Sieps
Swedish Institute for European Policy Studies

European Policy Analysis

JULY · ISSUE 2012:8epa

Jonas Malmberg and Caroline Johansson*

The Commission's Posting Package

Abstract

In March 2012, the Commission presented two legislative proposals – the Monti II-Regulation and the Enforcement Directive. The proposals constitute a response to the intense debate following the CJEU's rulings in the *Laval* quartet. The first proposal, the *Monti II-Regulation,* aims at clarifying the relationship between the right to take collective action and the economic freedoms. Its vague formulation, however, puts its potential to change the state of law in question. The second proposal, the *Enforcement Directive,* aims at improving the enforcement of the Posting of Workers Directive. In doing so it shall equally ensure workers' rights and enhance cross-border services by reducing employers' administrative burdens. It is doubted, however, whether the methods chosen will be effective, especially that the Directive seems to overlook how closely the different enforcement mechanisms are linked to individual institutional arrangements in the Member States. The following paper analyses these two proposals, examines their potential implications and suggests alternative approaches.

1 Introduction

In a series of judgments from 2007 and 2008, the Court of Justice of the European Union (CJEU) addressed issues regarding the interrelationships between, on the one hand, the freedom to provide services and freedom of establishment and, on the other hand, the protection of workers' rights and rights to take collective action.[1] The rulings made clear that collective action – although considered as a fundamental right according to EU law – is not in principle excluded from Articles 49 and 56 in the Treaty on the Functioning of the European Union (TFEU). Instead, collective action may, at least in cross-border situations like the ones in *Laval* and *Viking*, be considered as a restriction on the freedom of services and the right to establishment. Such restrictions may be justified according to the *Gebhard*-formula: a restriction can be accepted only if justified by overriding reasons of public interest and is proportional. Further, the Court of Justice interprets the Posting of Workers Directive[2] as an almost exhaustive coordination of the national measures for protecting workers in posting situations. According to the Court, the host Member State may not force a foreign service provider (posting undertaking) to apply better or other working conditions on posted workers than those which follow from the minimum mandatory requirements settled in the Posting of Workers Directive.

* Jonas Malmberg, Professor of private law, particularly labour law, Uppsala University and Uppsala Center for Labor Studies.
Caroline Johansson, LLM, Research assistant, Uppsala University and Uppsala Center for Labor Studies.

1 C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779 (Viking), C-341/05 *Laval un Partneri* [2007] ECR I-11767, C-346/06 *Rüffert* [2008] ECR I-1989 and C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

2 Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

These rulings have triggered an intense debate amongst political groups, social partners and academics. Trade unions, some political groups and many labour law academics have been critical, arguing that the rulings have in an unforeseeable and unreasonable way limited the ability to regulate social and labour market issues at national level. Others, for instance BusinessEurope and a number of Member States, have welcomed the rulings as a clarification of the state of law.

The judgments have also prompted an intense activity amongst the political institutions of the EU. As early as October 2008 the European Parliament adopted a resolution calling for legislative amendments as a response to the judgments.[3] The Commission has arranged a series of conferences and hearings, ordered a number of impact assessments as well as arranged public consultations.

In a speech to the European Parliament prior to his re-election, President Barroso recognised the need to address the concerns and issues raised by several stakeholders and announced a legislative initiative to resolve the problems with the implementation and interpretation of the Posting of Workers Directive.

The most influential political analysis of the consequences of the judgments was made in May 2010 by the former Commissioner, and now Prime Minister of Italy, Mario Monti, in the report "A new Strategy for the Single Market".[4] According to Monti, the case law of the CJEU has 'exposed the fault lines that run between the Single Market and the social dimension at national level' and 'revived an old split that had never been healed: the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level'. Further, 'the revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration'.

Monti's argument is not that case law has threatened the social models of Member States, but that it jeopardises the political support for the economic integration from stakeholders which is necessary for its success. In doing this, Monti reclaims an argument for a social dimension to the European Union, invoked in the social action programmes in the 1970s[5] as well as by Jacques Delors in the mid-1980s.[6]

On the basis of his analysis Monti recommended different legal initiatives: a strengthening of the enforcement of the Posting of Workers Directive and a regulation guaranteeing the right to strike.

The Commission has, on 21 March 2012, presented two proposals, mainly in line with the suggestions of Monti:

– a regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services (the Monti II-Regulation)[7] and

– a Directive on the enforcement of the Posting of Workers Directive.[8]

We will, in the following, present and analyse these proposals.

2 The Monti II-Regulation

2.1 Overview

The proposal aims at clarifying the relationship between the exercise of the fundamental right to take collective action and the freedom of establishment and the freedom to provide services. This is mainly done through the *formulation of general principles,* indicating that the right to take collective action and these economic freedoms are equally important. We will return to interpretation of this general principle below.

Further, the draft contains a proposal regarding *dispute resolution mechanisms*. If the Member States in connection with national labour disputes provide for non-judicial dispute resolution mechanisms, such as mediation, the Member State should also provide for equal access to those mechanisms in transnational situations or situations having a cross-border character in the context of the exercise of the freedom of establishment or the freedom to provide services, including the application of Posting of Workers Directive.

3 Resolution of 22 October 2008 on challenges to collective agreements in the EU (2008/2085(INI)).
4 Monti (2010).
5 Shanks (1977) 5.
6 Barnard (2006) 12.
7 COM (2012) 130 final.
8 COM (2012) 131 final.

The proposal also contains an *alert mechanism*, according to which the Member State must immediately inform other Member States concerned and the Commission if there are serious acts or circumstances which could cause grave disruption to the proper functioning of the internal market by disturbing the exercise of the freedom of establishment or the freedom to provide services. The alert mechanism should also be used if there are circumstances that may cause serious damage to the industrial relations system or create serious social unrest.

2.2 The general principle

The most important and controversial part of the proposal is the general principle on the relationship between the exercise of the fundamental right to take collective action on the one hand, and the freedom of establishment and the freedom to provide services on the other. The principle reads as follows:

"The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms" (Article 2)

The ambition of the Commission is, according to its press release, to 'send a strong message that workers' rights and their freedom to strike are on an equal footing with the freedom to provide services'.[9] Does the proposal send such a strong message?

In *Viking* and *Laval* the CJEU interpreted the Treaty-based freedoms: the freedom of establishment and the freedom to provide services. Hence, this case law is based on primary law. It is not obvious how adopting secondary EU law – a regulation – would be strong enough to change the jurisprudence of the CJEU. Primary law has supremacy over secondary EU law. Generally, the starting point is that secondary EU law is interpreted in the light of primary law, rather than the other way around. It is thus possible that the CJEU will interpret the Monti II Regulation, as far as possible, to be consistent with primary law, which means to be consistent with its own previous case law.[10]

The proposal accepts that collective actions are not excluded from Articles 49 and 56 TFEU, but insists that the freedom of establishment and the freedom to provide services and the right to collective action must be put on an equal footing. Article 2 of the proposal does not give any further guidance about how the balancing of the right to collective action and these economic freedoms will be achieved.

It could be argued that the case law of the CJEU already includes such balancing of the right to collective action and the economic freedoms in question. In *Viking,* the CJEU acknowledges that the right to take collective action is a fundamental right which forms an integral part of the general principles of Community law, the observance of which the Court ensures. This right may, none the less, be subject to certain restrictions.[11] The Court at the same time proclaims that the fundamental economic freedoms could be restricted according to the *Gebhard*-test and the exercise of the fundamental right of taking collective action is such an overriding requirement of public interest that it could justify a restriction of the economic freedoms. Further, the Court states that the economic freedoms of the Treaty must be balanced against the objectives pursued by social policy.[12]

Thus, it is possible to argue that the Court in a formal sense has put the right to collective action and economic freedom on an equal footing and that Article 2 of the proposal confirms this practice. On the other hand, many argue that the Court, when applying this act of balancing in particular cases, *de facto* gives the economic freedoms primacy over the right to collective action.[13] This is done by applying a kind of 'one-sided proportionality test'. The Court asks if exercising the right to collective action in a particular case could justify a restriction of the economic freedoms without (also) putting the question the other way around: Could the interest of exercising the economic freedoms in a particular case justify a restriction of the right to take collective action?

With this background, one must ask if the ambition of the Commission to strengthen the position of collective action in relation to the economic freedoms is fulfilled. In considering this, one must observe that the preamble and the explanatory observations contain several elements

9 http://ec.europa.eu/social/main.jsp?langId=en&catId=471&newsId=1234&furtherNews=yes (2012-06-08).
10 Bruun & Bücker (2012).
11 *Viking,* paragraph 43.
12 *Viking,* paragraph 77-78.
13 See for instance, Davies (2008) 141; Barnard (2008); Joerges & Rödl (2009); Syrpis & Novitz (2008) and Deakin (2008).

indicating the possibility of other ways of pursuing the balancing act.

First, the Commission underlines that a collective action may only be a restriction of the economic freedoms if it contains a cross-border element, as was the case in *Laval* and *Viking*. Where cross-border elements are lacking or hypothetical, a collective action shall, according to the Commission, be assumed not to constitute a violation of the freedom of establishment or the freedom to provide services.[14] This seems to indicate a wider interpretation of the principle that the freedom to provide services shall not apply in wholly internal situations, than has hitherto been applied in the case law of the CJEU.[15]

Second, the preamble and the explanatory observations indicate some guidelines on how to balance the right to take collective action and the fundamental economic freedoms which differ somewhat from the lines of argumentation in *Viking* and *Laval*. Instead of the 'one-sided' proportionality test applied in *Viking* and *Laval*, the proposal describes a kind of 'double-sided' proportionality test.[16]

In the preamble it is stated that the fundamental economic freedoms and the fundamental rights, as well as their effective exercise, may be subject to restrictions and limitations.[17] The exercise of these rights could be reconciled in accordance with the principle of proportionality.[18] It is further indicated that the there should be a kind of 'double-sided' proportionality test: a restriction imposed by a fundamental right on a fundamental freedom is not permitted to go beyond what is appropriate, necessary and reasonable to realise that fundamental right. Conversely, a restriction imposed on a fundamental right by a fundamental freedom cannot go beyond what is appropriate, necessary and reasonable to realise the fundamental freedom.[19]

When assessing which limitations could be justified in the right to collective action and the economic freedoms respectably, the Charter of Fundamental Rights of the European Union must be taken into account.[20] Both the right to take collective action and the freedom of establishment and to provide services are guaranteed in the Charter (Articles 28 and 15.2). Any limitation on the exercise of the rights and freedoms recognised in the Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union, or the need to protect the rights and freedoms of others (Article 52.1).[21]

The proposal uses a 'three-stage test' (appropriate, necessary and reasonable to realise the fundamental freedom). This does, however, not tell us about how intrusive the judicial review should be. The Court sometimes does not ask whether the measure is the only measure possible or the best measure possible but whether it was manifestly inappropriate. This is particularly the case in areas which entail political, economic and social choices on the part of the legislature, and in which it is called upon to undertake complex assessments, for which the legislature therefore enjoys a broad margin of manoeuvre and action.[22] The proposal seems to leave this question open for the Court.

Lastly, the proposal stresses the role of national courts. It is, according to the proposal, for the national courts to establish the facts and ascertain whether actions pursue objectives that constitute a legitimate interest, are suitable for attaining these objectives, and do not go beyond what is necessary to attain them (Article 3.4).[23] Thus, it is for the national courts to strike a fair balance between the rights and freedoms concerned and reconcile them in individual cases.[24]

As has been described above, the proposal does not clearly spell out how the balance between the right to collective action and economic freedoms is to be struck. Although far from a 'strong message', the proposal does give

---

14 COM (2012) 130 final p. 12.
15 See particularly C-60/00 Carpenter [2002] ECR I-6279 and Barnard (2010) 357 ff.
16 The kind of proportionality test suggested in the proposal is inspired, inter alia, by the opinion Advocate General Trstenjak in C-271/08 Commission v Germany [2010] ECR I-7091. See further Barnard (2012).
17 Paragraph 10.
18 Paragraph 11.
19 Paragraph 13.
20 Paragraph 12.
21 COM (2012) 130 final p. 13.
22 Opinion Advocate General Trstenjak in C-365/08 *Agrana Zucker* [2010] ECR I-4341 p. 59 ff.
23 COM (2012) 130 final p. 11.
24 COM (2012) 130 final p. 13.

some impetus for the courts to reconsider how to handle individual cases where there is a conflict between the right to take collective action and the economic freedoms. The principles of *Laval* and *Viking* need not be applied where a cross-border element is lacking or hypothetical, the proportionality test could be reformulated and the national courts could make the assessment of the fair balance between the rights and freedoms without making a preliminary reference to the CJEU. These arguments might be of relevance for the courts even if the Monti II is not adopted.

2.3 Legal basis

The Commission has, despite a strong political commitment, not been able to adopt a firm standpoint on the relationship between the right to take collective action and the economic freedoms. This is, of course, explained by the lack of competence of the EU in relation to collective action.

The right to take collective action is excluded from the range of matters that can be regulated across the EU by way of minimum standards through Directives (Article 153(5) TFEU). However, the *Laval* and *Viking* rulings have clearly shown that the fact that Article 153 does not apply to the right to take collective action does not, as such, exclude collective action from the scope of EU law.

The legal basis chosen by the Commission is instead the flexibility clause in Article 352 TFEU, which seems to be the only available option for a binding legislative act in this case. According to this provision, the Council may, acting unanimously and with the consent of the European Parliament, adopt the appropriate measures, if action by the Union should prove necessary to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers.

Considering the unanimity requirement, it is important to note, that, the proposal has been contested on the grounds of subsidiarity by twelve national parliaments[25], including the Swedish, Danish and Finnish Parliaments, according to the specific procedure provided for controlling the exercise of the subsidiarity principle in legislative acts.[26] This means that the Commission must review the proposed regulation. The Commission can choose to maintain, amend or withdraw the proposal. Irrespective of which action is taken, reasons for the new decision must be provided.

This indicates that the proposal at this stage stands no chance of being unanimously adopted.

2.4 Concluding reflections: A soft law approach?

Laval and *Viking* have put the political institutions of EU in a dilemma. What can be done in order to come to terms with the interpretations of the Treaty, which have generated such hostility from broad groups of Member States and stakeholders that the support for economic integration is at risk? It does not seem to be realistic in the short term to seek Treaty changes. The proposed regulation must be adopted unanimously by the Council and with the consent of the European Parliament. In order to have some chance of being adopted, the proposal was drafted in such a cautious way that it is far from clear that it would – if adopted – actually strengthen the position of collective action in relation to the economic freedoms. Despite this, it is now obvious that the proposal will not be adopted as it stands and that the Commission will have to reconsider its position.

The question is thus if there is any other way to tackle the issue at EU level. Or must the question be left to future occasional litigation before the CJEU or national courts?[27]

It has been suggested that, instead of the proposed regulation, it would be possible to adopt guidelines according to Article 26 (3) TFEU.[28] Article 26 aims to balance different policy objectives in the establishment of the internal market. Such guidelines can be adopted by qualified majority (Article 16.3 TEU). This legal basis would thus provide a better opportunity of reaching a sufficient consensus than that under Article 352 TFEU. The focus of such guidelines should not be to find the balance between the economic freedom and the right to take collective action through a proportionality test. Instead, the Council could reaffirm a commitment to respect international law and standards concerning the freedom of association and the right to collective action.

---

25 http://www.fackligt.eu/2012/05/23/nationella-parlament-sager-nej-till-monti-ii/.
26 Protocol (No 1) on the Role of National Parliaments in the European Union.
27 Compare Monti (2010) 69.
28 Bruun & Bücker (2012).

3 The Enforcement Directive

3.1 The background

The Posting of Workers Directive was adopted in 1996 and regulates the employment conditions for workers temporarily posted to another Member State in connection with cross-border services. The Directive prescribed that host countries should ensure that posted workers have 'a nucleus of mandatory rules for minimum protection' in the host country. This so-called 'hard nucleus' is defined as rules (a) laid down by statutes or – for the building sector – by collective agreements that have been declared generally applicable and (b) concern certain specified terms and conditions (health and safety, maximum working hours, minimum wage etc.).

A crucial question concerning the Posting of Workers Directive has been whether it should be interpreted as merely obliging the Member States to protect the posted workers, or does it also limit the ability of a Member State to extend other parts of national labour law to the posted workers?

In *Laval*, *Rüffert* and *Commission v Luxembourg*, the CJEU clarified, in many respects, the interpretation of the Posting of Workers Directive.[29] The Court interprets the Directive as an almost exhaustive coordination of the national measures for protecting workers in posting situations. The interpretation thus comes rather close to an understanding of the Posting of Workers Directive as a ceiling: that is, an almost comprehensive description of the competence of the Member State in relation to posted workers.

The institutional debate leading to the Directive clearly indicates that it was thought – at least by many – as being more about establishing a minimum labour law directive, rather than exhaustively coordinating measures that the host state was allowed to adopt in relation to posted workers. However, the Posting of Workers Directive was adopted with reference to EU competence in the field of free movement of services (now Articles 53 and 62 TFEU). The reason for the choice of the legal base was, at the time, to circumvent the lack of competence for the EU (including the UK) in the social field. By using the competence for the free movement of services, the Directive could be adopted through qualified majority voting, instead of demanding unanimous agreement in the Council. The latter alternative was not available since the UK and Portugal were opposing the Directive. In order to gather a qualified majority, the basic functions of the Directive had to be blurred and some fundamental ambiguities were inserted in the Directive. In this way the political institutions gave the Court of Justice a rather wide margin of judicial discretion.[30]

The interpretation of the Posting of Workers Directive as a maximum free movement directive must have appeared rather surprising for the European legislator, as it limits the Member States competence in pursuing social aims at national level in an unforeseen manner. The obvious response in such a situation – at least in a national context – would be for the legislator to change the law. If a national parliament at the first instance did not succeed in explaining its intentions for the courts, it would most certainly try to formulate itself more clearly a second time.

In October 2008 the Commission arranged a 'Forum on Workers' Rights and Economic Freedoms'. At the Forum, the Commission and the governments of Germany, France, Denmark, Luxembourg and Sweden confirmed the view that the interpretation of the Posting of Workers Directive made by the CJEU was unforeseen and would cause problems at national level. On the other hand, they seemed reluctant to open the Posting of Workers Directive for revision.

This point of view seems to be based on what is considered politically possible. There is not sufficient support amongst the Member States for amending the Posting of Workers Directive in the direction of a minimum labour law directive. Such an amendment would require a qualified majority in the Council. Even if there was, in 1996 with an EU-15, a qualified majority for a 'minimum labour law'-version of the Posting of Workers Directive, this is not the case today in the EU-27.

Instead of arguing for a revision of the Posting of Workers Directive, the political ambition was directed at improving the supervision and enforcement of employment and working conditions of posted workers. This is a crucial issue. Since the posted workers will not be fully integrated into the industrial relations of the host state, they will not, in practice, be covered by the normal mechanisms for supervision and control of working condition in the

[29] C-341/05 *Laval un Partneri* [2007] ECR I-11767, C-346/06 *Rüffert* [2008] ECR I-1989 and C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

[30] Malmberg (2011).

host state. Neither will they, in practice, be under any close scrutiny by the control mechanisms in the state of origin. In this way, there is a risk of creating a free zone for irregular or undeclared work where neither the labour laws of the host state nor the labour laws of the state of origin are, in practice, enforced.

Against this background, the Commission has put forward a proposal for a Directive on enforcement of the Posting of Workers Directive (the Enforcement Directive). According to its press release the Commission is, through this proposal, 'taking concrete action to stamp out the unacceptable abuses. We want to ensure that posted workers are treated on an equal footing and enjoy their full social rights across Europe'.[31]

The proposal aims at making sure that posted workers actually enjoy the minimum protection prescribed in the Posting of Workers Directive. The proposal contains a long list of measures, including awareness raising (better information), state enforcement mechanisms (inspections and sanctions) and private law enforcement mechanisms (joint and several liability). The Commission regards this as a comprehensive approach where all aspects are important. Weakening one of the aspects would, according to the Commission, imply strengthening other aspects of enforcement in order to achieve a similar result.[32]

We will, in the following, present some of the proposed measures: 1) the definition of the notions "establishment" and "temporary", 2) improved access to information, 3) administrative cooperation, 4) inspections and other national control measures and 5) joint and several liability in subcontracting. Other parts of the proposal will, due to space restraints, not be addressed. To make the legal analysis more accessible we will illustrate it with an example of posting from Sweden (state of establishment / sender state) to Denmark (host state). Before we move on to that, however, we will briefly examine the regulatory objectives behind the proposal and the legal basis for its adoption.

3.2 Aim and legal basis

When drafting the proposal the Commission was entangled in a balancing act in several dimensions.

First, even though the main reason for putting forward the Enforcement Directive is the idea of strengthing the position of the posted workers, the Commission had to take into account the three folded aims of the original Posting of Workers Directive. That Directive aims at enhancing the freedom to provide cross-border services by establishing a core set of clearly defined employment conditions which the posting undertakings must ensure. Further, these minimum mandatory requirements provide a significant level of protection of posted workers. Lastly, the Directive also aims at promoting a climate of fair competition between all service providers (including those from other Member States) by guaranteeing both a level playing field and legal certainty for service providers, service recipients, and workers posted for the provision of services.[33] This means that the protection of the posted workers has to be reconciled with the interests of the freedom of providing services

Second, the Commission has to take into account the objective of reducing administrative burdens, which has been set by the European Council.

The two objectives of enhancing cross-border services and reducing the administrative burdens could be ensured by limiting the possibilities for Member States to impose control measures on the posting undertakings, particularly small and medium-sized enterprises.[34] The proposed more uniform rules for administrative cooperation, mutual assistance, national control measures and inspections, endeavours to avoid unnecessary or excessive administrative burden for posting undertakings.[35]

That these objectives are just as important as the protection of the posted workers and creating a climate of fair competition is manifested by proposing Article 53(1) and 62 TFEU, that is the free movement of services, as the legal base for the Enforcement Directive.

Thus, when assessing the proposal it is important not only to analyse the obligations following from the Enforcement Directive for the Member State with regard to enforcing the Posting of Workers Directive. One must also analyse what restrictions the proposal puts on the Member States' power to adopt national monitoring measures. To put it

---

31 http://europa.eu/rapid/pressReleasesAction.do?reference=IP/12/267&format=HTML&aged=0&language=EN&guiLanguage=en.
32 COM (2012) 131 final p. 20.
33 COM (2012) 131 final p. 2.
34 COM (2012) 131 final p 10.
35 COM (2012) 131 final p 12.

another way: What must the Member State do? And what are they not allowed to do?

Third, the proposal must take into account and respect the different industrial relations systems as well as the autonomy of social partners, which is explicitly recognised by the Treaty (Article 152 TFEU). In the Member States, different models for enforcement are applied, involving both public authorities and workers' representatives. Comparative experiences indicate that the enforcement of labour law could not be left to the workers themselves, but needs institutional support. In many Member States enforcement is mainly handled by labour inspectorates. In the Nordic countries supervision of minimum standards for labour conditions is, to a large extent, exercised by the trade unions or the social partners in cooperation. Further, an effective enforcement must also be organised close to the workplace.[36] With this background, the need to use national institutions, such as labour inspectorates and trade unions, in the enforcement of the Posting of Workers Directive must be accepted.

3.3 A stricter definition of the notions "establishment" and "temporary"

A posted worker is, according to the 1996 Directive, a worker who is sent (posted) by an employer established in one country to temporarily carry out work in another Member State than the one in which he or she normally works. The Posting of Workers Directive does not provide any definition of 'establishment' or how to define 'temporarily carries out his work'. This is addressed in the Enforcement Directive (Article 3). The aim of this definition is to prevent abuse and circumvention.

The definition first seeks to answer the question: where is the service provider established? The idea seems to be that one should not take for granted that the service provider is established in, for instance, Sweden just because the firm is registered in Sweden. Other aspects have to be taken into account, such as the place where posted workers are recruited, which law is applicable to the contracts concluded with the workers as well as the clients, where the undertaking performs its substantial business activity etc. If it turns out – when assessing these facts – that the undertaking genuinely performs substantial activities in Denmark instead of in Sweden, then there is no posting, but a purely national situation.

In the same vein, the proposal tries to answer the question: Is the worker temporarily carrying out work in a Member State other than the one in which he or she normally works? This question should be answered through an overall assessment of aspects such as: if the work is carried out for a limited period of time in Denmark, if the worker returns or is expected to resume working in Sweden etc. If this overall assessment results in the conclusion that the worker is not normally working in Sweden, but in Denmark, there is not a posting situation. Instead the worker shall be treated like any 'Danish' worker according to the principle of non-discrimination.

3.4 Improved access to information

The proposal includes measures to improve the access to information (Articles 4-5). The provisions are directed to the host state and describe different ways in which the Member State should provide information to the posting undertaking (regarding mainly the content of the hard nucleus in the host state). The Commission has, in several communications, stressed the importance of accessible information.[37] The Commission has criticised the Member States for not providing comprehensive information regarding relevant working conditions, that the information provided has not been easy to access and that information in language/s other than the one/s spoken in the host state has been scant or non-existent.

The Enforcement Directive addresses these issues in a fairly general manner. The host should, *inter alia*, make the information available on the internet and publish it in other language(s) than the one spoken in the host state.

The host state must also provide information (on internet sites) regarding which collective agreements are applicable and to whom. Further, the information should, if possible, contain links to websites of the relevant social partners.

If the mandatory rules for minimum protection in the host state are determined according to collective agreements (according to Article 3.8 Posting of Workers Directive) – which for instance is the case in Sweden and Denmark – the host state must ensure that social partners identify the collective agreement and make the relevant information available in an accessible and transparent way for the posting undertakings and the posted workers. The information provided should, in particular, include the different minimum rates of pay and their constituent elements, the method used to calculate the remuneration

[36] Malmberg (2009).
[37] See for example COM (2006) 159 final and COM (2007) 304 final.

due and the qualifying criteria for classification in the different wage categories (Article 5.4).

3.5 Administrative Cooperation

According to the Posting of Workers Directive, the authorities of the host state and the state of establishment must cooperate (Article 4). The Member States should designate liaison offices and cooperate by, in particular, answering reasonable requests from other authorities. The Commission has stressed the importance of this administrative cooperation, which, according to the Commission, should be the main source of information regarding work- and employment conditions for posted workers. The Commission has argued that the better this cooperation works, the more restricted becomes the possibility to require information from the posting undertaking.[38]

In the proposed Enforcement Directive the *role of the state of establishment* is more thoroughly defined (Article 7). When an undertaking posts workers to another Member State, the state of establishment (Sweden) should continue to control, monitor and take necessary supervisory or enforcement measures. It must provide the authorities in the host state (Denmark) with relevant information concerning the circumstances regarding the posting, including the employment conditions. This view differs somewhat from the Posting of Workers Directive, which indicates that it is the host state which has the main responsibility to enforce the Directive.

If the host state (Denmark) request information about, for instance, the service provider, the state of establishment (Sweden) should provide information (normally within two weeks). Further, the state of establishment must also *on its own initiative* give the host state relevant information concerning the service provider, if that state of establishment is aware of facts indicating 'possible irregularities'.

3.6 Inspections and other national control measures

According to the Posting of Workers Directive, the host state should ensure that the workers posted to its territory are guaranteed a minimum protection from its own labour law (Article 3). It follows from this that the enforcement of the Directive is a task for the host state. The Directive does not specify, however, by which mechanism the host state should ensure that the minimum protection is applied to the posted workers.

The Enforcement Directive specifies the required enforcement measures in several ways.

Inspections

The Enforcement Directive states that the Member States *must* ensure that appropriate *checks and monitoring mechanisms* are put in place. It further specifies that the Member States make sure that *effective and adequate inspections* are carried out in order to control and monitor compliance with the provisions and rules laid down in the Posting of Workers Directive (Article 10). The provision implies – read together with Article 7 on administrative cooperation – that both the host state and the state of establishment are to be engaged in the enforcement.

The inspections should be carried out on their own territory. Further, it is stated that the inspections must be based primarily on a risk assessment to be regularly performed by the competent authorities. The risk assessment should identify the sectors of activity in which the employment of workers posted for the provision of services are concentrated in their territory. When making such risk assessment, the realisation of big infrastructural projects, the special problems and needs of specific sectors, the past record of infringement, as well as the vulnerability of certain groups of workers should be taken into account. Member States must ensure that inspections and controls of compliance with the Posting of Workers Directive are not discriminatory and/or disproportionate.

It this way, the Enforcement Directive prescribes that the Member States must provide effective and adequate administrative enforcement of the hard nucleus according to the Posting of Workers Directive. In Sweden there exists administrative enforcement of working time and health and safety at work and – to some extent – of rules on non-discrimination. Other parts of the hard nucleus – particularly minimum wages and holidays – are not subject to any administrative enforcement.

The Enforcement Directive takes these differences in industrial relations systems into account. In countries such as Sweden and Denmark, where a minimum level of protection – in particular the minimum rates of pay and working time – is regulated by the social partners, the monitoring of the relevant terms and conditions may also be left to those parties, provided that an adequate level of protection is guaranteed.

[38] COM (2006) 159 p. 7.

Other control measures

Further, the Enforcement Directive enumerates which *other control measures* the Member States *may* adopt. These provisions concern – as we understand it – the Member States in their capacity as host states. That is, the control measures the Member States may adopt in relation to workers posted to their territory.

In the case law of the CJEU, national control measures have frequently been reviewed as restrictions on freedom to provide services.[39] The question has been whether the national monitoring measures are restraining the free movement of services in a way which could not be justified.

This case law is the starting point for the proposal concerning national control measures. The Commission considers it important to codify the case law in the proposed Enforcement Directive. The result is, however, not merely a codification of the state of law. Article 9 contains an exhaustive list of control measures which the host state may adopt. The Enforcement Directive thus marks the limits of the Member States' competence for adopting national control measures, without indicating which measures they must adopt. In this way, the Directive turns an open-ended list of administrative requirements and control measures which the Member State may now adopt, into a closed enumeration.

The list contains three types of national control measures.

a) A simple declaration

First, the host state may require *a simple declaration* prior to the posting (at the latest at the commencement of the service provision). The possibility of requiring a prior declaration is in line with the CJEU's case law, which has clarified that the host state may require a prior declaration as long as it is not combined with any kind of prior registration procedure or prior control.[40]

However, the new provision also specifies which information the prior declaration may contain. The declaration may only cover the identity of the service provider, the presence of one or more clearly identifiable posted workers, their anticipated number, the anticipated duration and location of their presence, and the services the posting workers take part in. The enumeration of the kind of information the host state may require is exhaustive. Such a limitation of the host state's capacity to require information in a simple declaration does not follow from the prior case law of the CJEU.

Further, the list does not include any documentation on work- and employment conditions. The idea seems to be that the host state, instead of asking the posting undertaking for this information, should contact the competent authority in the state of establishment in order to receive that information, or carry out checks at the work site where the posting takes place, after the posting has been initiated.

b) Social documents

The host state may also require that posting undertakings must hold certain 'social documents' available. The documents the host state may require are employment contracts (or equivalent document which is consistent with directive 91/533/EEC), pay slips, timesheets and proof of payment of wages or copies of equivalent documents. The list of social documents seems to be exhaustive, which would mean that no other documents may be required.

The host state may require that the documents are kept or made available in an accessible and clearly identified place in the host state's territory, for example the work place. The host state may require that the social documents are translated as long as the documents are not excessively long. Further, the host may require that the documents are kept accessible during the period of posting.

The idea seems to be that the host state (Denmark) may, through inspection of the social documents, control the employment conditions of the posted workers during the posting. If a need to control the employment conditions occurs after the posting has ended, and the worker has returned to the state of establishment, the host state (Denmark) has to request the information from the competent authority in the state of establishment (Sweden). This differs from the CJEU case law. The CJEU found in *Arblade* that the requirement to have a representative in order to keep the documents *after* the posting had ended was contrary to EU law since less restricting measures could be taken, such as sending the documents to the competent authority in the host state.[41] The CJEU did not comment on the host state's

[39] See for instance C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453, C-490/04 *Commission v Germany* [2007] ECR I-06095, C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

[40] C-515/08 *Santos Palhota* [2010] ECR I-0000.

[41] C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453, paragraph 77 – 78.

requirement that social documents were to be kept in the host state's territory after the posting had ended, but did comment on the way the documents were kept.[42]

c) A contact person

The host state may further require that the posting undertaking designate a contact person to negotiate on behalf of the employer with the relevant social partners in the host state.

The possibility of requiring a contact person with the authority to negotiate on behalf of the employer has not been subject to CJEU case law. The Court has held that the host state may not require the posting undertaking to designate a representative domiciled in the host state in order to keep and maintain social documents.[43] However, the Court has not addressed whether the host states may require a representative or a contact person with the authority to negotiate, a measure considered crucial for the Nordic countries. The proposal for a Service Directive seemed to exclude any possibility for a representative without clarifying if it was possible to designate a contact person with increased authority to act on behalf of the employer.[44]

The proposed Enforcement Directive clarifies, to some extent, this aspect. However, there is no further explanation of the provision's limits in the explanatory memorandum. The proposal does not, for instance, spell out whether the Member States may require that the contact person is competent of concluding collective agreements concerning the posted workers.

3.7 Joint and Several Liability in subcontracting

The Enforcement Directive addresses joint and several liability in subcontracting as a means of enforcing the rights of the posting of workers according to the Posting of Workers Directive. Application of this mechanism is, however, limited to the construction sector only. Joint and several liability in subcontracting was subject to CJEU's review in *Wolff & Müller*.[45] The CJEU held that joint and several liability might be a justified and effective way to ensure posted workers' rights according to the Posting of Workers Directive.

The Enforcement Directive aims at clarifying when and how the Member States should or may implement such a system. According to the Enforcement Directive, the Member State *must* introduce a system for joint and several liability in subcontracting in the construction sector (Article 12). The provision should apply to all posted workers in the construction sector, including posting by temporary work agencies.

The main idea is that the posted workers and/or common funds or institutions of social partners may hold a contractor in the same chain of contract as the employer of the posted worker responsible. However the joint and several liability must only apply to the contractor of which the posted workers employer is a direct subcontractor. This contractor could be denominated as the direct main contractor. Other contractors – higher up in the contract chain – are not covered by the mandatory system prescribed by the proposal.

This liability for the first contractor should be either in addition to or in place of the employer.

It should be possible for the posted worker or common funds or institutions of social partners to hold the direct main contractor liable for paying the relevant minimum pay and/or contributions due to common funds or institutions of social partners, in so far as they are covered by the mandatory minimum requirements of the Posting of Workers Directive. The liability of the direct main contractor should also cover any back-payments or refund of taxes or social security contributions unduly withheld from the salary of the posted worker.

There are some restrictions regarding the system for joint and several liability for the direct main contractors which the Member State should ensure. *First*, the system which the Member State introduces must be non–discriminatory "with regard to the protection of the equivalent rights of employees of direct subcontractors established in its territory". Although the Directive only concerns liability in posting situations, this provision implies that the Member State will have to adopt similar rules for purely national situations. *Second*, the Member State should provide that a direct main contractor who has undertaken due diligence should not be held liable.

The Member State *may*, *if they wish*, provide more stringent liability rules as regards to the scope and range

[42] For another interpretation, see COM (2012) 131 final p. 17f.

[43] C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453 and C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

[44] COM (2004) 2 final. See Article 24 in the proposal.

[45] C-60/03 *Wolff & Müller* [2004] ECR I-9553.

of subcontractor liability. This could, for instance, include liability for others than the direct main contractor. These provisions must, however, be non-discriminatory and proportionate. The Member States may provide for such liability in sectors other than the construction sector.

3.8 Concluding observations: Will the proposal ensure the posted workers their full social rights?

The proposal for the Enforcement Directive is presented as concrete action to ensure that posted workers are treated on an equal footing and enjoy their full social rights across Europe.

The proposal is addressing the duties of both the state of establishment and the host state as well as the duties that may be imposed on the posting service provider. The Enforcement Directive clarifies the Member States' responsibilities in protecting the employment conditions of posted workers: they must clearly point out which are competent authorities, they must carry out inspections and checks in their own territory, they must loyally answer requests to the authorities in other Member States, as well as, on their own initiative, informing other Member States on suspected irregularities. The Directive also clarifies the duties which the host states may impose on the employers performing cross-border services. These duties are, on the other hand, rather limited. The idea seems to be that the main communication regarding the posting service provider, such as, for example, information concerning the undertaking, should be gathered from the competent authority in the state of establishment.

In our view the proposal is problematic with respect to two aspects.

First, the aim of the proposed Enforcement Directive is only partly to ensure that the posted workers actually enjoy the minimum protection prescribed in the Posting of Workers Directive. It also aims at enhancing cross-border services and reducing the administrative burdens, particularly for small and medium-sized enterprises. The significance of the latter objectives is manifested by proposing the free movement of services as the legal basis (Article 53(1) and 62 TFEU). With this background it is likely that the Enforcement Directive will be interpreted as a co-ordination of what measures the Member State are allowed to adopt in relation to posting undertakings in order to secure the rights of the posted workers according to the Posting of Workers Directive. When a system of cooperation on information has been put in place, then the Member States will have less scope to demand information directly from the posting undertakings.[46] In this way the Enforcement Directive might – just as the Posting of Workers Directive – pre-empt the host state's power in relation to posting undertakings.

Second, by pointing out which methods of enforcement should be employed, and thereby possibly excluding other methods, the Enforcement Directive seems to overlook how closely the different enforcement mechanisms are linked to institutional arrangements in different Member States. The main focus in the proposed Directive is on administrative enforcement rather than empowering trade unions or other parts of the civil society (although these are by way of exception mentioned from time to time). Further, by establishing at Union level which methods for enforcement should apply, the proposal risks obstructing development of other methods. For instance, in the Swedish building sector, a system for standardised and mandatory ID cards is being developed by the social partners. A demand for such an ID card might not be in line with the Directive. In this way the proposal seems to neglect the need for legal and institutional evolution through mutual learning, which has often have been an essential part of EU social policy.[47]

---

[46] Compare COM (2006) 159 p. 7.

[47] Rogowski & Deakin (2011).

References

C-60/00 *Carpenter* [2002] ECR I-6279

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

C-271/08 *Commission v Germany* [2010] ECR I-7091

C-319/06 *Commission vs Luxembourg* [2008] ECR I-4323

C-341/05 *Laval un Partneri* [2007] ECR I-11767

C-346/06 *Rüffert* [2008] ECR I-1989

C-365/08 *Agrana Zucker* [2010] ECR I-4341

C-369/96 and C-376/96 *Arblade* [1999] ECR I-8453

C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union* [2007] ECR I-10779

C-490/04 *Commission v Germany* [2007] ECR I-06095

C-515/08 *Santos Palhota* [2010] ECR I-0000

COM (2004) 2 final. Proposal for a Directive of the European Parliament and of the Council on services in the internal market

COM (2006)159 final.

COM (2007) 304 final. Posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers

COM (2012) 130 final. Proposal for a Council Regulation on the exercise of the right to take collective action within the context of the freedom of establishment and the freedom to provide services

COM (2012) 131 final. Proposal for a Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

Barnard, C. (2006) *EC employment law*. Oxford, Oxford University Press.

Barnard, C. (2008) "Social Dumping or Dumping Socialism?" *Cambridge Law Journal* 67: 262-264.

Barnard, C. (2010) *The substantive law of the EU : the four freedoms*. Oxford, Oxford University Press.

Barnard, C. (2012) "A proportionate response to proportionality in the field of collective action." *European Law Review* 37(2): 117-135.

Bruun, N. & A. Bücker (2012) Critical assessment of the proposed Monti II regulation – more courage and strength needed to remedy the social imbalances. ETUI Policy Brief N° 4/2012.

Davies, A. C. L. (2008) "One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ." *Industrial Law Journal*: 126ff.

Deakin, S. F. (2008) "Regulatory competition after Laval" *Cambridge Yearbook of European Legal Studies* 10: 581-609.

Joerges, C. & F. Rödl (2009) "Informal Politics, Formalised Law and the 'Social Deficit' of European Integration: Reflections after the Judgments of the ECJ in Viking and Laval." *European Law Journal* 1: 1-19.

Malmberg, J. (2009) *Enforcement*. In B. Hepple and B. Veneziani. *The Transformation of Labour Law in Europe– A comparative study of 15 countries 1945-2004*. Oxford, Hart Publishing. 261–287.

Malmberg, J. (2011) *Posting Post Laval – Nordic Responses*. In M.-A. Moreau. *Before and After the Economic Crisis: What Implications for the European Social Model?*, Edward Elgar Publishing. under utgivning.

Monti, M. (2010) A New Strategy for the Single Market at the Service of Europe's Economy and Society: Report to the President of the European Commission José Manuel Barroso.

Rogowski, R. & S. Deakin (2011) *Reflexive Labour Law, Capabilities and the Future of Social Europe*. In R. Rogowski, R. Salais and N. Whiteside. *Transforming European Employment Policy: Labour Market Transitions And The Promotion of Capability*. Cheltenham, Edward Elgar.

Shanks, M. (1977) *European social policy, today and tomorrow*. Oxford, Pergamon Press.

Syrpis, P. & T. Novitz (2008) "Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation." *European Law Review* 33: 411.

European Policy Analysis available in English

2012

2012:7epa
The Greek Elections of 2012 and Greece´s Future in the Eurozone
Author: Dionyssis G. Dimitrakopoulos

2012:6epa
Common Fisheries Policy Reform and Sustainability
Author: Jill Wakefield

2012:4epa
Eurobonds, Flight to Quality, and TARGET2 Imbalances
Author: Erik Jones

2012:3epa
The Hungarian Constitution of 2012 and its Protection of Fundamental Rights
Authors: Joakim Nergelius

2012:2epa
The EU and Climate Treaty Negotiations after the Durban Conference
Author: Katak Malla

2012:1epa
The EU's Cooperation and Verification Mechanism: Fighting Corruption in Bulgaria and Romania after EU Accession
Authors: Milada Anna Vachudova and Aneta Spendzharova

2011

2011:14epa
Public Services at the Local Level – is a Decentralisation of State Aid Policy Necessary?
Author: Jörgen Hettne

2011:13epa
Euro Plus Pact: Between Global Competitiveness and Local Social Concerns
Author: Karolina Zurek

2011:12epa
The EU Strategies for New Climate Treaty Negotiations
Author: Katak Malla

2011:8epa
Brussels Advocates Swedish Grey Wolves: On the encounter between species protection according to Union law and the Swedish wolf policy
Author: Jan Darpö

2011:7epa
A New Proportionality Test for Fundamental Rights
Authors: Anna-Sara Lind and Magnus Strand

2011:6epa
The European Treaty Amendment for the Creation of a Financial Stability Mechanism
Author: Bruno de Witte

2011:5epa
Comment on the European Commission´s "Green Paper towards adequate, sustainable and safe European pension systems"
Author: Conny Olovsson

2011:1epa
How Small are the Regional Gaps? How Small is the Impact of Cohesion Policy? A Commentary on the Fifth Report on Cohesion Policy
Author: Daniel Tarschys

2010

2010:14epa
Mollifying Everyone, Pleasing No-one. An Assessment of the EU Budget Review
Author: Iain Begg

2010:11epa
Social and Employment Policy in the EU and in the Great Recession
Author: Giuseppe Bertola

2010:10epa
The Socio-Economic Asymmetries of European Integration or Why the EU cannot be a "Social Market Economy"
Author: Fritz W. Scharpf

2010:9epa
Strengthening the Institutional Underpinnings of the Euro
Author: Stefan Gerlach

2010:6epa
The European External Action Service: towards a common diplomacy?
Author: Christophe Hillion

2010:2epa
Rethinking How to Pay for Europe
Author: Iain Begg

2010:1epa
Internal and External EU Climate Objectives and the Future of the EU Budget
Author: Jorge Núñez Ferrer

2009

2009:14epa
The Eastern Partnership: Time for an Eastern Policy of the EU?
Author: Anna Michalski

2009:13epa
Out in the Cold? Flexible Integration and the Political Status of Euro Outsiders
Authors: Daniel Naurin and Rutger Lindahl

2009:12epa
From Zero-Sum to Win-Win?
The Russian Challenge to the EU's Eastern Neighbourhood Policies
Author: Hiski Haukkala

2009:11epa
The CAP and Future Challenges
Authors: Mark Brady, Sören Höjgård, Eva Kaspersson and Ewa Rabinowicz

2009:10epa
A Legal Analysis of the Global Financial Crisis from an EU Perspective
Author: Sideek Mohamed Seyad

2009:9epa
An EU Strategy for the Baltic Sea Region: Good Intentions Meet Complex Challenges
Author: Rikard Bengtsson

2009:8epa
What to Expect in the 2009-14 European Parliament: Return of the Grand Coalition?
Author: Simon Hix

2009:7epa
The 2009 Swedish EU Presidency: The Setting, Priorities and Roles
Authors: Fredrik Langdal and Göran von Sydow

2009:5epa
When Lab Results are not Sufficient: On the Limitations of Science in Tackling Modern Food Regulatory Concerns
Author: Karolina Zurek

2009:2epa
Democracy Promotion in a Transatlantic Perspective: Reflections from an Expert Working Group
Author: Anna Michalski

2009:1epa
Foreign Policy Challenges for the Obama Administration
Author: John K. Glenn

2008

2008:14epa
The Swedish 2009 Presidency – Possible Policy Priorities
Authors: Fredrik Langdal and Göran von Sydow

2008:11epa
EU Energy Policy in a Supply-Constrained World
Authors: Jacques de Jong and Coby van der Linde

2008:8epa
The Potential Impact of the Lisbon Treaty on European Union External Trade Policy
Author: Stephen Woolcock

2008:4epa
The Lisbon Treaty and EMU
Author: Sideek Mohamed Seyad

2008:3epa
The Lisbon Treaty and the Area of Criminal Law and Justice
Author: Ester Herlin-Karnell

2008:2epa
A Better Budget for Europe: Economically Efficient, Politically Realistic
Author: Filipa Figueira

2008:1epa
The Future of the Common European Asylum System: In Need of a More Comprehensive Burden-Sharing Approach
Author: Eiko Thielemann

2007

2007:6epa
Flexicurity – An Answer or a Question?
Author: Lars Calmfors

2007:5epa
Agenda 2014: A Zero-Base Approach
Author: Daniel Tarschys

2007:3epa
A New Proposal for a Regulation on Mutual Recognition of Good – Towards a Harmonized Administrative Order?
Author: Jane Reichel

2007:2epa
Spillover or Activist Leapfrogging? Criminal Competence and the Sensitiveness of the European Court of Justice
Author: Maria Bergström

2007:1epa
Better Regulation of Mobile Telecommunications
Authors: Johan Stennek and Thomas P. Tangerås

For a full list of publications, see www.sieps.se.