Treu, had clearly resolved to attempt to bring the matter to a successful close. He unfolded an exceptionally active diplomacy, touring the European capitals and consulting with his counterparts in the various Member States, in addition to meeting with the EP Committee on Social Affairs on 24 January. On the 26th he circulated a memo sketching proposals, with a view to have it discussed at the informal Council meeting on 3 February. The European Parliament adopted a resolution supporting the new draft on 14 February. A consolidated proposal was tabled on 16 February (Council 1996b), and after discussions in the Council Working Party and Coreper it was put, with some amendments, to the Council for its meeting on 29 March. There were three main topics in addition to the threshold issue. First, a rather technical point on the scope of the directive (Article 1(3)(a)), second, the nation of “minimum pay”, and third, the matter of an “open list”. On the latter, the proposal’s Article 3(6), initially introduced by German in November 1996 and finding its final form in March 1995, appears substantially unchanged in Article 3(10) PWD. The proposal on threshold provisions was quite complex, with a ‘zero threshold’ as a point of departure but including also, inter alia, an ‘assembly clause’ with an eight day threshold. This compromise, ‘brilliantly suggested by the Commission’ in the words of Marco Biagi who took part in the events, eventually made it possible to attain political agreement in the Council, leading to the enactment of the Posted Workers Directive. The threshold provisions, one mandatory (the ‘assembly clause’) were carried through to Article 3(2) – (5) PWD.

There were still contentious issues and discussion on possible adjustments but in May agreement was reached on a draft Common Position which was subsequently adopted on 3 June 1996, the UK voting against and Portugal abstaining. The Common Position was approved by the EP Committee on Social Affairs, rejecting a number of amendment proposals, on 24 July, and subsequently by the European Parliament on 17 – 18 September. The final adoption by the Council took place on 24 September (again with the UK voting against and Portugal abstaining). The finalization of the legislative act was protracted somewhat, due to objections from the side of the EP to not having been presented the declarations to the Council minutes. Once this was resolved the Posted Workers Directive was duly signed on 16 December 1996, with a three year implementation deadline.
3.65 **Bones of contention**

[SE: The idea would be to look more closely at certain issues, in part such as figured prominently in the tug-of-war between Member States in the drafting process, in part such as have come to the forefront with and post Laval, e.g.]

a) legal basis and objectives
b) the scope, in particular as regards temporary workers
c) the threshold issue
d) the possible forms of collective agreements
e) the minimum-maximum issue, relating to Article 3(7) and 3(10)
   - and more, if anyone brings up a brilliant idea.

This is text that needs to be drafted in the subsequent process.]

3.66 **Summary observations**

a) **On the instrument**

Looking back, it is evident that in terms of the choice of law applicable to the employment contract the Posting of Workers Directive imposes a regime differing from that of the Rome Convention, and now the Rome I Regulation. Already from the start, with the 1972 and 1976 draft regulations there was a focus on securing the application of certain standards applying in host state law. The Posting of Workers Directive is based on the same template. The prescription in Article 3(1) PWD, listing the host state rules that shall apply ‘whatever the law applicable to the employment relationship’ entail a principle of territorial application in part. The scope for party autonomy under Article 3 cf. Article 6(1) of the Rome Convention is correspondingly precluded. Moreover, by Article 6(2) of the Convention, in an ideal-typical case of posting the worker most likely would ‘habitually’ carry out his or her work in the home state or, alternatively, the employer would be based in the home state.60 The Directive can be said to ‘compensate’ in favour of the worker as the weaker party by encompassing also a principle of favourability. As we shall see, Article 3(7) PWD can be held to aim to ensure that host state rules are not applied separately if that would be to the disadvantage of the worker. The rules of the law otherwise governing the employment relationship still apply if they are more favourable to the worker.61 In so doing, the Posting of Workers Directive strikes a form of balance between a host state’s interest in having national terms and conditions of employment applied to all employment relations involved in performing work on its territory, and a Community, now EU,

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

61 Cf. Kolehmainen 2002, 198
interest in harmonisation of basic standards with a view to reduce obstacles to the free movement of services, as well as the safeguarding of workers’ interests. The Directive provides a protection for posted workers and respects national labour law regimes – up to a point – without imposing substantive harmonisation or a general principle of equal treatment.

b) On the actors

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

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

SE: Remains to be penciled out.

3.7 PWD implementation in the States in study

3.8 The Services Directive

1. The backdrop and legislative process, including role of actors
2. Implementation in States involved
3.9 The Laval quartet and responses
(a tricky topic given that there has been and still is hectic activity at the EU level) Some form of introduction presenting the notion of a ‘Laval quartet’ is needed here, with a comment on the impact generally speaking.

3.91 The ECJ and the ‘Laval Quartet’

a) Forms and levels of standards to be imposed

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

The prevailing opinion at the time of adoption was one of liberal construction, [possible reference to supra] memorably epitomised by Marco Biagi in his account of the final stages of the adoption process, noting that the Directive is based on the principle of a non-exhaustive list and that Member States have the ‘discretion to extend (unlimitedly?) the concept of “public policy provisions”’. The ECJ has, however, decisively settled the issue in a different vein. The message in Laval is abundantly clear, in the Court’s analysis of the Directive as well as in its assessment of the compatibility of industrial action with Article 56:

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

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

The crucial point, then, is the question of what falls within the ambit of ‘public policy’. In Laval the Court did not comment on the thematic scope of the concept but emphasised that public policy provisions must be emanations of government (‘national authorities’). Trade unions and employers’ associations ‘not being bodies governed by

62 See Biagi (1996), 104.
public law’, consequently cannot invoke Article 3(10) to attain public policy status for collective agreement rules or arrangements.63

Building on this in Commission v Luxembourg, the Court went on to underline the very significant view that ‘public policy’ in the PWD is a Union law concept. Its scope cannot be determined unilaterally by a Member State; and it must be regarded as an exception clause derogating from the basic free movement principles and must therefore be ‘interpreted strictly’.64 From this the Court proceeded to give Article 3(10) a fairly narrow scope in assessing a number of statutory measures in Luxembourg law, thereby also demonstrating that a Member State is not at liberty to decide what, in its labour law, is so important that everyone should abide by it.

A different matter from the thematic scope is the question of the level at which a standard may be fixed. Here, Article 3(1) PWD is no more than a starting point. The ‘list’ includes ‘minimum paid annual holidays’, ‘minimum rates of pay’, and ‘maximum work periods and minimum rest periods’. In Laval the Court, starting with Article 3(1), held that inasmuch as the Directive does not ‘harmonise the material content’ of rules on matters covered by it, the content of such rules may ‘be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law’. Thus in principle, it is for the (host) Member State to decide on the level of protection. The words ‘freely defined’ cannot be taken at face value, however. Continuing, the Court underlined that the standards which may be imposed are mandatory minimum rules (‘mandatory rules for minimum protection’). The Court made very clear that, pursuant to Article 3(1), it is solely domestic mandatory minimum standards on topics listed in items (a) to (g), and Article 3(10) as the case may be, with which a cross-border posting employer can be required to comply.65

The starting point of freedom to set levels is nonetheless important. Article 56 TFEU and the PWD do not preclude a State from fixing higher standards for a branch or industry than would otherwise be the national mandatory minimum standards. This is a matter of State autonomy within the general bounds of Union law. This is brought out by the ECJ’s decision in Finalarte,66 in which it was accepted in principle that Germany had fixed paid annual leave for construction workers at 30 days, whereas the general minimum was 24 days. Similarly, where minimum wage legislation does not exist, permissible wage levels are not restricted to a subsistence minimum, or unemployment

63 See Laval, above n 2, paras 60 and 73–84.
64 See Commission v Luxembourg, above n 2, paras 26–33. The ‘strict interpretation’ clause is of course familiar from Court of Justice case law in general.
65 See also Laval, paras 60 and 73–84.
66 Finalarte, paras 55–58.
benefit levels or the like. This is still tenable after the ‘Laval Quartet’. Dismissing a complaint against Norway, the points in substance were stated explicitly by the EFTA Surveillance Authority (ESA), in a decision that was closely consulted with the EU Commission, mirroring in fact practices in a number of EU/EEA Member States.

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

Read in isolation, or in conjunction with recital 17 of the Preamble, the wording of Article 3(7), first paragraph, may invite this interpretation. It rested nonetheless on rather shaky ground, cf. supra XX on the drafting history. In any case, the ECJ decisively refused to interpret Article 3(7) as allowing the host State to impose higher standards. In Laval, Article 3(7) was held to apply to ‘more favourable’ terms and conditions applicable in a worker’s home State. The provision grants no opening to a host State to ‘make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection’.

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

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67 ESA decision of 15 July 2009, Case No 63734, Event No 5211127, 3.
68 See, e.g., Biagi (1996 and 1997), and Dølvik and Visser, 8.
70 See Laval, paras 79–81.
71 See Rüffert, paras 32–34.
b) **Means of regulation**

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

The first of the two became relevant in the Laval case. Wage fixing in Sweden is essentially a collective bargaining matter. The Swedish Act on implementation of the PWD was based on this, but did not contain any provision to that effect nor any explicit stipulation that existing collective agreements could be applicable. The Court’s – however cursory – observation (offered three times over) was that Sweden ‘has not made use of the possibility provided for in the second subparagraph’ of Article 3(8).

The requirement implicit in this reasoning evidently is that if a State wishes to ‘so decide’ pursuant to Article 3(8), some form of explicit mention of this must be made in the legislation implementing the PWD. This should hardly be surprising. The Court’s stance coincides with that of the Working Party of national experts on the implementation of the Directive. The underlying consideration surely is to ensure ‘transparency’, a notion that figures prominently in the *Laval* decision on other points. The approach is alien to Scandinavian legislative traditions, but the end result is clear. To leave norm-setting to collective bargaining without explicit State regulation is not acceptable. This is simply another illustration of *étatisme* having precedence over *collective autonomy*.

c) **A first summing up**

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

(a) Opposites come to the point

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

The state of EU law impinges upon traditional and fundamental collective bargaining autonomy, and on the very tenets of the industrial relations systems. Moreover, the narrow interpretation of permissible standards and means of regulation adopted by the Court in Laval, Rüffert, and Luxembourg links up with the Court’s stance in Viking Line and Laval on possible recourse to industrial action. Concisely, a common denominator to the two decisions is that the prospect of being met with industrial action—strike, etc.—in the host State, as a means for a trade union to impose demands on an employer, amounts to a restriction on freedom of movement under Articles 43 and 49 EC (Articles 49 and 56 TFEU). It can hardly be said more emphatically that the state of domestic law as such is a restriction in EU law. It is not a prerequisite that there be an actual threat or application of collective action. The basic principle on which the Court rests implies that even if positive regulation of such matters is the prerogative of Member States, the state of national law cannot be such as to counteract or conflict with otherwise applicable EU law.

(b) The right to strike in harness

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

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72 Or the home State or ‘State of departure’ as in Viking Line.
73 See Viking Line, paras 32 et seq, and Laval, paras 96–100, 99 and 100 in particular.
75 Cf Viking Line, paras 43ff, and Laval, paras 90ff.
overriding reason of public interest’. The second question is how the proportionality test is to be conducted.

Effectively, restrictive limits apply on both counts. The Laval decision invites us to perceive the notion of ‘overriding reasons’ as one referring to the mandatory minimum rules applicable in pursuance of the PWD, both as a floor and as a ceiling.\(^\text{76}\) Similarly, in Viking Line the Court recognises protection of jobs and employment conditions from being adversely affected by a reflagging of the ship concerned as a form of legitimate protection of workers. But this comes with the proviso that it is no longer tenable if jobs or employment conditions are actually ‘not jeopardised or under serious threat’.\(^\text{77}\) This is an important reservation and one that immediately links in with the problem of proportionality. That issue was dealt with differently in Viking Line and Laval, but the difference lies more in form than in substance. In Laval, the ECJ took a definitive stand on the industrial action that had been implemented. The Court’s reasoning forcefully suggests that the host State trade unions had no basis for making wage demands inasmuch as no relevant minimum wage regulation was applicable. What the Court said 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’.\(^\text{78}\)

In addition, the Court made a point of noting that the provisions included in the trade union’s demand for a collective agreement in the Laval case went beyond what the transnational service provider was required to observe in terms of mandatory rules for minimum protection applicable in pursuance of the PWD. Thereby it linked the proportionality assessment with the limitations flowing, in the Court’s view, from the Directive. Moreover, given the way the Court framed its reasons, this ‘excessiveness’ of bargaining demands in itself was sufficient to render collective action disproportionate.\(^\text{79}\) In Viking Line there was a possibly legitimate objective, but as the situation had not yet matured the Court was confined to laying down guidelines for the referring court. It did so, emphasising that collective action must not go ‘beyond what is necessary to achieve the objective pursued’ (emphasis added). This includes considering whether other, less restrictive measures might be used and an ‘ultima ratio’

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\(^\text{76}\) See in particular Laval, para 108 and the reference to paras 81 and 83 therein.

\(^\text{77}\) See Viking Line, para 81.

\(^\text{78}\) See Laval, paras 69, 71, 100 and 110.

\(^\text{79}\) See Laval, para 108 and paras 81 and 83 referred to therein.
standard framed to the effect that all such other means should be exhausted before recourse is had to collective action.\textsuperscript{80} Coupled with the ‘serious threat’ clause,\textsuperscript{81} this is a requirement of vast import.

c) **Clashing with fundamental rights**

There is a paradox inherent in this case law. Whereas collective action is recognised in principle as a fundamental right, at the same time it is qualified as a ‘restriction’. Thereby the issue is turned into whether the exercise of this fundamental right in EU law may actually be lawful in EU law. Put differently, the exercise of the fundamental right needs to be justified vis-à-vis the fundamental freedoms. Arguably, this is turning the issue on its head; conventionally, a legal right takes precedence over a freedom.

The more serious discord is with public international law and human rights. The way in which the Court has chosen to limit possibly legitimate objectives by its construction and use of the PWD, and with the ‘serious threat’ clause, the application of the proportionality test and the use of an ‘ultima ratio’ standard, imposes considerably more strict limits on the right to strike than those ensuing from ILO Conventions Nos 87 and 98 and relevant case law. The inconsistency has been emphasised by many, including the ILO itself.\textsuperscript{82} It is confirmed by the ILO Committee of Experts in its recent Report to the 2010 Labour Conference, noting with reference to the UK and the BALPA case\textsuperscript{83} that

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

\textsuperscript{84}

[This bit can be elaborated from other material of mine. SE]

In *Viking* and *Laval* the ECJ merely took note of Conventions Nos 87 and 98 and refrained from elaborating. The same is true as regards the European Social Charter (1961),\textsuperscript{85} to which, as the Court duly noted, express reference is made in Article 151

\textsuperscript{80} Cf *Viking Line*, above n 2, para 87.

\textsuperscript{81} See the text to n XX above.

\textsuperscript{82} See further, e.g. Evju 2009, 134–35. Further, the Court’s stance in *Rüffert* is not reconcilable with ILO Convention No 94. An infringement case on the ground of Norway’s implementation of Convention No 94, pending with the ESA (August 2011), is illustrative of this point.

\textsuperscript{83} Application by the British Air Line Pilots Association to the International Labour Organisation Committee of Experts on the Application of Conventions and Recommendations against the United Kingdom for breach of ILO Convention No.87. London, 5\textsuperscript{th} October 2009.


\textsuperscript{85} And equally the European Social Charter (revised) 1996. Hereafter both Charters are referred to jointly with the acronym ‘ESC’.
TFEU. By the stance it adopted, the Court of Justice has framed a fundamentally different conception of the right to collective action from that obtaining pursuant to Article 6(4) ESC. The ESC recognises that the right to collective action may be restricted, but solely on narrow grounds. Under Article 6(4) it is deemed unacceptable, inter alia, to subject the exercise of this human right to a proportionality standard or otherwise construe the right as relative in domestic law.

The Court’s failure to take further account of these human rights instruments is remarkable. First of all, it places EU law in conflict with public international law obligations incumbent on all, or the vast majority of, Member States. Further, it thereby raises the prospect of Member States being compelled to denounce fundamental human rights instruments, pursuant to Article 307 EC (Article 351 TFEU). That would amount to nothing less than an outrage and be devastating to human rights efforts in the field of working life, if not beyond. Conventions Nos 87 and 98 belong to the list of core conventions included in the ILO Declaration on Fundamental Principles and Rights at Work (1998).

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d) A second summing up: a persistent dilemma

In conclusion on this point, it can safely be said that the Court of Justice, in the name of market freedoms, has created a both serious and highly complicated dilemma for the EU and for EU/EEA Member States. Some like the outcomes of the Court’s case law; some

86 See ESC 1961 Art 31, and Art G of the 1996 revised Charter; the exception clauses are similar to that of Art 11(2) ECHR.

87 See, eg, ESC, European Committee of Social Rights, Conclusions XVIII-1 (Council of Europe, Strasbourg, 2006), vol. 1, 74–75 (Belgium) and 306–307 (Germany).

88 This Declaration has subsequently been reinforced by the ILO Declaration on Social Justice for a Fair Globalization 2008.
do not. That is, no doubt, a part of the problem as it stands. Either way, the current case law entails a wide range of problems. Member States are faced with the prospect of maybe having to enact legislative change in order to fall into line with the state of EU law as decreed by the Court of Justice. The EU itself is confronted with the dilemma of how to reconcile the Court’s doctrines with conflicting Member States’ interests, and with international policy declarations and commitments.

3.93 National responses

The immediate problems faced by national jurisdictions in consequence of the ‘Laval Quartet’ rulings evidently will differ, in form and degree, with the state of domestic law. The Nordic scene is an illustrative example. Finland and Norway each have different forms of statute law-based extension of collective agreement regulation, and therefore have not been immediately affected.89 Denmark and Sweden, on the other hand, have stayed with collective bargaining, in particular as regards wages, and have been compelled to undertake legislative change. However, their approaches differ significantly.

Denmark has maintained a strong collective bargaining-based approach. On the basis of a tri-partite committee report tabled in June 2008, a new provision was inserted into the Act on Posting of Workers.90 Explicit reference is made in the Act (section 6(a)) to the applicability of collective agreements concluded by the ‘most representative’ labour market organisations and having a nationwide geographical scope.91 A collective agreement will not, however, apply automatically to a foreign service provider. If it is sufficiently clear with regard to payable wages and the employer has been notified of the relevant provisions, a trade union is free to undertake collective action in accordance with the rules that apply on the domestic labour market, to press for the conclusion of a collective agreement. The solution arrived at is perhaps tenuous, and certainly controversial, but has not yet been put to the test.

89 The scheme in Finland is anchored in ch 2, s 7 of the Employment Contracts Act 26.1.2001/55. Norway employs a particular form of fixing minimum standards based on collective agreements by public law regulations, under the Act of 4 June 1993 No 58 on Making Collective Agreements Generally Applicable, etc.


91 There is a certain irony in this. The ‘most representative’ option in Art 3(8) PWD was an Italian proposal. The alternative that was proposed and insisted on by Denmark is the ‘generally applicable’ option in the first indent of Art 3(8); cf above n 92. The choice made in 2008 can be seen as a reluctant recognition of reality on the part of Danish industrial relations actors.
Sweden commissioned an Expert Report, which was tabled in December 2008 and submitted to public consultation.\textsuperscript{92} The Report proposed inserting an explicit reference to collective agreements in the Act on Posted Workers, coupled with provisions restricting the right of trade unions to have recourse to collective action to comply with EU law. The proposals met immediately with considerable controversy, on several grounds, and have remained controversial. In November 2009, the Swedish Government tabled a Bill largely adhering to the Report’s proposals.\textsuperscript{93} It met with significant opposition in the Riksdagen (Parliament) and was sent back and forth several times between the independent Advisory Council on Legislation (Lagrådet) and Riksdagen’s Standing Committees on the Labour Market and on Constitutional Affairs, before the Labour Market Committee finally tabled a Report on 18 February 2010. The Report contained a large array of separate motions, demonstrating the many differing opinions; and when brought up for debate in the Riksdagen, the key points, in particular the reference clause and the provisions on restrictions of the right to strike, passed by a small majority only. The Amendment Act was finally approved on 24 March 2010, and the amendments entered into force on 15 April 2010.\textsuperscript{94} Obviously, this new legislation will remain controversial for some time to come.

3.10 The Temporary Work Directive

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

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

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

\textsuperscript{92} SOU 2008:123 Förslag till åtgärder med anledning av Lavaldomen Betänkande av Lavalutredningen.

\textsuperscript{93} Regeringens proposition 2009/10:48 Åtgärder med anledning av Lavaldomen.

This provision conveys acceptance of a principle of equal treatment, which, as we have seen is not quite what the PWD allows for in general. Moreover, a host state may require a cross-border temporary work undertaking to abide by ‘the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings’, which, seen in isolation, may amount to a restriction on the freedom to provide services. This was however a conscious choice in the adoption process, in view of the considerable differences in the use of temporary agency work and in the legal situation, status and working conditions of temporary agency workers within the European Union that were still prevailing.95

In 2008, the EU adopted a separate directive on labour only contracting, the Temporary Work Directive (TWA).96 The TWA applies to strictly national cases but also to cross-border temporary work relations. In the latter capacity it intersects with the Posting of Workers Directive. This was clear from the start of the legislative process, the intention being that a new directive would not alter the scope of the PWD, or the possibilities for exemptions from it. A directive on temporary agency work should rather be seen as an ‘extension of arrangements already in force for transnational posting of temporary workers’, meaning that its special provisions would take precedence over the limiting provisions of the PWD.97

The Temporary Work Directive has a mixed background. On the one hand, it embodies social policy aims by establishing protection and rights for temporary workers; on the other hand, it pursues employment policy aims, also as encompassed in the Lisbon Strategy, in the form of provisions expressly oriented towards improving the functioning of the labour market.98 The TWA explicitly rest on a principle of equal treatment,99 that being the headline of Article 5 which states the basic rule as being ‘The basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job’ (Article 5(1), first subparagraph, TWA, cf. also Recital 14 of the Preamble).

95 Cf. evidence to be added. It is still deemed to be the case, cf. Recital 10 of the Preamble to the Temporary Work Directive (see the next footnote for reference).


99 Referred to in the travaux préparatoires also as a principle of non-discrimination.
The TWA intersects also with the Services Directive, 2006/123/EC,\textsuperscript{100} which is aimed, essentially at removing barriers to the freedom of establishment and the free movement of services and to guarantee recipients and providers the legal certainty necessary for the exercise in practice of those two fundamental freedoms of the TFEU.\textsuperscript{101} As noted above, regulation of the conditions for hiring-out of workers, etc., may constitute restrictions within the meaning of Treaty law. This is however left outside of the reach of the Services Directive, which explicitly does not apply to ‘services of temporary work agencies’ (Article 2(1)(e)). This exemption was not included in the original ‘Bolkestein’ proposal\textsuperscript{102} but was included, along with the labour law exemption clauses (Article 1 nos. 6 and 7) following the first hearing in the EP, as one of several amendments accepted by the Commission.\textsuperscript{103} The Temporary Work Directive itself captures the Services Directive thrust, however, by Article 4 that stipulates that ‘Prohibitions or restrictions on the use of temporary agency work shall be justified only on grounds of general interest relating in particular to the protection of temporary agency workers, the requirements of health and safety at work or the need to ensure that the labour market functions properly and abuses are prevented’. The predominance of Treaty principles again is manifested.

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

\textsuperscript{100} See supra. [specification to be added].

\textsuperscript{101} Cf. Recital 5 of the Preamble to the Directive.


\textsuperscript{103} Cf. the preliminary amended proposal circulated in March 2006, COM(2006) yyy final (2006/aaaa (COD)), 41, and subsequently COM(2006) 160 final of 4 April 2006. In the former, the exemption read simply ‘temporary wok agencies’, the words ‘services of’ were added in the latter. [Possible ref. to supra, as this was one of many points in debate in NO]