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„The Posted Workers Regime in the EU. Is a reform
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List of Abbreviations

PWD	Posted Workers Directive
PWE	Posted Workers Enforcement Directive
ECJ	European Court of Justice
EU	European Union
MS	Member State
IMI	Internal Market information system
ETUC	European Trade Union Confederation
UK	United Kingdom

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Introduction

On March 8, 2016 the European Commission, proposed review of the Posted Workers Directive 1996 (PWD), which regulates people employed in one member state, but are sent to temporarily work in another. The proposal is aimed at revising the rules on posting of workers set out by the PWD that was followed by an enforcement directive in 2014, in order to facilitate the provision of goods and services across borders of the EU Member States. However, given that the 2014 Enforcement directive has not yet entered fully into force and that the proposed rules are met with mixed responses from the EU Member States, one would beg to question whether a new regime is necessary at this point.

Despite of European policies facilitating the free movement of workers,¹ the freedom of establishment² and the freedom to provide services,³ substantial labour mobility is not yet achieved in the EU.⁴ While it is true that the EU's continuous efforts to remove remaining barriers has improved the possibility for an integrated European labour market, statistics show that worker's mobility remains low.

According to the European Commission's 2014 annual report on labour mobility, there were a little over seven million EU citizens that lived and worked in an EU country other than their own.⁵ That represents 3.3% of the total employment in the EU. However, the percentage has increased a lot in the past decade. Between 2005 and 2012, an increase of 50% was observed.⁶ According to these statistics, western European countries such as Germany, France, Belgium and the United Kingdom are among the top destination countries.⁷ When it comes to origin countries, Romania, Poland and Portugal come on top.⁸

¹ Article 45 Treaty On The Functioning Of The European Union 26 October 2012 (EU) OJ C 326/47

² *ibid* Article 49

³ *ibid* Article 57

⁴ Claire Dhéret, Andreia Ghimis 'The revision of the Posted Workers Directive: towards a sufficient policy adjustment?' [2016]

⁵ Commission, 'Annual report on statistics on intra-EU movers' COM (2014), 76

⁶ Dhéret C., Lazarowicz, A., Nicoli, F., Pascouau, Zuleeg 'Making progress towards the completion of the Single European Labour Market' [2013] EPC Issue Paper N°75, 6

⁷ Commission 'Annual Report on Labour Mobility, COM (2014), 1

⁸ *ibid*

The limited nature of long-term labour mobility also has a bearing on more temporary forms mobility. Posting of workers is such a temporary form of mobility whereby a worker, employed in one MS is being sent to another in order to perform work for a limited period of time and then return to his home State.⁹ It is estimated that there were approximately 1.9 million temporary workers in the EU by 2014.¹⁰ What is interesting to point out here is that the percentage has grown by 44% between 2010 and 2014. Thus, while posting still has a modest impact on working population of the EU, its share in the annual flows of labour mobility is becoming more and more significant.¹¹

In addition, posting is significantly relevant in several economic sectors. More than 42% of total postings are concentrated in the construction sector. Substantial numbers of posting are also observed in the manufacturing, and other service sectors such as health, social work and education.¹²

However, data sources containing information about posted workers across the EU are still rather imperfect. In fact, there is no EU-wide register with such information and national statistics are sometimes difficult to compare. The Commission uses information accumulated by the so-called A1 administrative forms. These forms are issued by the authorities of the State of origin and serve to provide in which country, the worker is entitled to social security rights.¹³ That being said, an underestimation of the real numbers of posted workers is very possible, as evident from the discrepancies between the national and EU figures.¹⁴

Nevertheless, the Commission's estimates point to a substantial increase of the number of posted workers in the last couple of years. Some scholars have

⁹ Dr. Gregor Thusing, *European Labour Law* (1st, Verlag C. H. Beck oHG, Germany, Munich 2013) 158

¹⁰ Commission, 'Impact assessment accompanying the proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' COM (2016) 128 final, 6

¹¹ De Wispelaere, 'Posting of workers as a stabilising mechanism. An enlarged notion of labour mobility as a prerequisite for an optimal currency area' [2015], KU Leuven Research Institute for work and society, 6

¹² Commission, 'Impact assessment accompanying the proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' COM (2016) 128 final, 8

¹³ Maslauskaitė, 'Posted workers in the EU: state of play and regulatory evolution' [2014], Notre Europe Jacques Delors Institute Policy Paper, 4

¹⁴ Claire Dhéret, Andreia Ghimis 'The revision of the Posted Workers Directive: towards a sufficient policy adjustment?' [2016]

attributed this surge to the transitional arrangements introduced by EU countries after the enlargements in 2004, 2007 and 2013, which temporarily limited the freedom of movement of people, due to fears of significant labour markets shock if they were opened immediately.¹⁵ These restrictions have mostly now been removed and although it is hard to establish a direct causal relationship, the coincidence between the timing of the lifting of these restrictive measures and the substantial surge in the number of workers being posted in the EU suggests that the two developments are interrelated.

Regardless, what is evident is that posting of workers has been and will continue to be an integral part of the Internal Market based particularly on the right to provide services. Article 56 TFEU does not only require the elimination of all discrimination against a person on grounds of nationality, but also has been found by the ECJ to have broader meaning. In *Van Binsbergen*, the Court ruled that “the restrictions to be abolished pursuant to Articles 56 and 57 TFEU include all requirements which may prevent or otherwise obstruct the activities of the service provider”¹⁶ In Case *Säger*, the Court clarified that this broad interpretation would cover a measure that applies without distinction to national providers of services and to those of other Member States “when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.”¹⁷ Thus, one of the great advantages of the EU’s single market is the fact that service providers should be able to offer their services throughout the Union unhindered by discrimination on grounds of nationality or any other requirement that may prevent or obstruct the activities of the service provider.¹⁸

However, this also poses a danger to worker’s rights and fair competition.¹⁹ Unless some sort of control is put in place, EU companies will opt to set up their

¹⁵ De Wispelaere, ‘Posting of workers as a stabilising mechanism. An enlarged notion of labour mobility as a prerequisite for an optimal currency area’ [2015], KU Leuven Research Institute for work and society, 6

¹⁶ Case 33/74 *Johannes Henricus Maria Van Binsben v Bestuur Van De Bedrijfsvereniging Voor De Metaalnijverheid GEN* [1974] ECR 1299, para 10

¹⁷ Case C-76/90 *Säger v Dennemeyer & Co. Ltd.* [1991] ECR I-42421, para 12

¹⁸ Dr. Gregor Thusing, *European Labour Law* (1st, Verlag C. H. Beck oHG, Germany, Munich 2013) 160-161

¹⁹ *ibid*

operations in those Member States where they can pay the lowest wages, taxes and social security charges. Alternatively, companies can also hire cheap labour force from another MS with low labour law standards through a sub-contractor established in that MS. This is also known as social dumping. The practice has been deemed undesirable by the EU as it has negative effects on the workers who are exported, trade unions in the importing country and competition in the given industry of the importing country.²⁰ Essentially, if the EU upholds the freedom to provide services to a full extent, this would create a situation where an undertaking established in a MS with low labour standards, provides services in a MS with high labour standards at a fraction of the price offered by local undertakings. This is due to the fact that the required wage minimum in the home country is less than that of the host country. Thus competition is distorted. That is why, there are derogations²¹ from the right to provide services in the EU and further safeguards, based on these derogations are put in place with the PWD.

However, this thesis argues that the Directive did not achieve its goal, not in small part thanks to the judgments of the ECJ in the so-called “Laval quartet”. It is submitted that even though the Directive overall improved the possibilities for posting, in the end it fell short in providing a coherent instrument that balances economic against social rights. This led to the adoption of the 2014 Posted Workers Enforcement Directive, which in the opinion of the author failed to address some key issues. What followed was the 2016 proposal that has so far been met with hostility by the MS, but continues to be pushed by the Commission regardless.

This thesis analyses whether or not a new posted workers instrument is necessary and if so, whether the proposed legislation has the capacity to once and for all strike balance between the freedom to provide services and social rights.

For this purposes, the first chapter of the thesis lays down the main features of a posting situation and describes relevant legislation outside the PWD. It also, examines the Directive in detail.

²⁰ Roger Blanpan, *European Labour Law* (Kluwer Law International, The Netherlands 2010) 433

²¹ Paul Craig. Grainne de Burca, *EU law Text, Cases and Materials* (5th, Oxford University Press, The United States, 2011) 269-271

In the second chapter, the thesis analyses the ECJ's case law on posted workers both before and after that adoption of the PWD. After a brief discussion of the earlier case law, a detailed analysis of the *Laval*, *Rüffert*, *Viking* and *Luxembourg* judgments are undertaken. The main issues with the reasoning of the Court are pointed out and possible problems with ECJ's judicial activism are underlined.

The third chapter encompasses an analysis of the effect of the Court's rulings on selected Member States. Arguments are presented in order to support the claim that the approach, the Court adopted in the above mentioned cases had detrimental effect on these countries and opened the possibility for harmful practices²² in the Internal Market. Further, the chapter analyses the 2014 Enforcement Directive and provides conclusion on its potential effectiveness after entry into force in 2016.

The last chapter deals exclusively with the 2016 commission proposal. It examines it in depth and provides recommendations as to its capability of improving the posting situation in the European Union.

Finally, this thesis provides a conclusion that sums up all the arguments contributing to the discussion at hand. Additionally, it elaborates on the author's recommendation as to whether a reform is necessary.

²² E.g. "Social Dumping", "letter box" companies" etc...

Chapter I

The posting of workers and the Posted Workers Directive 96/71/EC

1. Rules applicable to the posting of workers, other than those in the PWD

The typical case for freedom of movement for workers is in the form of an employee leaving his country of origin and commencing work in another.²³ This way, he becomes fully integrated into the employment system there. However, there are forms of worker mobility where the connection to the country of origin remains and the integration into the host country's employment system is to a lesser degree. Such cases are referred to as posting of workers. Example of posting is where a company brings its own employees for a project outside of the country of origin or a temporary work agency sending employees on an assignment to a foreign company.

The possibility of posting workers is secured in EU law, first and foremost by the Union's fundamental freedoms. Particularly relevant is the freedom to provide services, enshrined in Article 56 TFEU. It was held in Case *Rush Portuguesa* that Article 56 also guarantees the right of a person to post his own staff from his state of origin to the host state. The freedom of establishment can also be relevant in posting situations where a company assigns staff from its headquarters to an affiliate company in another European state.²⁴ However, the freedom of movement of workers is not considered to apply to posting of workers in the context of working and services, as the posted worker specifically does not want to be integrated into the foreign employment market.²⁵ It is a different situation where employees are hired out to other States as temporary workers, as

²³ Article 45 TFEU

²⁴ Dr. Gregor Thusing, *European Labour Law* (1st, Verlag C. H. Beck oHG, Germany, Munich 2013) 158

²⁵ Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831

the temporary worker is under the control of the hirer and is therefore utilized in the same way as a worker employed in the host state.²⁶

Having said that, it is interesting to point out which legal regime would apply had the PWD not been adopted. A

2. The Posted Workers Directive 96/71

The approach of the Directive consists of introducing the place of work principle for the “hard core” of work conditions. Legally, this is achieved by declaring that certain work conditions are internationally mandatory rules. The PWD takes precedent over the Rome I regulation as an act of the Community pursuant to Article 23, Rome I Regulation.²⁷

The Directive applies to undertakings, which post workers for a limited period²⁸ in the framework of cross-border services to the territory of a Member State²⁹ other than the Member State in which the workers carries out his economic activity normally in the framework of either subcontracting, a group, or a temporary work for a user. Subcontracting is described by the Directive as a situation where an undertaking posts workers to another Member State on their account and directions.³⁰ This posting is done under a contract concluded with another undertaking, for which the services are intended. There must, however be a relationship between the company of origin and the worker during the period of posting.

Posting in the framework of a group, on the other hand is described as posting of workers to an establishment owned by the same group to another Member State.³¹ As with subcontracting, there must be a relationship between the undertaking of origin and the workers during the posting period.

A temporary work for a user is to be understood as posting of workers in the context of temporary employment undertakings or placement agencies, again

²⁶ Case C-113/89, *Rush Portuguesa Limitada v. Office National d'Immigration* [1990] ECR I-1417

²⁷ Roger Blanpan, *European Labour Law* (Kluwer Law International, The Netherlands 2010) 433

²⁸ Article 2 (1) Directive (EC) 96/71 of 16 December concerning the posting of workers in the framework of the provision of services [1996] OJ L18/1 (Posted Workers Directive)

²⁹ *ibid* Article 1 (1)

³⁰ *ibid* Article 1 (3) (a)

³¹ *ibid* Article 1 (3) (b)

provided that there is an employment relationship between the agency and the workers during the period of posting.³² Additionally, Member States can provide that temporary workers get equal treatment compared to domestic temporary workers.³³

The main focus of the Directive the terms and conditions of Employment that must be awarded to any posted worker falling within its scope. The PWD lays down a nucleus of minimum working conditions concerning:

- “(a) Maximum work periods and minimum rest periods;*
- (b) Minimum paid annual holidays;*
- (c) The minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;*
- (d) The conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;*
- (e) Health, safety and hygiene at work;”³⁴*

These rules may only be derogated from on grounds of public policy.³⁵ According to Advocate General Verica Trstnjak the adoption of such list of minimum mandatory rules was intended to have three distinct objectives.³⁶ First, the avoidance of any distortion to competition which could be brought about by the application of different national rules concerning labour protection to undertaking providing services within the same Member State. Secondly, the elimination of obstacles and ambiguities to the freedom of movement of services. Thirdly, the guarantee of a minimum standard of social protection for workers posted within the EU.

The Advocate General based her argument on recital 13 of the Directive which provides that the laws of the Member States must be coordinated in order to lay down a nucleus of mandatory rules for “minimum” protection to be observed in the host country.³⁷ In addition, the PWD says, in Article 3 (7), that the “hard core”

³² *ibid* Article 1 (3) (c)

³³ *ibid* Article 1 (9)

³⁴ Article 3 (1) Posted Workers Directive

³⁵ *ibid* Article 3 (8) Posted Workers Directive

³⁶ Conclusion de L’Avocat General Madame Verica Trstenjak dans l’Afaire C- 319/06 Commission des Communiautes v. Grand – Duche de Luxembourg [2008] ECR I – 4323, para 33.

³⁷ Recital 13 Posted Workers Directive

rules shall not prevent the application of terms and conditions of employment, which are more favorable to workers. It is also submitted that the purpose of the PWD is not to harmonize the system for establishing the terms and conditions of employment in place in the MS. This is not, however, how the ECJ has interpreted the “minimum working standards”. This issue is further analyzed in chapter II.

Other conditions, Member States can impose under the PWD are those relating to public order³⁸ or those contained in generally binding collective agreements. In addition, companies domiciled in different Member States must be treated equally³⁹ and favorable treatments cannot be awarded to local enterprises.⁴⁰

Exceptions were also envisaged for these requirements under the PWD. Firstly, parts of the “hard core” rules of article 3 (1) do not apply in the case of first installation of goods where this is an integral part of a contract for the supply of goods and the posting does not exceed 8 days.⁴¹ Some Member States have made use of this exception (Belgium, Finland, France and others). The United Kingdom and Ireland, however, have not. This does not apply to activities in the area of building works. Secondly, Member States are free to decide not to apply the minimum pay requirement of Article 3 (1) (a) where the posting does not exceed one month. Finally, the same provision may not be applied where the amount of work to be done is not significant.

³⁸ Article 3 (10) Posted Workers Directive

³⁹ *ibid*

⁴⁰ *ibid* Article 1 (4)

⁴¹ Roger Blanpan, *European Labour Law* (Kluwer Law International, The Netherlands 2010) 767-768

Chapter II

ECJ's interpretation of the provisions of the PWD

1. Earlier case law

From the case law prior to the entry into force of the PWD, it is evident that host States' requirements varied greatly. They were anything from the minimum rates of pay and contributions, to the national system providing benefits in case of bad weather in the construction industry.⁴² In addition, the vague instructions given to national courts did not help overcome those difficulties. It was often left for the national authorities to determine whether there was a difference in the level of social protection between the home and the host State. In a situation where the freedom to provide services was gravely compromised by the lack of legal certainty as to what extent national legislation is to be applied, the PWD provided the necessary remedy.

The case law itself began to evolve at a time when the dynamic nature of the internal market was prompting companies to engage in cross-border activities. The situation of posted workers in the provision of services was raising new legal issues relating to EU law. Member States at the time were increasingly concerned about the wave of cheap migrant labour's threat to their employment systems. They were very keen on preserving their national rules on wage setting and worker protection. In its case law before the enactment of the PWD, the Court recognised the Member States' concerns by ruling 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

⁴² Case C-369/96 and C-376/96, *Arblade & Fils SARL and against. Bernard Leloup and Others* [1999] ECR I-8453.

*Community law prohibit Member States from enforcing those rules by appropriate means*⁴³

This shows willingness on behalf of the Court to allow MS to apply collective agreements and other national worker protection measures to posted workers. The first case, prior to the adoption of the PWD, where the ECJ actually had to rule on an issue with posted workers was *Seco and Desquenne (1981)*.⁴⁴ Following a request for preliminary ruling, the ECJ was asked to determine whether an undertaking from another Member State posting its workers to Luxembourg could be required to pay social security contributions in the same way as a national undertaking is. The posting undertaking was already subjected to relatively similar standards in its home country, but the workers who were posted could not benefit from the additional social security contributions made by their employer in Luxembourg. The Court first acknowledged that Treaty provisions on free movement prohibit not only discrimination on grounds of nationality but all forms of covert discrimination which, although based on apparently neutral criteria, in practice lead to the same result.⁴⁵ According to the Court, a discriminatory situation arises if a host state does not take into account the contributions a posting undertaking has already paid in its state of establishment. Furthermore, social security contributions could not be justified in the case at hand since they did not relate to any benefit for the posted workers themselves.⁴⁶ Therefore, although the requirement concerning the employers' share of social security contributions was precluded, the Court allowed the application of the host state's minimum wages to all workers posted to its territory.

In later rulings *Rush Portuguesa*⁴⁷ and *Vander Elst*,⁴⁸ the ECJ was asked to examine whether a requirement for posted workers, who were not nationals of any Member States, to obtain work permits was justifiable. Although it rejected the work permit rule, the Court pointed out that Member States can apply domestic

⁴³ Case C-113/89, *Rush Portuguesa Limitada v. Office National d'Immigration* [1990] ECR I-1417, para. 18

⁴⁴ Joined cases 62/81 and 63/81, *Seco and Desquenne* [1982] ECR 223.

⁴⁵ *ibid* para 8.

⁴⁶ *ibid* para. 10

⁴⁷ Case C-113/89, *Rush Portuguesa Limitada v. Office National d'Immigration* [1990] ECR I-1417

⁴⁸ Case C-43/93, *Raymond Vander Elst v Office des Migrations Internationales* [1994] ECR I-3803.

labour standards to posted workers.⁴⁹ Furthermore, the ECJ held in *Arblade*⁵⁰ that collective agreements could be applied to guest service provider, if they are precise enough, accessible and did not render it impossible or excessively difficult for the employer to determine his obligation in the host State. However, in *Finalarte*,⁵¹ the Court of Justice stressed that such application would be prohibited if the collective agreement differentiated between domestic and foreign companies.

The first case after the entry into force of the PWD was *Wolff & Müller*.⁵² The case involved the principle contractor's wage liability. In German law, a principal contractor functions as a guarantor for obligations concerning the payment of minimum wages to its subcontractors' employees. The ECJ held that such a procedural arrangement ensuring the observance of worker protection is allowed since it benefits posted workers by providing them with another obligate that is jointly liable with the primary employer and generally more solvent.⁵³ Although the primary aim of the national legislation was claimed to be the protection of the national labour market, it was not detrimental as long as the German legislation was also capable of protecting posted workers.⁵⁴

Thus *Wolff & Müller* generally improved the possibility to enforce minimum wages in the cross-border provision of services. This is part of the reason why the ruling of the Court in the cases to follow, namely *Laval*, *Rüffert*, *Viking* and *Luxembourg* were so controversial.

2. The Laval quartet

2.1 Laval case

The *Laval* case was the first instance where the Court frustrated the language of the PWD and developed a policy for promoting company's freedom to provide services over worker's rights. This was the first step towards creating uncertainty in the legal regime regulating posted workers. The case was referred

⁴⁹ Roger Blanpan, *European Labour Law* (Kluwer Law International, The Netherlands 2010) 442

⁵⁰ Joined cases C-369/96 and C-376/96, *Arblade and Others* [1999] ECR I-8453, para. 43.

⁵¹ Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte and others* [2001] ECR I-7831, para. 76-83.

⁵² Case C-60/03, *Wolff & Müller* [2004] ECR I-9553

⁵³ *ibid* para 40

⁵⁴ *ibid* paras 38-41

by a Swedish national court to the ECJ under the Treaty's reference procedure. The Swedish court requested guidance on whether Swedish law could provide for a greater level of social protection for posted workers than that which was envisaged under the PWD. More specifically it requested guidance on whether or not the provision under national law of a more favourable legal framework for posted workers than what was provided for under the Directive was compatible with Article 56 TFEU.

In 2004, Laval, a company incorporated under Latvian law posted construction workers to Sweden in order to work on building sites operated by L&P Baltic Bygg (Baltic), a company incorporated under Swedish law. Thereby, Laval entered into negotiations with the relevant Swedish trade union, Byggtatan, and sought to sign a collective agreement for the building sector. That negotiated agreement also included terms and conditions regarding the employment of the posted workers. The collective agreement further provided for certain pecuniary obligations which were not set out in the PWD. Additionally, Byggtatan required Laval to agree to the establishment of a certain minimum hourly rate of pay for its posted workers, despite the fact that Swedish law does not actually provide for a minimum rate of pay. When negotiations broke down, Byggtatan launched an industrial action against Laval. At first it only consisted of blockades of certain construction sites where Laval had posted its workers. However, it later escalated to a general boycott supported by other Swedish trade unions. As a result, Laval was unable to carry out its economic activity in Sweden and Baltic declared bankruptcy in 2005.

The first question on which the referring Swedish court sought clarification was whether or not the collective action of the trade union requiring Laval to establish a fixed rate of pay and to guarantee other terms and conditions of employment to its posted workers was compatible with the Treaties and the PWD. The ECJ addressed this question by examining the possibilities of the Member States for determining the terms and conditions of employment as referred to in

Article 3 (1) (a) to 3 (1) (g) of the PWD.⁵⁵ The Court of Justice stated that the purpose of the PWD is not to harmonize the material scope of national systems for establishing the terms and conditions for employment of posted workers in the host State. In fact, the Court continued, Member States are free to choose a system at national level which is not expressly mentioned in the Directive itself, provided that such a national system does not hinder the provision of services within the EU.⁵⁶ Furthermore, the Court pointed out that in Sweden, the terms and conditions for employment covering the matters listed in Article 3 (1) (a) to 3 (1) (g) of the PWD, with the exception of the minimum rate of pay of Article 3 (1) (c) PWD, had been exclusively provided by national law. Therefore, such terms and conditions did not need to be included in a collective agreement. Consequently, it concluded that the Swedish trade union were not justified in including terms and conditions of employment in the collective agreement at issue in the main proceedings.⁵⁷

With regards to the demand of the trade union for Laval to fix a certain minimum hourly rate of pay, the Court held that Article 3 (1) (c) PWD relates exclusively to a minimum rate of pay. The provision was not applicable in the case of the imposition of an obligation for a service provider to comply with any other rate of pay. Therefore, the ECJ ruled that the trade union was not justified in requiring Laval to set rates of pay on case-by-case basis which did not constitute minimum wages.⁵⁸

The next question, the Court gave consideration to was whether the industrial action taken by the trade union to compel Laval to sign the collective agreement was compatible with the Treaties and the PWD. The ECJ acknowledged that Article 3 (1) to 3 (6) could not prevent the application of terms and conditions of employment which are more favourable than the terms and conditions of the Directive itself.⁵⁹ However, it held that the PWD could not be interpreted as allowing the Host State to make the provision of services in its territory

⁵⁵ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767 para. 133

⁵⁶ *ibid* para 61

⁵⁷ *ibid* para 67

⁵⁸ *ibid* paras 67-71

⁵⁹ *ibid* para 79

conditional on the observance of terms and conditions of employment going beyond the mandatory rules for minimum protection as provided in the Directive. Any contrary interpretation, the Court held, would deprive it of its effectiveness.⁶⁰ Thus, the ECJ concluded that the level of protection which must be guaranteed to a posted worker is limited to what is provided for in Article 3 (1) (a) to 3 (1) (g) PWD. It did however, point out that an exception to this rule would be a situation where the posted worker already enjoys more favourable collective agreement in his State of origin or the service provider voluntarily agrees to provide more favourable terms to posted workers.⁶¹

In addition to providing answers to the referring questions, the ECJ also responded to the observations of the Danish and the Swedish governments. They contested that the right of a trade union to take collective actions is a fundamental right in the EU and as such, it did not need to be compatible with Article 56 TFEU. This argument was on the basis that the right at hand was protected by the constitution of Sweden and the ECJ had already ruled that the protection of fundamental rights was an objective justification for restrictions on rights, even if they are provided by the Treaties.⁶²

The Court accepted that the right to collective actions was a fundamental right which form part of the general principles of community law. However, it stated that even fundamental right are subject to certain restrictions.⁶³ The fundamental rights for collective actions must be reconciled with the application of the fundamental freedom to provide services and in accordance with the principle of proportionality.⁶⁴

On the basis of these findings, the ECJ concluded that the activities of the Swedish trade unions in the *Laval* case constituted a restriction on the freedom to

⁶⁰ *ibid* para 80

⁶¹ *ibid* para 81

⁶² Advocate General's opinion to Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767 paras 61-77

⁶³ *ibid* para 91

⁶⁴ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767 para 94

provide services within the meaning of Article 56 TFEU.⁶⁵ The Court essentially took a narrow interpretation of the rules in the PWD by ruling that requirements in excess of those prescribed the Directive constitute a breach of the right to provide services.

However, in reaching this conclusion, the ECJ failed to take into consideration several important factors. Firstly, it completely ignored the fact that the EC legislator did not intend that the level of social protection available to posted workers in the EU be limited to the modest provisions of the PWD. Recital 13 of the Directive provides for the establishment of “nucleus of mandatory rules for the minimum protection” of posted workers undertaking employment activity in the EU. In addition, the Court’s reasoning seems to be in conflict with Article 3 (7) PWD which provides that Article 3 (1) to 3 (6) shall not prevent the application of terms and conditions more favorable to workers. Furthermore, the Directive itself is aimed at the coordination of the Member States laws and this naturally requires a considerable amount of elasticity left to the national legislator. It is submitted by the Commission Communication on the implementation of the PWD that the Directive does not provide for the harmonization at national level of the material content of the mandatory rules of minimum protection as laid down in Article 3 (1).⁶⁶

By submitting that the PWD establishes a maximum level of social protection, the ECJ’s decision leads to the conclusion that any activity at national level enhancing the level of social protection as provided for under the Directive constituted an automatic infringement of Article 56 TFEU.⁶⁷ The Court has in essence limited the taking of collective action in respect of the social rights of posted workers to cases falling within the scope of Article 3 (1) of the Directive. Thus, it has prioritized the business interests of enterprises over the right of posted workers to enjoy a high level of social protection.⁶⁸

⁶⁵ *ibid* para 99

⁶⁶ Commission, ‘Communication on the the implementation of Directive 96/71/EC in the Member States’ COM (2003) 458 final

⁶⁷ Cathal Flynn, ‘The Protection of worker’s rights and the Freedom of Movement: Compatible objectives in the EU legal order? A critical analysis of the Laval and Ruffert Judgements of the ECJ’ [2009] *Irish journal of European Law* 182

⁶⁸ *ibid*

Finally, it could be argued that the ECJ did not give sufficient consideration to the defense trade union's argument that their actions constituted an overriding reason of public interest within the meaning of EU law as it was aimed at protection of workers by preventing social dumping. By rejecting this argument, the Court has ignored the fact that its approach may allow foreign service providers to gain unfair competitive advantage over domestic providers. The decision of the ECJ on this matter is even more dubious considering the fact that in case *Wolf*,⁶⁹ the Court has regarded the PWD not only as social policy instrument but also as an instrument for preventing unfair competition between undertakings posting workers to the host State and undertakings established there.

2.2 Rüffert case

Only one year after *Laval*, the ECJ deliberated again on the issue of social protection applicable to posted workers in the *Rüffert* case.⁷⁰ In this case, the Court reaffirmed its approach to the interpretation of the provisions of the PWD and strengthened its policy for favouritism towards businesses and the right to provide services. *Rüffert* concerned the relationship between a legal requirement in Germany that provided for the inclusion of social considerations in a public tendering process, and the economic right of a sub-contractor established in Poland to provide services as guaranteed by the Treaties.

In 2003, Object und Bauregie, a company incorporated under the laws of Germany, won a public tender and after that, entered into a contract with the government of Land Niedersachsen for the carrying out of repairs to the roof of a State prison. According to the applicable law, a company contracting with a public authority may only do so if it pays the specific wage as provided by the local collective agreements in force.⁷¹ This provision, as the Public Procurement Law in Niedersachsen states, applies to both the principle service provider and all subcontractors.⁷² After entering into a public contract, Object und Bauregie sub-

⁶⁹ Case C-60/03, *Wolff & Müller* [2004] ECR I-9553, paras 41-42.

⁷⁰ Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989

⁷¹ Cathal Flynn, 'The Protection of worker's rights and the Freedom of Movement: Compatible objectives in the EU legal order? A critical analysis of the Laval and Ruffert Judgements of the ECJ' [2009] Irish journal of European Law 185

⁷² Landesvergabegesetz (LVergabeG), Vom 9, Dezember 2005 (Nds. GVBl. S. 395) para 4.1.

contracted some of its work to an undertaking established under the laws of Poland, called PKZ s.p. z.o.o. In 2004, the Polish sub-contractor came under suspicion that it has employed workers at a wage below the rate provided by the collective agreement in place. Having established this fact, Land Niedersachsen terminated the agreement with Object und Bauregie on the grounds that it had failed to comply with its contractual obligations, namely to the terms of the collective agreement. A legal dispute arose and the case was ultimately referred to the ECJ for a preliminary ruling.

The central issue was whether or not the German national court was prohibited from applying the Public procurement law of Niedersachsen on the ground that it was not compatible with the freedom to provide services, as guaranteed by Article 56 TFEU. The referring court also noted that the said piece of legislation caused undertakings established in other Member States to lose their competitive advantage by virtue of their lower wage costs, as it obliges them to adapt the rate paid to posted workers as remuneration to the normally higher level in force of that particular region in Germany.

The ECJ took the opinion that the issue needs to be discussed in light of the PWD.⁷³ The Court further concluded that the minimum rate of pay provided for under the collective agreement at hand cannot be considered to be a more favourable term and condition of employment for the purposes of Article 3 (7). It once more, pointed out that this article cannot be interpreted as allowing the host State to make provision of services conditional on the observance of terms and conditions of employment going beyond the mandatory rules of minimum protection as provided by the Directive. Thus the Court of Justice followed its previous ruling in *Laval* by holding that the level of social protection applicable to posted workers in a host State is limited to the provisions of Article 3 (1) (a) to 3 (1) (g) PWD.⁷⁴ It further noted that a national law requirement that equally obliges an undertaking established in a third party Member State with low wage costs to respect the minimum rate of pay as provided for in a collective agreement in force

⁷³ Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 para. 20-28

⁷⁴ Cathal Flynn, 'The Protection of worker's rights and the Freedom of Movement: Compatible objectives in the EU legal order? A critical analysis of the *Laval* and *Ruffert* Judgements of the ECJ' [2009] Irish journal of European Law 188

in the host State could place an economic burden on the service provider that may prohibit, impede or render less attractive the provision of its services in the host Member State.⁷⁵ On these grounds, the ECJ ruled that the Public Procurement Law of Niedersachsen, which provided for the application of collective agreements to foreign service providers exceeding the terms and conditions as established by the PWD, was therefore contrary to Article 56 TFEU.

As in *Laval*, the ECJ's reasoning in *Rüffert* fails to take into account recital 13 PWD and does not give sufficient consideration to Article 3 (7). It is also submitted that the Court's interpretation of the Directive is incompatible with the intention of the EU legislator. Even though the ECJ had previously acknowledged in case *Commission v Luxembourg*⁷⁶ that Member States are authorized to apply, in a non-discriminatory manner, national terms and conditions of employment on matters other than those referred to in Article 3(1) in the case of public policy provisions, the Court once again rejected the argument that the contested legislation could be justified on the basis that it constituted an overriding reason of public interest. In addition, this approach is in direct contradiction to the Court's earlier case law, which unconditionally recognizes the protection of workers as legitimate public interest consideration.⁷⁷

Importantly, Advocate General Bot made a compelling argument in this regard. In his opinion, the national legislation of Niedersachsen served as an effective preventative measure against social dumping. He held that Article 3(7) of the Directive authorized in principle the implementation of an enhanced level of social protection at national level, provided that it is in accordance with article 57 TFEU.⁷⁸ According to him, the degree of social protection granted to posted workers by the applicable law or collective agreements in place cannot prevent the application of terms and conditions of employment which are more favourable to the posted worker.⁷⁹ Advocate General Bot also pointed out that the disputed

⁷⁵ Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 para 37

⁷⁶ Case C- 319/06 *Commission des Communiautes v. Grand – Duche de Luxembourg* [2008] ECR I – 4323

⁷⁷ Case C-60/03, *Wolff & Müller* [2004] ECR I-9553, para 35

⁷⁸ Opinion of Advocate Bot to Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989 para 81

⁷⁹ *ibid* para 84

provision could be justified by an overriding principle of public interest. He supported his argument with the fact that the ECJ has already accepted in its earlier case law that the objective of preventing the distorting effect caused to competition by undertakings paying their workers less than the minimum wage may be considered to be an overriding requirement capable of justifying a restriction to provide services.⁸⁰ The ECJ however, did not agree with Advocate General Bot's approach and in effect has allowed foreign service providers, by virtue of the fact that they are established in a third party MS, to avoid public procurement laws in the host State. At the same time, local companies are subject to the unconditional application of these national measures.

2.3 Viking case

Although the ECJ did not deal with the PWD in this case, it serves to highlight the degree the importance, the Court gives to internal market freedoms over social rights in the EU. As it shall become clear further on, this was one of the main reasons that lead to the need for a reform in 2014.

Viking Line, a Finnish shipping company, is the owner of the Rosella, a ferry flying the Finnish flag and plying the route between Tallinn and Helsinki.⁸¹ The crew of the Rosella are members of the Finnish Seamen's Union (FSU), which is affiliated to the International Transport Workers' Federation (ITF), an international federation that brings together more than 600 transport worker's unions from 140 countries and has its headquarters in London.⁸²

Viking Line gave notice to the FSU of its intention to reflag the Rosella by registering it in Estonia in order to be able to enter into a new collective agreement with a trade union established in that State and to employ an Estonian crew, whose wages are lower than those paid in Finland. Following that notice, the ITF sent a circular to its affiliates asking them to refrain from entering into negotiations with Viking Line, as a result of which Viking Line was prevented from holding talks with

⁸⁰ *ibid* para 108

⁸¹ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP* [2007] ECR I-10806

⁸² *ibid* para 7

Estonian trade unions.⁸³ At the same time, the FSU announced its intention to strike, demanding inter alia that a collective agreement be concluded which provided that, during the reflagging, Viking Line would continue to comply with Finnish employment law and not lay off the crew.

Viking Line then brought an action against ITF, requesting that the it be ordered to withdraw the circular and the FSU be ordered not to infringe its right of establishment with regard to the reflagging of the *Rosella*.⁸⁴ The issue was referred to the ECJ for preliminary ruling.

The ECJ pointed out first of all that the provisions on the fundamental freedoms within the internal market do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.⁸⁵ Since working conditions in the different Member States are governed sometimes by provisions laid down by law or regulation and sometimes by collective agreements and other acts concluded or adopted by private persons, and in order to avoid creating inequalities, collective action initiated by a trade union or a group of trade unions which seeks to induce an undertaking to enter into a collective agreement falls, in principle, within the scope of Article 49 TFEU.

In this context, the Court acknowledged that the right to take collective action, including the right to strike, constitutes a fundamental right, which forms an integral part of the general principles of Community law. It added that that right must, however, be reconciled with the fundamental freedoms within the internal market, such that exercise of that right may be subject to certain restrictions, in accordance with the principle of proportionality.⁸⁶

Continuing its line of reasoning, the Court stated that Article 49 EC has direct horizontal effect, that is to say it confers rights which may be relied on not only against the authorities of a Member States, but also against certain private parties such as, in this case, a trade union or an association of trade unions.⁸⁷ The

⁸³ *ibid* para 11

⁸⁴ *ibid* para 18

⁸⁵ *ibid* para 44

⁸⁶ *ibid* para 46

⁸⁷ *ibid* para 27

abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise, by associations or organisations not governed by public law, of their legal autonomy.

Finally, the Court examined whether or not the actions taken by the ITF and the FSU were restrictive and whether there was any justification for them.

First of all, it found that those actions have the effect of making less attractive, or even pointless, Viking's exercise of its right to freedom of establishment, such that they constitute restrictions on that freedom.⁸⁸

Next, it set out the criteria on the basis of which the referring court must examine whether or not justifications exist: the protection of workers and improved living and working conditions are legitimate interests which, in principle, justify a restriction of one of the fundamental freedoms guaranteed by the Treaty. More specifically, the actions taken by the FSU could be justified if it were established that the jobs or conditions of employment of the members of that trade union employed by Viking Line were genuinely jeopardised or under serious threat, and if the collective action initiated by that union were suitable to ensure the achievement of the objective pursued and did not go beyond what is necessary to attain that objective.⁸⁹

Therefore, the ECJ, once again gave priority to economic over social rights. Even though, the PWD was not concerned in this case, it is commonly cited by authors as an instance where the Court reaffirmed its views in *Laval*.⁹⁰

2.4 Luxembourg Case

By this judgment, the ECJ has taken another step in the reinterpretation of the Posting of Workers Directive which it embarked upon with the *Laval* Case judgment, transforming PWD into an instrument for restricting the rights to take

⁸⁸ *ibid* para 86

⁸⁹ *ibid* para 87

⁹⁰ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767

action – from the part of public authorities or trade unions – to ensure equal pay for equal work.⁹¹

In July 2006, the Commission of the European Communities brought an enforcement action against Luxembourg in which it claimed that Luxembourg had failed to fulfil its obligations under the PWD and under Article 56 and 57 TFEU concerning the freedom to provide services.

The Commission claimed that Luxembourg, by wrongly describing national provisions as mandatory provisions falling under national public policy, and thereby requiring undertakings which post workers to its territory to comply with them, imposed obligations on those undertakings which went beyond those laid down by the PWD.

The Commission also criticized Luxembourg for failing fully to transpose article 3(1) (a) of the PWD, relating to maximum work periods and minimum rest periods, and for violating Article 56 by requiring foreign undertakings posting workers to Luxembourg to fulfil certain additional requirements that were not required by undertakings established in Luxembourg.

In its judgment the Court noted both that Article 3(1) of the Posted Workers Directive set out an exhaustive list of the matters in respect of which the Member States were permitted to give priority to the rules in force in the host Member State, and that under Article 3(10) of the Directive it was nevertheless open to member states to apply, in a non-discriminatory manner, to undertakings which posted workers to their territory terms and conditions on matters other than those referred to in Article 3(1), in the case of public policy provisions.⁹²

The Court held that the public policy exception in Article 3(10) should be determined narrowly. The Court's reasoning was that this constituted "*a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, and the scope of which cannot be determined unilaterally by the Member States.*"⁹³

⁹¹ Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-04323

⁹² *ibid* paras 26-27

⁹³ *ibid* para 30

The Court then declined to see the public policy provision used by Luxembourg to apply Luxembourgish standards relating to the requirement of a written contract or document. Such a requirement was already required in home states in the Community by virtue of another Community measure.⁹⁴ It was therefore redundant. A very similar conclusion was reached in relation to requirements relating to rules on part-time and fixed-term work laid down in Luxembourg's 2002 law.⁹⁵ A Luxembourgish requirement relating to the automatic adjustment of rates of remuneration to the cost of living also fell outside Article 3(10).

The Court noted that Luxembourg had “merely cited in a general manner the objectives of protecting the purchasing power of workers and good labour relations, without adducing any evidence to enable the necessity for and proportionality of the measures adopted to be evaluated.”⁹⁶ Accordingly, the Grand Duchy of Luxembourg was held not to have shown to the required legal standard that the relevant provision of its 2002 law came within Article 3(10) of the Directive

The Court also declined to hold Article 3(10) broad enough to encompass a measure such as the Luxembourgish requirement applying as mandatory rules all national rules in respect of collective agreements. The Court noted, *inter alia*, that there was no reason why rules about collective agreements should fall under the definition of public policy.⁹⁷

Indeed “*such a finding must be made as regards the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either.*”⁹⁸

Therefore, after its already restrictive judgments in the *Laval* and *Rüffert* Cases, the ECJ has in its judgment in *Commission v Luxembourg* even further reduced the remaining possibility, provided for by Article 3(10) of PWD, to impose

⁹⁴ Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ 1991 L 288

⁹⁵ *ibid* para 60

⁹⁶ *ibid* para 53

⁹⁷ *ibid* para 65

⁹⁸ *ibid* para 66

national labour law standards on employers from other Member States relying on posting of workers in order to provide services.

While the very outcome of the *Commission v Luxemburg* Case is hardly surprising in the light of the Court's previous case-law, one cannot help but to be surprised by the doctrinal and even defiant attitude of the Court in this case. In the light of the outcome in the *Laval*, *Rüffert* and the *Commission v Luxemburg* Cases, it is now clear that the PWD has been fully reinterpreted by the ECJ into a meaning detrimental to the trade union movement. This calls for a serious reassessment from the Commission, including strategies to achieve in-depth modifications to the current state of EU law.

Chapter III

The aftermath of the Laval quartet and legislative developments

1. Consequences of the judgments on selected Member States

The judgments in the “Laval quartet” have triggered a political and economic debate touching on central issues of European integration. The problem of social dumping and the role of social partners in combating it are creating uncertainty and tension in the EU.⁹⁹ The way in which the ECJ tackled the four cases has not only been criticized for disregarding essential elements of the PWD, but also for overlooking social rights and overemphasizing economic interests. The status quo resulting from the judgments is unsuitable for many Member States. In particular, it has led to a situation where the PWD is being read and used in ways that were never intended when the instrument was first introduced in 1996. What we have today is a Directive that is controversially interpreted as a *de facto* maximum or exhaustive harmonization instrument.¹⁰⁰ It is regularly used to import to host Member States, the standards and rules prevailing in the country of origin, as we saw in *Rüffert*. It is also abused as a vehicle for transnational posting of workers performing works or services abroad, through the use of “letter box” companies, set up in low wage member States. These are fundamental problems pertaining to the substantive content of the PWD, as interpreted by the ECJ. This chapter highlights the above-mentioned issues and illustrates the detrimental effect of the judgments on Sweden and Germany, as these two countries were directly affected by the judgments in *Laval* and *Rüffert*.

⁹⁹ Andreas Buckner, Matti Hauer, Torsten Walter, ‘Reconciling fundamental social rights and Economic Freedoms after Viking, Laval and Ruffert, Workers’ rights and economic freedoms: symphony or cacophony? A critical analysis from a German perspective’ (2011), 4-5

¹⁰⁰ Mark Freedland, Jeremias Prassl ‘Viking, Laval and Beyond: Civilizing the European Posted Workers Directive’ (2014)

1.1 Consequences on Sweden

One of the predominant features of the Swedish industrial relations system is its high degree of organization. Around 95% of all employees are covered by collective agreements.¹⁰¹ Trade unions are accorded a great degree of self-regulation. While state inspectors are only responsible for controlling the workplace environment, the unions have the responsibility of supervising respect of employee rights.¹⁰² In addition, while it is true that the right to take industrial actions is protected by the Swedish constitution, only trade unions and not individual employees can make use of this protection. Thus unions play a pivotal role in protecting worker's right.

The primary impact of the judgments concerns the scope within which collective action can be used. The wage and employment conditions against which trade unions can ultimately take collective actions are now limited. The impact of the judgment is therefore of major importance for the Swedish industrial relations system. The ECJ's decision makes it clear that there can be no collective bargaining with EU companies posting workers to the Nordic country. As pointed out in the previous chapter, the Court ruled that a trade union demand to enter into bargaining on the conditions applicable is an obstacle to the free movement of services. This has led to a situation where it is *de facto* impossible to guarantee posted workers their rights based on the PWD.¹⁰³ However, the more far-reaching consequence of the judgment is that employers in Sweden may now leverage the principle laid down by the ECJ to avoid participating in the industrial relations system. They are calling on the State to intervene with a national statutory minimum wage, which would serve on one hand as an instrument for achieving transparency in cross-border situations, but on the other hand as an instrument to put pressure on wages set by collective agreements.¹⁰⁴ Therefore, the Laval

¹⁰¹ Niklas Bruun, Claes-Mikael Jonsson, Erland Olauson, 'Reconciling fundamental social rights and Economic Freedoms after Viking, Laval and Ruffert: Consequences and policy perspectives in the Nordic countries as a result of certain important decisions of the Court of Justice of the EU' (2011) 20-21

¹⁰² *ibid* 38-39

¹⁰³ *ibid*

¹⁰⁴ *ibid*

judgment in particular has partly undermined the efficiency of the system, which is no longer able to guarantee equal treatment of foreign and domestic workers.

1.2 Consequences on Germany

In Germany, the *Rüffert* case caused major problems as well, with the danger of social dumping emerging. Within the country's federal structure, certain Federal States used to have clauses in their statutory procurement regulations stipulating compliance with collective agreements.¹⁰⁵ Bidders for public-sector contracts needed to provide a commitment that they would pay wages at the local levels laid down in collective agreements. However, after the *Rüffert* decision, existing collective agreement compliance clauses were no longer enforced.¹⁰⁶ Therefore, new universally applicable clauses for public tenders were drafted. These clauses refer to collective agreements that only provide for a certain minimum wage standard that is in most cases below the actual local wages.¹⁰⁷ Thus foreign bidders, who need to be taken into account when public sector contracts are awarded, have a competitive advantage due to the lower rates of pay they are subjected to. This allows them to win tenders almost automatically.¹⁰⁸ The consequences on the German companies are that they are either being squeezed out of the market or they are forced to cut their pay levels.

Therefore, the ECJ's interpretation of Article 3 (1) PWD has brought about substantial negative effect on both Sweden and Germany. In the Nordic country, it is essentially impossible for posted workers' rights to be guaranteed due to the narrow application of the Directive by the Court. In Germany, competition is severely distorted and local undertakings are put in a disadvantage following the ECJ's ruling. Naturally these issues needed to be addressed by the legislator in light of the fact that the PWD did not achieve its intended effect.

¹⁰⁵ Andreas Buckner, Matti Hauer, Torsten Walter, 'Reconciling fundamental social rights and Economic Freedoms after Viking, Laval and Ruffert, Workers' rights and economic freedoms: symphony or cacophony? A critical analysis from a German perspective' (2011). 45-46

¹⁰⁶ Bavarian Constitutional Court (Bay-VerfGH) [20.6.2008] Vf 14-VII/00-NJW-RR

¹⁰⁷ Andreas Buckner, Matti Hauer, Torsten Walter, 'Reconciling fundamental social rights and Economic Freedoms after Viking, Laval and Ruffert, Workers' rights and economic freedoms: symphony or cacophony? A critical analysis from a German perspective' (2011). 84-85

¹⁰⁸ *ibid*

2. The Posted Workers Enforcement directive

Having experienced the negative effect of the ECJ's decisions in the "*Laval* quartet", the Member States were once again set on repairing the posting of workers regime. With its judgments in those cases, the Court's effectively annulled some of the provisions of the PWD, or at least in terms of the directive's Article 3 (1) and 3. (10). Thus if the ECJ can in effect overturn a directive, one would ask himself what the purpose of producing more regulatory text to "reform" EU law in the area is.¹⁰⁹

The response was a new Enforcement Directive (PWE).¹¹⁰ Contrary to the prior concerns that the Commission was to embody the ECJ's controversial approach, the tone of the new directive is reminiscent of the original PWD. In addition, it provides several new innovations that claim to address many of the issues presented by procurement supply chains and collective agreements.¹¹¹

The PWE uses access to information and administrative assistance rules to provide for the enforcement of those legal principles enshrined in both the old and new Posted Workers Directives. Access to information for cross-border firms is to be made available through the Internal Market Information system (IMI) and places new demands on member states to ensure that requisite information is forthcoming.¹¹² Crucially, the responsibility is placed upon Member States to ensure that article 3 (10) is drafted properly in national law.

This presents, as it did with the PWD, the critical issue of how member states absorb a piece of EU law. The *Laval* case presented this powerfully, where the implications for Sweden's autonomous collective bargaining system were

¹⁰⁹ C. Barnard 'British jobs for British workers: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU market'. [2009] *Industrial Law Journal*, 245-246

¹¹⁰ Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') [2014] OJ L 159/11 (Posted Workers Enforcement Directive)

¹¹¹ Andrew Morton, 'EU Reform of transnational Posted Workers law and the place of working rights and collective agreements within the Single European Market' (European Public Services Briefings 5) <<http://www.european-services-strategy.org.uk/news/2013/eu-reform-of-transnational-posted-workers-law/eu-reform-posted-workers.pdf>> accessed July 5, 2016

¹¹² Article 5, Posted Workers Enforcement Directive

serious.¹¹³ Article 3 (8) of the PWD exhaustively spelt out those means in which national authorities could define their national rules for foreign countries to observe. By implication, it appears to be the Commission's view that Sweden did not make full use of these provisions in the PWD.¹¹⁴

Whether inadequate transposition as it issue or not, and any aggressive intervention by the ECJ in these questions notwithstanding, *Laval* did prompt some observers and academics to place part of the blame at Sweden's own door for the problems.¹¹⁵ It should be recalled that the ECJ applied a similar *Laval*-like logic in *Rüffert*, where there is little ambiguity about the legal standing of the relevant collective agreement and its extension no such related concerns with the German transposition of the PWD.¹¹⁶ In short - these problems are mostly ECJ-made, so targeting reform efforts at the national level misses a major part of the problem.

The heavy responsibility the Commission has placed on national level enforcement points to a Commission view that the either the ECJ was not to be blamed, as Member States needed to do better to mitigate against the effects of ECJ oversight and better enforce the spirit of PWD, or simply that they are on their own in trying to do so. This might even appear to be an admission on the part of the Commission that it cannot shield its own interpretation of EU posted workers laws from the ECJ's activism in this area.¹¹⁷ Therefore Member States must do their utmost to do this themselves.

¹¹³ Niklas Bruun, Claes-Mikael Jonsson, Erland Olauson, 'Reconciling fundamental social rights and Economic Freedoms after Viking, Laval and Ruffert: Consequences and policy perspectives in the Nordic countries as a result of certain important decisions of the Court of Justice of the EU' (2011) 20-21

¹¹⁴ C. Kilpatrick, 'Laval's regulatory conundrum: collective standard-setting and the Court's new approach to posted workers' [2009] *European Law Review*, 844

¹¹⁵ Mark Freedland, Jeremias Prassl 'Viking, Laval and Beyond: Civilizing the European Posted Workers Directive' (2014)

¹¹⁶ Andrew Morton, 'EU Reform of transnational Posted 'Workers law and the place of working rights and collective agreements within the Single European Market' (European Public Services Briefings 5) <<http://www.european-services-strategy.org.uk/news/2013/eu-reform-of-transnational-posted-workers-law/eu-reform-posted-workers.pdf>> accessed July 5, 2016

¹¹⁷ J-E Dolvik, J. Visser 'Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?' [2009] *Industrial Relations Journal* Vol 40, no.6, 491

However, The new PWE does appear to offer substantive provisions concerning supply chains in procurement contracts and 'letter-boxing' practices.¹¹⁸ The Directive demands extended liability along procurement supply chains so that ancillary contracts are covered by the same employment conditions as the primary contractor. It does this principally by making the latter liable in the event of a breach. This would appear to overturn the ECJ's *Rüffert* decision and reassert the German rules this decision had overturned.

This does need to be taken with a grain of salt. Firstly, the responsibility is once again upon member states to articulate this within their transposing legislation. Secondly, there is an alarming lack of reference to these supply chain in the Commission's own 2011 proposals for EU public procurement law reform,¹¹⁹ and lastly, nothing explicitly contradicts the essential logic of the ECJ's *Rüffert* decision on the issue on enforceable social standards.

Given that EU public procurement regulates so many of these types of public contract, it is essential to make these two pieces of European legislation consistent. In terms of underlying ideology, and to those specific points like these concerning social considerations in public contracts, these two proposed reforms suffer from a poor degree of mutual fit. This is a critical flaw in approaching reform in both posted workers and procurement.

Although the inclusion of a specific provision outlawing 'letter-box' practices is welcome, a similar problem of compatibility and congruence emerged when looking into other areas of EU law. In *Viking*¹²⁰ and *Centos*¹²¹ cases, companies re-registered themselves in a new member state to circumvent national regulations deemed burdensome. The PWE does not clarify if the principles applied in these cases are thereby null and void, perhaps it should be viewed as given in light of the clear statement of letter-boxing's illegality within the

¹¹⁸ Andrew Morton, 'EU Reform of transnational Posted 'Workers law and the place of working rights and collective agreements within the Single European Market' (European Public Services Briefings 5) <<http://www.european-services-strategy.org.uk/news/2013/eu-reform-of-transnational-posted-workers-law/eu-reform-posted-workers.pdf>> accessed July 5, 2016

¹¹⁹ Commission, 'Green Paper on the modernisation of EU public procurement policy Towards a more efficient European Procurement Market' COM (2011) 15 final

¹²⁰ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP* [2007] ECR I-10806

¹²¹ Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-01459

enforcement directive. This has not been addressed in the proposals or its supporting documents. Thus the provision is open to ECJ's judicial activism in the field, which does not help with establishing certainty in the field.¹²²

These are crucial omissions given the ambiguity of current EU procurement law. This could be seen as a deliberate attempt to leave loopholes on the part of the Commission, hoping that cross-border firms exploit such regulatory gaps to foster their mobility in the name of the Single Market. It cannot be denied that incentives are present in, for example, the construction sector for firms that pick up regular temporary contracts to base themselves legally elsewhere and reduce labour costs to make their bidding for contracts more competitive.

There can be little doubt that the ECJ's interpretative turn on the issue of posted workers is the principal rationale for reform. The reforms attempt to square a desire to placate long held political allies of the European project, like the trade union movement. Thus, even though the PWE is to be fully implemented by the member States later this year, it is already evident that there are some problems with it. Further, on the face of it, it is the author's opinion that the Directive is likely not going to be able to achieve its goals and strike a balance between economic and social rights in the EU. Despite this, it might seem at least natural to give the PWE a chance and observe how the posting regime evolve in the next couple of years. That is not, however the Commission's approach as it announced its plan to reform the original PWD earlier this year. The new proposal is analyzed in detail in the final chapter of this thesis.

¹²² Andrew Morton, 'EU Reform of transnational Posted 'Workers law and the place of working rights and collective agreements within the Single European Market' (European Public Services Briefings 5) <<http://www.european-services-strategy.org.uk/news/2013/eu-reform-of-transnational-posted-workers-law/eu-reform-posted-workers.pdf>> accessed July 5, 2016

Chapter IV

The proposed 2016 reform of the PWD

1. The Commission's proposal

Having initially indicated that a review of the PWD would be carried out in parallel with the national transposition of the Enforcement Directive, the EU Commission signalled that it would come up with a proposal to revise the PWD in autumn 2015.¹²³ This was in order to address unfair practices leading to social dumping by ensuring that the same work in the same place is rewarded by the same pay.¹²⁴

With regards to the needs to revise the PWD, the Commission highlighted in particular on the fact that the 1996 Directive no longer addresses the new realities within the Internal Market, namely the growth in wage differentials that create unwanted incentives to use posting as a means for unfair competition. The Commission referred specifically to the need to tackle the shortcomings in the concept of "minimum rates of pay that resulted in "stark wage differences between posted and local workers, especially in Member States with relatively high wage levels.

The revision proposal focuses on three main areas: the remuneration of posted workers, rules on temporary work agencies and rules applying to long-term posting, with the aim of applying the principle of equal pay for equal work.

Concerning the remuneration of posted workers, the objective is to reduce the wage differences that exist between posted and local workers. While employers only have to respect the minimum rates of pay under the current Directive, the new proposal obliges them to apply the rules of the host country, as laid down by law or by universally applicable collective agreements. In addition, these rules set

¹²³ Directorate General For Internal Policies Policy Department, *Posting of Workers Directive – current situation and challenges* (2015)

¹²⁴ Commission, 'No time for business as usual. Commission Work Programme 2016' COM (2015) 610 final, 8

by universally applicable collective agreements become mandatory in all sectors, whereas previously they were only mandatory in the construction sector. This implies that employers will have to offer the same advantages, such as bonuses, allowances or pay increases according to seniority, to posted workers as to local ones.

Regarding rules on temporary agencies, the new proposal foresees to ensure equal treatment between local temporary agency workers and posted temporary agency workers with respect to remuneration and working conditions. With respect to long-term posting (i.e. lasting more than two years), the Commission proposes that long-term posted workers are now covered by the mandatory rules of the host country's labour law.

Do these new elements really lead to a full implementation of the principle of equal pay for equal work? The response to this question is hotly contested among the different parties involved. Some see these changes as a significant improvement, others denounce a missed opportunity to get full equal treatment in Europe, while others believe that the new proposal already goes a step too far and limit the economic opportunities of the Single Market.

2. Stakeholder's reactions

The EU Commission had already made the announcement of the decision to carry out a review of the PWD in 2015, but the March proposal for a revision of the Directive has triggered quite different and controversial reactions from stakeholders and Member States.¹²⁵

For those stakeholders that are strongly demanding a full implementation of the equal pay for equal work principle, the new proposal is a missed opportunity that only delivers equal treatment for some, or that could only be regarded as an impartial solution to key problems related to posting. For instance, ETUC welcomes the proposed targeted revision, including the new concept of

¹²⁵ Directorate General For Internal Policies Policy Department, *Posting of Workers Directive – current situation and challenges* (2015)

remuneration.¹²⁶ However, the organization opinionated that the reform only partly addresses key demands of the organisation, in particular the demand for unconditional equal pay for posted workers. For the European unions, the revised PWD should include a clear commitment that competition on labour costs in the context of posting is not accepted.

In contrast, for a number of employer organisations, such as *BUSINESSEUROPE* and a group of national employer federations from Poland, the Czech Republic, Malta, Lithuania, Latvia, Portugal, Slovakia and Ireland, the new proposal goes too far in the wrong direction as it limits key principles of economic freedom.¹²⁷ Furthermore, as highlighted in a joint letter of Nordic Employer Organisations that was sent to the Commission November 2015, employers have serious concerns with regards to the unintended effects of the "*equal pay for the same work at the same place*" principle on national systems of wage setting and collective bargaining.¹²⁸

They argue that the PWD offers a sufficiently clear and protective legal framework and should not be changed. The employer organizations point to the analysis carried out by the Commission in 2009-2011, which lead to the Enforcement Directive, and argue that the basic Directive should not be touched before more information is known about the effect of the Enforcement Directive.¹²⁹

With regards to EU Member States prior to the publication of the new proposal, there were two groups of ministers: those representing major receiving and higher wage-level countries on the one hand, and those representing sending and lower-wage countries on the other. They have both sent letters to Commissioner Thyssen highlighting their views and concerns on the issue.

¹²⁶ European syndicate trade union confederation, 'ETUC calls for right decisions on CETA and Posted Workers' < https://www.etuc.org/press/etuc-calls-right-decisions-ceta-and-posted-workers#.V49LAFc_7dk> accessed 5 July 2016

¹²⁷ Joint letter of 9 February 2016 of the presidents Polish Confederation Lewiatan, Confederation of Industry of the Czech Republic, Malta Chamber of Commerce, Enterprise and Industry, Lithuanian Confederation of Industrialists, Employer's Confederation of Latvia, Confederation of Portuguese Business, RUZ Slovakia, IBEC Ireland.

¹²⁸ Joint letter of 18 November 2015 by the Confederation of Finnish Industries, Business Iceland, Confederation of Norwegian Enterprises, Confederation of Swedish Enterprises and Confederation of Danish Employers to Commissioner Thyssen.

¹²⁹ Directorate General For Internal Policies Policy Department, *Posting of Workers Directive – current situation and challenges* (2015)

In their joint letter of 18 June 2015, the “higher wage” group (made up of labour ministers from Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden) demanded a substantive change in the regulation of posting along the principle of “*equal pay for equal work in the same place*” as the only way to re-balance economic and social principles in a fair way, and to avoid social dumping.¹³⁰

In contrast, in August 2015, the “lower wage” group (ministers responsible for labour and social affairs from Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) expressed their view on the issue, arguing that a discussion on a possible revision of the PWD was premature and should be postponed until “a proper assessment” become available on the implementation and results achieved by the Enforcement Directive. Furthermore, the ministers raised concerns about the potential negative effects that a substantive change of the PWD would have on the freedom to provide services.

Both positions differ strongly with regards to their assessment on whether the balance between the freedom to provide services and the protection of workers' rights, which was struck in 1996, still provides sufficient safeguards to protect the social rights of posted workers today. Furthermore, the assessments differ with regards to the question of whether the Enforcement Directive already provides a sufficient instrument to fight abusive practices, circumvention and fraud through legal provisions, and address further challenges relating to the proper implementation of the Directive.

Regardless, By 13 May 2016 the parliaments of eleven EU Member States (Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia) have issued “reasoned opinions” and showed the so-called “yellow card” to the European Commission for the proposed amendment of the PWD. This represents 22 votes, which is therefore already 3 votes above the required threshold.¹³¹

¹³⁰ Ibid

¹³¹ Georgi Gotev, ‘National parliaments invoke ‘yellow card’ in response to revised Posted Workers Directive’ < <https://www.euractiv.com/section/social-europe-jobs/news/national-parliaments-invoke-yellow-card-in-response-to-revised-posted-workers-directive/>> accessed July 7. 2016

As the initiator of the legislative proposal, it is now up to the European Commission to acknowledge receipt of the reasoned opinions from national Parliaments and to confirm that the required threshold for the "yellow card" was reached. The European Commission must then review its proposal. After such review, the European Commission may decide to maintain, amend or withdraw the draft. Reasons must be given for this decision.

3. Criticism to the proposal

A lot of criticism regarding the Commission's new proposal concerns the implication of relying merely on universally binding collective agreements. For instance, the European Trade Union Confederation (ETUC) deplores the fact that other types of agreements are excluded, such as most sectorial collective and all company-level agreements. In addition, the new provision regarding temporary agency workers might cause some problems in some Member States that have no universally applicable collective agreements.¹³²

Thus, narrowing down the Directive to a certain type of agreement neglects the reality of collective bargaining in Europe, which is characterized by great diversity. In addition, it creates inequality among posted workers: the ones working in sectors with universally binding collective agreements will enjoy a higher level of social protection than the ones who are active in less regulated sectors. While this point needs to be seriously considered during the negotiations, it also calls for social partners to play a stronger role in ensuring that posted workers have the right tools to protect themselves.

Adequate protection of workers can be obtained by collective agreement and some sectors, such as the construction sector, have been more successful than others in developing transnational regulation.¹³³ Trans-border collective bargaining is therefore essential for the future of posted workers and sectoral

¹³² De Bruyne, J.de Potter de ten Broeck, Van Hiel, 'Policy within and through law' [2015] Maklu University Press, Antwerpen 303

¹³³ Irish congress of trade unions, 'False economy: the growth of 'bogus self-employment' in the construction industry', 8
<http://www.ictu.ie/download/pdf/false_economy_the_growth_of_bogus_self_employment_in_construction.pdf> accessed on 7 July 2016.

social partners need to create the structures for transnational collective bargaining.¹³⁴ In the same way, posted workers need to be better represented.

Another course of action relates to information on posting. There is a large consensus on the lack of data and reliable information regarding posted workers. At the moment, the debate is based on information provided by the A1 forms, which is used for social policy coordination between member states. However, the information provided in these forms is not always reliable and clearly insufficient to get a complete understanding of posting across Europe. This is due to two main reasons. First, companies that only post workers for social security reasons do not apply for A1 forms, and there have even been cases of falsified A1 forms.¹³⁵ Second, a lot of information is missing in the A1 form, as it does not include information related to posted workers' salary and working conditions.¹³⁶

Against this background, there is an urgent need to implement a comprehensive strategy against social fraud and abuses. This strategy should be twofold. On the one hand, the creation of a common EU electronic database of A1 forms would increase transparency and allow for rapid checks and control. To make this database efficient, and as suggested by the European Federation of Building and Woodworkers, a unique European registration number for companies and workers could help track their history and identify irregularities. On the other hand, additional resources should be allocated to countries encountering difficulties to carry out sufficient labour inspections. These additional resources could also help them to create an appropriate system necessary to meet the new requirement about posting online elements of remuneration in collective agreements.

¹³⁴ European Builders Confederation, 'Posting of workers: European small construction entrepreneurs welcome revision'

<http://www.ebcconstruction.eu/fileadmin/Publications/Press_releases/2016/2016_03_08_EBC_on_EC_PWD_revision_EN.pdf> accessed on 7 July 2016.

¹³⁵ Cremers, 'Letter-box companies and abuse of the posting rules: how the primacy of economic freedoms and weak enforcement give rise to social dumping' [2014] European Trade Union Institute Policy Brief, 5

¹³⁶ European Parliament Committee on employment and social affairs, 'Draft Report on social dumping in the European Union'

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=%2F%2FEP%2F%2FNONSGML%2BCOMP_ARL%2BPE-571.622%2B01%2BDOC%2BPDF%2BV0%2F%2FEN> accessed on 7 July 2016.

Conclusion

This thesis set out to establish whether a reform in the posting of workers regime in the EU is necessary and if so, could the 2015 proposed legislation have the effect of limiting social dumping and striking a balance between economic and social rights.

At the very beginning, it was determined that share of posted workers in the annual flows of labour mobility is becoming more and more significant. With this, the problem of social dumping arises, which threatens both fair competition and worker's rights. Further, it was provided that the country of origin principle, which would apply, had the PWD not existed, has some distinct disadvantages. Thus, in order to ensure the application of the host country principle to a posting situation, the EU has adopted the PWD. It lays down a set of minimum standards that must be applied to both domestic and posted workers without distinction, but at the same time also allows for the posted worker to be subjected by his home country's social security system. The Directive generally improved the possibility for posting by striking a delicate balance between, on the one hand the economic right to provide services and the labour rights of workers on the other.

This delicate balance, however, was swiftly diminished by a series of rulings of the ECJ. While the Court at first generally improved the possibility to enforce minimum wages in *Wolff & Müller*, it went on to re-interpret the PWD in the cases of the "Laval quartet". This thesis has proven that the reasoning in the *Laval*¹³⁷ and *Rüffert*¹³⁸ cases was flawed, while *Luxembourg*¹³⁹ and *Viking*¹⁴⁰ further re-affirmed the ECJ's position and prioritized economic over social rights even more. In effect, the Court reversed the substance of the Directive to the freedom of origin

¹³⁷ Case C-341/05, *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet* [2007] ECR I-11767

¹³⁸ Case C-346/06, *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989

¹³⁹ Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-04323

¹⁴⁰ Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v. Viking Line ABP* [2007] ECR I-10806

principle, which lead to stark consequences on some Member States. In Sweden, the decision in *Laval* rendered it impossible for the trade unions to guarantee posted worker's rights. At the same time in Germany, *Rüffert* created an anti-competitive environment with regards to public tenders. Foreign companies are now subject to collective agreements that adhere to article 3 (1) PWD, while national undertakings are obliged to adopt higher social standards. Thus, the very foundation of the Directive is undermined. In practice, neither worker's rights nor fair competition is enhanced following the controversial judgments of the Court.

This lead to the adoption of the 2014 Enforcement Directive, which aimed at eliminating social dumping by administrative measures. However, this thesis argued that targeting reform efforts at the national level misses a major part of the problem, because the addressed issues are ECJ made, rather than national. Further, while the PWE did essentially overturn the judgment of the Court in *Rüffert*, the responsibility for transposition is once again left to the individual MS and nothing in the Enforcement Directive directly contradicts the logic applied to *Rüffert*. Evidently, the PWE was a missed opportunity on behalf the EU to protect fair competition and social rights. Despite the Directive, just recently having been implemented by all MS, it is the conclusion of this thesis, that it will likely not be sufficient to address the new realities within the Internal Market, namely the growth in wage differentials that create unwanted incentives to use posting as a means for unfair competition. While some social partners are calling for patience and refrain from a reform at this stage, it is the author's belief that new legislation on posted workers must be adopted sooner or later, as the PWE does not reverse the damage to the European Social model incurred by the ECJ's ruling in *Laval* and *Luxembourg* in particular. Thus a reform is necessary, but as this thesis has established, it might not be adequate under its current form in the Commission's 2016 proposal. This is also the opinion of a large number of the MS, as they have triggered the yellow card procedure. Many social partners also criticize the proposal. Thus, the recommendation of the author is for the current proposal to be withdrawn and a new one to be drafted while consulting with all stakeholders, as well as establishing a unique EU registration number, in order to avoid falsification of A1 forms.

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Abstract

On March 8, 2016 the European Commission, proposed review of the Posted Workers Directive 1996 (PWD), which regulates people employed in one member state, but are sent to temporarily work in another. The proposal is aimed at revising the rules on posting of workers set out by the PWD that was followed by an enforcement directive in 2014, in order to facilitate the provision of goods and services across borders of the EU Member States. However, given that the 2014 Enforcement directive has not yet entered fully into force and that the proposed rules are met with mixed responses from the EU Member States, this thesis analyzes whether such reform is necessary.

The rulings of the ECJ in the “Laval quartet” has fundamentally disrupted the balance between economic and social rights in respect of posted workers. The Court essentially deprived the 1996 PWD of its effect. This lead to chaos in some MS, where the detrimental effect of ECJ’s judgments was strongly felt. In order to address the situation, the EU adopted the Posted Workers Enforcement Directive, which seeks to combat social dumping and unfair competition by administrative means. Even though it had just recently entered into force in all MS, the PWE is likely not to achieve its goals at it fails to address key issues pertaining to posted workers and social dumping.

Therefore, a reform is necessary and Commission has sought to adopt a revision of the original Posted Workers Directive. However, the 2016 proposal was met with harsh criticism from virtually all stakeholders. The potential reforms aims to address the situation after the “Lava quartet” by introducing an equal pay for equal work principle, rules on temporary work agencies and rules applying to long-term posting. The thesis concludes that this effort on part of the Commission is likely not going to be sufficient and a new approach is necessary. The author recommends withdrawal of the current proposal and launching a dialogue with all stakeholders in order to strike a compromise, taking into account everyone’s concerns. In addition, the author recommends establishing a unique EU registration number, in order to avoid falsification of A1 forms.