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On the Social Dimension in Posting of Workers

Reasoning on Posted Workers Directive, Wage Liability, Minimum Wages and Right to Industrial Action

Tiivistelmä

Tutkimuksen ensimmäisestä luvusta käy ilmi – ehkä tähänastista kirjallisuutta selvemmin – miten lähetettyjen työntekijöiden direktiivi (LD) on aiemman oikeuskäytännön jatke ja alistuu sellaisena perustamissopimuksen artiklojen 49 ja 50 EY kehikkoon. Oikeuskäytäntö toisaalta osoittaa sisämarkkinoita koskevien käsitysten perustavaa laatua olevan luonteen. Sekä oikeuskäytäntö että LD hylkäävät ajatuksen toisista jäsenvaltioista tulevan matalapalkkakilpailun sietämisen pakollisuudesta. Lisäksi LD asettaa velvoitteen hylätä matalapalkkakilpailu, jos jäsenvaltiossa on sitovat vähimmäispalkat. LD yhdistää näin reilun kilpailun ja työntekijöiden oikeuksien suojan. Kokonaan päinvastainen käsitys, joka korostaa matalapalkkakilpailua perustamissopimuksesta johtuvana seikkana, on vaikuttanut varsinkin Saksassa näihin päiviin asti. Oikeuskäytäntö lopulta osoittaa myös sen, miten yhteisöoikeus tällä alueella perustuu kilpailun vääristymiä ennalta ehkäisevään sääntelyyn, joka yhdistää työnantajien ja työntekijöiden edut. Se heijastaa myös perinteistä työoikeudellista ajatusta, että työvoima ei ole kauppatavaraa.

Tilaajanvastuussa tuore oikeuskäytäntö osoittaa, miten jäsenvaltiot ovat LD:n kautta, ja sen toimeenpanemiseksi, oikeutettuja tilaajanvastuun kaltaisiin järeisiin valvontatoimiin. Tämä oikeuskäytäntö (jota käsittelee luku II) yhdessä vähimmäispalkan määrittelyä koskevan oikeuskäytännön (jota käsittelee luku III) kanssa osoittaa tarpeen lukea ja soveltaa LD:tä – kuten yhteisön muutakin, palvelutarjontaa koskevaa johdettua oikeutta – yleiseen etuun perustuvien palvelutarjonnan rajoitusten yleisten kriteerien valossa. Sekä vastaavuus- että suhteellisuusperiaate ovat asiaan vaikuttavia tekijöitä sovellettaessa työntekovaltion oikeutta ulottaa kansalliset vähimmäispalkkamääräykset lähetettyyn työvoimaan. Perimmiltään suhteellisuusperiaate, ollen yhteisöoikeuden periaate, toimii (vain) varaventtiilinä ns. sosiaalista protektionismia vastaan. Keskustelu ja käytäntö tilaajanvastuusta toisaalta havainnollistavat sitä, miten itse matalapalkkakilpailun estäminen heijastaa sellaista yleistä etua, joka voi oikeuttaa palvelutarjonnan rajoituksia.

Lähetetyn työvoiman työehdot voivat luonnollisesti johtaa näiden ehtojen taustalla vaikuttavan tai niiden kollektiiviseen sääntelyyn nimenomaisesti tähtäävän työtaistelu/lakko-oikeuden käytön oikeudelliseen arviointiin. Tämän tutkimuksen IV luku päätyy johtopäätökseen, että Kansainvälisen Työjärjestön ILOn piirissä muotoutunut työtaisteluoikeus sitoo myös EU:ta, pääosin jäsenvaltioiden aiempia kansainvälisoikeudellisia sopimuksia koskevan EY 307 artiklan kautta ja lopuiltakin osin yleisen kansainvälisen oikeuden varassa, siten kuin ne molemmat on tähän mennessä ankkuroitu EY-tuomioistuimen käytännössä. ILOn piirissä työtaisteluoikeus johdetaan nykyään työehtosopimusneuvotteluoikeuden tehokkaasta toteuttamisesta. EU toisaalta edistää – myös oikeudellisesti - ILOn työelämän perusoikeuksien toteutumista, minkä täytyy koskea myös sitä itseään. EU:ssa työtaisteluoikeus nojautuu myös sen johtaviin periaatteisiin (art. 6.1 EU): vapaus, kansanvalta, ihmisoikeuksien ja perusvapauksien kunnioitus sekä oikeusvaltioperiaate. Ensimmäisissä työtaisteluoikeutta koskevissa tapauksissaan EY-tuomioistuimen haasteena on suojella tätä perusoikeutta palvelutarjonnassa. Ennakoidusti se tulee tapahtumaan yhdistämällä aiemmat opit palvelutarjonnan rajoituksista ja perusoikeuksien suojasta. Tapaus ’Laval’ koskee lisäksi Ruotsin ja Tanskan työehtosopimuksiin perustuvan mallin asemaa Euroopan yhteisössä.

Sammandrag

Första kapitlet i denna studie påvisar – kanske tydligare än tidigare litteratur – att EG:s utstationeringsdirektiv (96/71/EG) bygger vidare på tidigare rättspraxis och väl låter sig inordnas under fördragets artiklar 49 och 50 EG. Av rättspraxis framgår den inre marknadens grundläggande karaktär. Såväl rättspraxis som utstationeringsdirektivet innebär ett avståndstagande från tanken att medlemsstaterna vore tvungna att tolerera låglönekonkurrens från andra medlemstater. Dessutom upprätthåller utstationeringsdirektivet en skyldighet att begränsa låglönekonkurrens, då det finns bindande minimilöner i respektive medlemsland. Härigenom kombinerar utstationeringsdirektivet kravet på en sund konkurrens med hänsyn till arbetstagarnas skydd. En helt motsatt uppfattning (som betonar låglönekonkurrens som en fördragsbestämd faktor) har särskilt i Tyskland gjort sig gällande ända fram till dessa dagar. Rättspraxis å andra sidan ger vid handen hur gemenskapsrätten på detta område grundas på förhandsreglering av konkurrenssnedvridningar genom att kombinera arbetsgivarnas och arbetstagarnas intressen. Detta återspeglar också ett tänkesätt enligt vilket arbetskraften inte är en handelsvara.

Rättspraxis om det så kallade beställaransvaret ger vid handen att medlemsstaterna genom införandet av utstationeringsdirektivet, och för att implementera det, är berättigade till starka kontrollåtgärder såsom beställaransvaret. Denna rättspraxis (som beskrivs i kapitel II) tillsammans med rättspraxis gällande bestämning av minimilöner (som beskrivs i kapitel III) utvisar behovet av att tolka och tillämpa utstationeringsdirektivet – liksom annan sekundär gemenskapslagstiftning – i ljuset av de allmänna regler gällande det offentliga intresset som motiverar begränsningar i rätten att fritt tillhandahålla tjänster över medlemsstaternas gränser. Både motsvarighets- och proportionalitetsprincipen är relevanta vid en tillämpning av nationella minimilöner på den till landet utstationerade arbetskraften. Slutligen är proportionalitetsprincipen som en gemenskapsrättslig kategori en säkerhetsventil mot såkallad social protektionism. Praxis och debatt om beställaransvaret ger å andra sidan vid handen hur begränsning av låglönekonkurrens kan återspegla ett sådant allmänintresse som kan rättfärdiga begränsningar i tillhandahållandet av tjänster.

Den utstationerade arbetskraftens arbetsvillkor kan naturligtvis komma att bestämmas under direkta eller indirekta hot om kollektiva kampåtgärder. Det fjärde kapitlet i denna studie kommer till den generella slutsatsen att den inom ILO utvecklade rätten till fackliga påtryckningsåtgärder är rättsligt relevant också för den europeiska gemenskapen. Denna uppfattning stöds på artikel 307 EG och sist och slutligen också på den generella internationella rätten i enlighet med EG-domstolens praxis. Både inom ILO och EU ses rätten till strejk/kampåtgärder numera som en nödvändig del i det effektiva införlivandet av rätten till kollektiva förhandlingar och avtal. Inom gemenskapen är denna rättighet bunden också till dess grundläggande principer: frihet, demokrati, respekt för de mänskliga rättigheterna och de grundläggande friheterna samt till rättsstatsprincipen. I sina första mål om strejk/kampåtgärder ställs EG-domstolen inför utmaningen att skydda denna grundläggande rättighet vid tillhandahållandet av tjänster. Man kan förutspå att detta kommer att ske genom att kombinera de tidigare hävdade synsätten om skyddandet av de grundläggande rättigheterna och om tillåtna begränsningar vid tillhandahållandet av tjänster. Det svenska fallet ”Laval” gäller ytterligare till en del den dansk-svenska kollektivavtalsbaserade modellens ställning inom den europeiska gemenskapen.

Publisher's Note

The principle of tripartite co-operation is essential for Finland's policy in labour market matters. It is observed as well by the Ministry of Labour when providing the framework and financing for research on various working life issues, European Labour Law included. Consequently, the steering group of the study written by Mr. Jari Hellsten has been tripartite consisting of the representatives of the Ministry and social partners, and also academics. However, the researcher has done independent work. The views expressed do not bind the Ministry of Labour or other participants in the group.

This study, co-financed by the Ministry of Labour, traces the development of EU labour law and places special emphasis on some of the most current topics of this development.

Helsinki, 20th December 2005

Jouni Lemola
Chairman of the Steering Group
Ministry of Labour

Foreword

This study forms part of the wider project *"From Internal Market Regulation to European Labour Law'*, financed by the Finnish Work Environment Fund, the Finnish Ministry of Labour and several Finnish trade union organisations. It focuses especially on the relationship between the free movement of services as a basic freedom in the EC legal system and the social dimension and protection of workers in situations where they are sent to perform services or work in a Member State other than the one where they habitually work.

The project leader and research manager is professor Bruun and Jari Hellsten is the researcher. This report is the second published within the framework of this project. The first one "*On Social and economic Factors in the Developing European Labour Law*" was published last year in Sweden (Arbetsliv i omvandling 2005:11, National Institute for Working Life).

The topic is of general interest, not least since the enlargement of the European Union in 2004 lead to greater discrepancies between living and working conditions in different Member States. Also the debate on the still pending Commission proposal for a Services Directive and some court cases on the relationship between the freedom to undertake industrial action and the basic economic freedoms in the EU system have brought much public attention to the problems that *Jari Hellsten* focuses on in this study.

We wish to thank all the colleagues and friends who have commented on the manuscript and also helped us in different ways. It goes without saying that all responsibility for remaining shortcomings lies with the author and his supervisor. We also wish to express our gratitude to the Finnish Ministry of Labour for publishing this report in its scientific series.

Helsinki, 31 January 2006

Niklas Bruun
Professor

Abstract

In this study I discuss the Social Dimension in the Posting of Workers in four chapters: I: Posted Workers Directive (PWD) in the Treaty Framework; II: Wage Liability of Principal Contractor; III: Minimum Wages in Posting; and IV: The Right to Strike in EC Law, more particularly in the Framework of Free Provision of Services.

In the first Chapter it is shown – perhaps more clearly than in the earlier doctrine – that the PWD is an extension of the preceding case-law and is subject to the overall Treaty framework in Articles 49 and 50 EC. Case-law shows the fundamental considerations that affect the contents and nature of the internal market. Both case-law and the PWD reject the idea of low-wage competition from other Member States as inherent and accepted in the internal market. Furthermore the PWD imposes an obligatory rejection of low-wage competition if there are binding minimum wages in a Member State. In this way the PWD combined fair competition and the protection of workers. A diametrically opposite argumentation (endorsing the right to low-wage competition as inferred from the Treaty) has existed, especially in Germany, up to recently. Finally, case-law shows how the EC law in this field is based on the concept of preventing distortion of competition by means of regulation, thus combining the interests of workers and employers; it reflects also the concept that labour is not a commodity.

Regarding the liability of the principal contractor, recent case-law shows how the Member States are mandated by the PWD to resort to heavy structural measures such as wage liability in enforcing the PWD. This case-law (discussed in Chapter II), together with that concerning the definition of minimum wages (discussed in Chapter III), shows in more detail the need to read and apply the PWD, as any other part of secondary EC law, in the overall context of justifying restrictions on the free provision of services by overriding requirements of general interest. Equivalence and proportionality assessment are both relevant factors in applying the host state's right to extend the national minimum wages to posted workers. In the end, the proportionality assessment, strictly as a concept of EC law, works (only) as a safety valve against social protectionism. On the other hand, the liability debate illustrates how the prevention of low-wage competition reflects the general interest that may justify restrictions on the free provision of services.

The working conditions of posted workers may naturally lead to a legal assessment of the right to strike/industrial action behind these conditions or a striving towards a collective agreement thereon. This research (Chapter IV) leads to the conclusion that the ILO right to strike binds also the EU, partially as based on prior international agreements under Article 307 EC and finally due to general international law, as anchored in the existing case-law of the ECJ. In EU law, the right to strike is enshrined in the Charter of Fundamental Rights of the EU which, in the same way as the ILO nowadays, derives that right from the right to collective bargaining. Within EU law, protection of the right to strike is tied to founding principles of the Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. As the first direct strike cases (*Laval*, and *Viking* v. *ITF* and *FSU*) are now pending for a preliminary ruling, the European Court of Justice faces a great challenge in applying and protecting the fundamental right to strike/industrial action in the

context of the free provision of services. This is normally achieved by converging it with the doctrine of justifying restrictions on the free provision of services. The case *Laval* further deals with the position within the Community of the Danish-Swedish labour market model, which is crucially based on collective agreements, where it deserves its place. [*]

[*] The manuscript was substantively closed on 14 November 2005.

Introduction

This study is part of a wider project covering the evolution of EC employment and social law. An article 'On Social and Economic Factors in the Developing European Labour Law; Reasoning on Collective Redundancies, Transfer of Undertakings And Converse Pyramids' has been published [1] and a third study will deal with the social dimension in EC competition rules. A synthesis book should be ready by summer 2006 covering in broader terms the developments of EC law in this area, and whether and to what extent it is justified to speak about European Labour Law.

The enlargement of the European Union with ten new Member States in 2004 adds fresh spices to the principles underlying the EC law on the Internal Market. It raises again principal issues related to workers' rights and fair competition. It reintroduces a social reality where a crucially wider gap in the standard of living and income levels now exists within the Internal Market. Stating this fact does not imply criticism of any of the new Member States. I am amongst the most keen to look at means of blocking any possibility of exploiting the workers and employees of those Member States. On the other hand, as the Swedish Laval case proves (explored in Chapter 4), such attempts occur all the time.

This change in the overall economic reality of the Internal Market may have legal repercussions, too. In any case it justifies reducing the scope of this study to posting of workers in the framework of the free provision of services. I discuss the free movement of workers under Article 39 EC only for demarcation purposes or as a reflection to the reasoning of other scholars. On the other hand, I do not deal with the transitional provisions relating to the posting of workers under Articles 49 and 50 EC, except occasionally. In that specific framework, transitional provisions cover only Austria and Germany, and even in that framework the essential differences in standard of living and costs will remain long after 2011, which is the foreseen absolute end of any transitional provisions.

However, the highly important legal and political feature within the social dimension in the free movement of services is the Posted Workers Directive (hereinafter also 'PWD'). [2] There is no need to explore it from Alpha to Omega because the doctoral dissertation of Eeva Kolehmainen a priori does this. [3] She covers the Directive in a first English monograph, with the experience on case-law gained up to 2002. This reasoning equally tries to present the essentials in the PWD (based on my own

[1] See the scientific serial Work Life in Transition 2005:11 of the Swedish National Institute of Working Life.

[2] Officially it is 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. The author had the opportunity to be involved for several years in its preparation as a lobbyist in the European Federation of Building and Woodworkers (EFBWW).

[3] Eeva Kolehmainen, The Posted Workers Directive: European Reinforcement of National Labour Protection. European University Institute, 2002. Accordingly, the dissertation of Ulla Liukkunen discusses the PWD with some 77 pages: Ulla Liukkunen, The Role of Mandatory Rules in International Labour Law; A Comparative Study in the Conflict of Laws. Talentum, Helsinki 2004. She looks at the Directive through the framework of the present Rome Convention (hereinafter also 'RC'; OJ L266/1, 9.10.1980) on law applicable to contractual obligations.

experience in its preparation) but obviously with more emphasis on its position in the legal context dominated by the Treaty. Besides, I discuss new judgments or those given perhaps minor attention by Eeva Kolehmainen or other PWD issues that I feel are worthy of discussion. My focus is by definition on the construction industry, which in many countries covers also collective agreements concluded within others sectors, such as the metal industry. However, the principles formed concerning construction are normally and naturally widely transferable to other sectors.

My leading idea is to discuss the interaction and dependence of economic and social factors that the Preamble of the Directive solemnly declares in its fifth Recital. In other words, in the field of ideas the aim is to discuss (i) the basic fidelity of this description (the marriage of prudence between the economic and social factors), (ii) means of trying to fulfil this requirement in implementation and enforcement, and (iii) shaping the overall role of the PWD in the structure of the EC law, more particularly in the development of EC Labour Law. Under (i) I try to keep in mind the Internal Market after the enlargement of the EU. Under (ii) I try to avoid jumping too deep into the normative and practical jungle of details (and discuss substantively only the German and Finnish national law). Under (iii) my thesis is that making this kind of competition-bound labour law was in the final analysis a political and legal necessity.

In more practical terms the first Chapter covers the preparation and main contents of the PWD. It is essential to view the PWD as an extension of the case-law since the judgment *Seco* in 1982. I try also to show the necessary details in the development of the right of the Member States to extend their laws and collective agreements to workers posted temporarily into their territory. I further present the positions of scholars in various Member States on the essence of the PWD. The core of this Chapter, serving also the reasoning in my Chapters II and IV, might still be to present the overall framework of labour law restrictions on the free provision of services as laid down and demonstrated in judgment *Arblade*.

The second chapter covers the wage liability of the principal contractor in enforcing the minimum wages of the posted workers, subject to the preliminary ruling in case *Wolff & Müller v. Pereira* in October 2004. The debate in the German doctrine before the judgment, and the argumentation of the principal contractor, provide us with a useful mirror in assessing the legal status of the liability in the light of the PWD. It equally helps in determining the role of the PWD under the Treaty. As is the case with all directives, it has to comply with the Treaty (and its interpretations); but on the other hand, as based on the Treaty, the PWD legitimises further state measures that interfere with the market mechanism, such as the wage liability.

The third Chapter deals with the definition of the minimum wages concerned. It shows the direct link between the highly ‘integration-ideological’ level of the PWD and the grassroots where the wages consist of a variety of historically and culturally determined factors. Definition of the minimum wage was subject to a preliminary ruling in the recent infringement case *Commission v. Germany* where the ECJ gave its preliminary ruling in April 2005. It includes certain formal rewriting of the Treaty interpretation that forms the basis for the application of the PWD, showing more clearly the role of the proportionality assessment in this context.

The fourth Chapter addresses the very 'cat on the table', the issue that by the right to strike in the free provision of services has jumped into the European labour law debate. In April 2005 the Labour Court of Sweden decided to ask for a preliminary ruling in a posting case (*Laval*) that will likely form the basis for the right to strike in EC law. It includes reasoning also on the status of prior international agreements binding the Member States (Article 307 EC) and even general international law. The former provision is little discussed in the doctrine, the latter seems to be a wholly innovative step in European labour law, generated by the need, arising daily, to try to cover the relevant legal aspects in this challenging issue.

I do not discuss the Draft Directive on Services in the Internal Market (DSIM) at all. I clearly see, of course, the devastating effect that the Commission's original proposal would have had, especially on the control of working conditions, and many other problems besides. [4] However, time and space is limited, the purpose of this particular piece of research work is to analyse the past and present EC law while the whole DSIM still remains a draft.

The role of the ECJ is central to the lengthy legal development of this whole framework towards a more mature European Labour Law. In a preface this would amount to a need for special thanks. In ending an introduction it is enough to 'warn' the reader that this reasoning does not include any separate section detailing the evidence in support of my statement on that role (apart from some general remarks in section 3.4). It is common ground as all my chapters show.

[4] On this, see the presentation of Professor Niklas Bruun (Employment issues, memorandum) at the public hearing on the Proposal for a Directive on Services in the Internal Market of the European Parliament on 11 November 2004; www.europarl.eu.int.

Chapter I

Posted Workers Directive in the Treaty Framework

1.1 The Directive and the Rome Convention

The Rome Convention (RC) is not of little importance here. However, my principal focus is the balance between fair competition (economic) and guaranteeing the rights of workers (social**);** a reasonable and fair application of the RC does not justify it being the most suitable *general* framework. The PWD is in a legal-technical sense supplementary to the RC, but it takes precedence over the RC in any possible conflict, as Article 20 RC states. Finally, the applicable law is by definition important with respect to the cross-frontier provision of services, but any deep reasoning would differ depending on which one is the starting point, PWD or RC. With respect to work contracts, the RC is usually more significant in the case of executives and experts posted in minor numbers or just individually to other Member States while the PWD is more important in the case of blue-collar workers and technicians posted in larger numbers. The on-going work on replacing the Rome Convention by an EC regulation does not change this general approach.[5]

A separate issue that justifies establishing the PWD-RC relationship this way round rather than other way round (RC – PWD) is that by so doing collective agreements can be handled much more easily and more appropriately. In concluding collective agreements covered by the PWD the parties consider (or at least they should consider) their impact in the framework of the Directive but they hardly dream of the RC. Finally, regarding issues not covered by the Directive (like dismissal protection) the legal value of the RC increases essentially.

An essential difference between the two approaches is that the PWD is supposed to have, when implemented properly, a quasi-automatic and sanctioned effect on employment relationships whereas the RC mainly concerns the decision-making of the courts. More precisely, it aims at solving problems arising from *conflicts* of the law applicable. The RC has the freedom of choice as its starting point whereas the Directive means compulsory changes in the law applicable, guaranteed finally by all of the force the directives have under EC law. This means also that the home state courts must apply the host state law and collective agreements (with higher labour standards) covered either by the Directive directly or by the implementing national law. [6] Under the RC the home state courts have discretion over this aspect.

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[5] See the Green Paper on the Conversion of the Rome Convention, COM (2002) 654 final.

[6] This way and without reservations explains also Paul Davies, Posted Workers: Single Market or Protection of National Labour Law Systems, CMLRev. 34: 571-602, 1997, pp. 578-9. Kolehmainen first denotes that she is 'inclined' to share this opinion but then anyway states that it would depend on the national implementation law, op.cit. 89-90. There was no intention to treat the workers' claim differently depending on the forum they chose: home or host state court. The forum guaranteed by Article 6 PWD is clearly enacted as a provision *improving* or adding protection. Also interpreting the national law in conformity with EC law à la judgment Pfeiffer, C-397-403/01, judgment of 5.10.2004, nyr, leads to the same conclusion. Of course, Article 7(1) RC is a backdoor to arrive at the same conclusion.

1.2. The Framework in the Treaty

1.2.1 Relation to Free Movement of Workers

The PWD has its legal basis in Articles 57(2) and 66 (now 47(2) and 55) EC. Nevertheless, it must be interpreted in the light of present Articles 49 [7] and 50 EC. It essentially realises the provision in Article 50(3) EC, according to which the temporary provision of services in another Member State is allowed under the same conditions as those applicable to providers established in that State. As to the legal basis, a leaning towards the free movement of workers is natural. [8] Article 48 EC was several times proposed as being the necessary legal basis for the instrument but the Commission always firmly rejected it. One reason for avoiding Article 48 was to reject also Article 100 and thus keep the Directive under qualified majority voting (with the European Parliament in the co-decision position), notwithstanding the British criticism. A more formal ground was the decision that had already been made in judgment *Webb* in 1981 where the full Court stated that even the pure hiring-out of manpower was to be regarded as falling under the free provision of services. [9] 'EC constitutionally' the location of the Directive under the Services Chapter of the EC Treaty fits well with the fact that the PWD de facto regulates also competition between undertakings. As an alternative the Social Chapter of the Treaty, for regulating with its accent on working conditions, did not offer a sound legal basis in 1996 (being of pre-Amsterdam era).

However, a closer look at *Webb* reveals how the Court found that

> '…agencies for the supply of manpower may in *certain circumstances* be covered by the provisions of Articles 48 to 51 of the Treaty and the Community regulations adopted in implementation thereof.' [10] (italics by JH)

The Court did not define what those 'certain circumstances' might be. [11] However, a reference to 'Community regulations' clearly means e.g. Regulation 1612/68/EEC which safeguards the equal treatment of national and cross-border workers, including remuneration. Furthermore, there was an element of protection against social dumping

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[7] Case C-60/03 Wolff & Müller v. Pereira Félix, judgment 12.10.2004, paragraph 45, nyr.

[8] Another adjacent legal sphere is public procurement. It includes, since the directives Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, and Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts**,** a social aspect of its own. However, I pass it here. The author aims at publishing a separate article on social dimension in competition rules.

[9] Case 279/80 Webb [1981] ECR 3305, paragraph 10.

[10] Ibid.

[11] One example might be transition periods in an accession Act. E.g. in Rush Portuguesa the Court stated that hiring-out of manpower (from Portugal) could be against such a period in the Portuguese-Spanish Accession Act. See Rush Portuguesa, paragraphs 16-7. It is, anyway, difficult, if not impossible, to find relevant substantive limitations for the principle of equal treatment, if it is looked at from the perspective of the rights of the workers concerned.

also in the sphere of free movement of workers. Namely, in an infringement case the Court asserted in 1974, as follows:

> 'The absolute nature of this prohibition [against discrimination], moreover, has the effect of not only allowing in each state equal access to employment to the nationals of other Member States, but also … of guaranteeing to the State's own nationals that they shall not suffer the unfavourable consequences which could result from the offer or acceptance by nationals of other Member States of conditions of employment or remuneration less advantageous than those obtaining under national law, since such acceptance is prohibited.' [12]

The meaning of this passage is completely clear: the national labour force shall not suffer from cheap foreign labour. In practice, e.g. on a construction site, it is impossible to justify that those posted, i.e. those removing a priori on the initiative of an employer, should be less protected than those (work mates) removing but using their own fundamental right to free movement. There is no such justification. And, on a more practical scene again, experience shows that abuses are crucially more frequent where there is an 'employer' (sometimes a letter box company) posting the workers abroad.

Summing up, the free movement of workers is another legal framework whose rules may apply to posted workers only under 'certain circumstances'. I claim that this aspect is relevant at least with respect to issues falling outside the hard core of Article 3(1) PWD. It is well defendable that the rules in free movement of workers are of secondary application and are of clear interpretative value in posting situations. I will come back to this *infra*.

Article 39 (ex 48) EC has shown up in a posting context in case-law after *Webb* at least in the following cases: *Finalarte*, *Rush Portuguesa* and *Vander Elst*. [13] In case *Finalarte* it was, indeed, in all the four questions of the referring court, Arbeitsgericht Wiesbaden, Germany. Companies Finalarte and Portugaia referred to it by maintaining 'that the chances of workers being taken on and posted abroad are reduced to the extent that an employer may be deterred, as a result of the extension of the paid leave scheme, from exercising its freedom to provide services by pursuing activities in the Federal Republic of Germany' (paragraph 21 of judgment *Finalarte*). The ECJ stated that the posted workers

> '…do not, in any way, seek access to the labour market in that second State if they return to their country of origin or residence after completion of their work' (paragraph 22 of *Finalarte* that referred to paragraph 15 of *Rush Portuguesa*).

The ECJ then ruled that Article 39 (ex 48) EC did not apply (paragraph 23 of *Finalarte*). This labour market concept in the posting of workers, as used by the ECJ, requires some critical comments. First, in *Rush Portuguesa* the Court added immediately after the above statement that

[12] Case 167/73 Commission v France ECR [1974] 359, paragraph 45.
[13] Case C-49/98 Finalarte v ULAK [2001] ECR I-7831**,** paragraph 22 (hereinafter referred to as 'Finalarte'); case C-43/93 Vander Elst ECR [1994] I-3803, paragraph 21; case C-113/89 Rush Portuguesa [1990] ECR I-1417, paragraph 15.

> '…an undertaking engaged in the making available of labour, although a supplier of services within the meaning of the Treaty, carries on activities which are specifically intended to enable workers to gain access to the labour market of the host Member State.'(paragraph 16)

Thus, the labour market concept itself was twofold. Second, in *Rush Portuguesa* and in *Vander Elst* the concept was used in assessing the need to have work permits for the posted workers. However, it is difficult, if not impossible, to find such a reason to be valid after the adoption and entry into force of the Posted Workers Directive (PWD). Further on, the distinction made between posted workers who return back to their home (or living) state and those who do not return is artificial. In that thinking a worker moving on his own initiative for one day to the host state enters its labour market while a worker posted for a ten years' project does not. Moreover, freely moving workers may also return home, which for logic's sake should separate them from the labour market of the host state. Nobody claims it is so. In sum, it would be logical to acknowledge that at the latest since 1992/3 the internal market prevails (with the transitional exceptions, only) and that there is just one labour market of the Community within which workers are posted.

However, while the principles established under free movement of workers, equal treatment in particular, can for good reasons be applied as secondary arguments to the posting of workers under the free provision of services, the latter in any case forms a legal framework *sui generis* in the EC legal order. Later we will see how also labour law (rights of posted workers) has to be interpreted as being linked to the yardsticks and ways of reasoning within the free provision of services whether we like it or not.

1.2.2 Pre-Directive Case-law on Posting

Under this heading I will pick up from the cases concerned only issues that are directly linked to the basic balance between fair competition and workers' rights in the form of extending the national minimum wages to cover also posted workers. I see it as appropriate to cover under this heading the cases dealing with events that occurred before the Directive became compulsory, i.e. prior to 16 December 1999.

For the first time the ECJ confirmed that the possibility of extension was compatible in principle with EC law in judgment *Seco v. EVI* in 1982. This confirmation was not just any minor obiter dictum, but it was directly related to the main proceedings dealing with contributions for law-based social security in a posting situation. Luxembourg wanted to legitimise the offset of a competitive advantage gained by service providers from other Member States in paying wages lower than those fixed by law or collective agreements in Luxembourg. The offset Luxembourg made by imposing its social security contributions on those service providers. The offset issue was incorporated into the second question subject to preliminary ruling. The crucial point is that the issue reveals entirely opposite views linked to the very nature of the internal market. Namely, AG VerLoren van Themaat asserted as main grounds for his answer to the second question, as follows:

> 'It is one of the fundamental features of the Common Market, which is to be attained *inter alia* by the freedom to provide service, that when providing services in another Member State any employer may in principle make use of the cost advantages existing in his country, including lower wage costs, under the conditions of undistorted competition which constitute another objective of the Treaty.'

The full Court, while it (like the AG) rejected the offset argument as such, confirmed the opposite view on the contents of the Common Market, i.e. that

> 'It is well-established that Community law does not preclude Member States from applying their legislation, or collective labour agreements entered into by both sides of industry relating to minimum wages, to any person who is employed, even temporarily within their territory, no matter in which country the employer is established, just as Community law does not prohibit Member States from enforcing those rules by appropriate means.' [14]

Was this statement, the contents of which can be described as extension right or possibility, an example of (law-making) judicial activism? Certainly. *First*, it was judicial activism in the sense that it was not a necessary step in rejecting the offset argument. It would have been fully possible to reject it simply by stating that the argument did not represent overriding reasons of general interest justifying restrictions on the freedom to provide services. That doctrine was already in use at that time. However, the Court used this statement as a crucial part of its reasoning by concluding, in the same paragraph, that the offset was not of appropriate means as it disregarded the contributions paid in the home state and it resulted in no social security benefit whatsoever for the workers concerned. Furthermore, a case-related feature was that had the Court rejected the offset argument without stating the extension right, the obvious risk would have been to face arguments of or at least uncertainty about the Court perhaps endorsing the connotation which AG gave to the Common Market in his grounds. *Second*, the Court found the extension right as 'well-established' without being in this sense too much more elaborate than AG with his 'one of the fundamental features of the Common Market'. The Court did not refer to any precise provision(s) in the Treaty, an inferred purpose of the 'fondateurs' of the Community, case-law (wages were not present in *Webb*, decided in 1981) or any division of competences between the Community and Member States. Its simple tool was a 'well established' interpretation' of 'Community law', which, however, is notoriously something broader than the 'Common Market'. 'Community law' thus includes also the leading articles 2 and 3 EC, as well as the Social Chapter of the Treaty. The Common Market connotation of Advocate General was in obvious ideological contradiction with the principle of upwards harmonisation, a presumed (partial) consequence of the functioning of the Common Market, enshrined in Article 117 EEC. Anyway, the argumentation (see e.g. the position of Dörfler in footnote 72,

[14] Joined Cases 62/81 and 63/81 Seco and Desquenne & Giral v EVI [1982] ECR 223, paragraph 14. As is shown in my reasoning that follows this passage, we must read and understand it (the extension right) in the light of the opinion of Advocate General. Indeed, '[i]n important cases the opinion may be of great assistance to the reader trying to understand the full consequences of the Judgment'; Ole Due, Understanding the reasoning of the Court of Justice, in Rodríguez Iglesias et al. (éd.), Mélanges en hommage à Fernand Schockweiler, Nomos, Baden-Baden 1999, p. 79, *in fine*.

infra) 23 years later with the Common Market connotation of Advocate General proves that it was essential for the ECJ to state the extension right. In this sense it is appropriate to qualify the extension right as a kind of imposed judicial activism.

In *Rush Portuguesa* the ECJ (as a Chamber) repeated the extension right in 1990 (without the reference to 'minimum' wages), again as an obiter dictum while 'in response to the concern expressed in this connection by the French Government'. [15] The main proceedings dealt with administrative conditions for posting, namely work permits. In *Vander Elst* the ECJ in 1994, this time sitting in plenum but again as an obiter dictum, repeated the extension possibility, however, now referring to 'minimum wages' (established by law or by collective agreement). [16] This issue hardly signified an intentional change in relation to *Rush Portuguesa*. The change in wording was anyway taken into account in writing the Posted Workers Directive. [17] More important, however, was that the repetition of the extension possibility took place in a case between two Member States with a generally speaking similar socio-economic level. Mr. Vander Elst posted his Moroccan workers, resident in Belgium, from Belgium to France. Furthermore, the Court repeated the extension possibility in the circumstances that it described, as follows:

> '25 As the Advocate General has rightly observed in paragraph 30 of his Opinion, irrespective of the possibility of applying national rules of public policy governing the various aspects of the employment relationship to workers sent temporarily to France, the application of the Belgian system in any event excludes any substantial risk of workers being exploited or of competition between undertakings being distorted.'

The qualification of the Belgian *system* is noteworthy, as is its assessed consequence, avoidance of workers being exploited or competition being distorted. Typical features of the Belgian system are e.g. the sectoral social funds based on collective agreements and a strict approach of the state to guarantee for its part the rights of workers.

However, the ruling in *Vander Elst* found its opponents (i.e. some of the construction employers concerned) who wanted to provide services with the wages of the home state. They advanced this neo-liberal argument and interpretation of the Treaty**,** inter alia**,** in the cases *Arblade*, [18] *Finalarte* [19] and *Portugaia*. [20] In *Arblade* they 'anchored' it on judgment *Bond van Adverteerders and others v The Netherlands State* where the Court confirmed that purely *economic* aims cannot constitute grounds of public policy within the meaning of Article 46 (ex 56) EC, thus grounds to restrict

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[15] To give the official name of the case: Case C-113/89 Rush Portuguesa Ldª v Office national d'immigration ECR [1990] I-1417, paragraph 18.
[16] Case C-43/93 Raymond Vander Elst v Office des Migrations Internationales ECR [1994] I-3803, paragraph 23.
[17] See section 1.3.4, *infra*.
[18] Joint cases C-369 and 376/96, Arblade and others ECR [1999] I-8753. This French company had works in Belgium and pointed out that it had followed the French legislation. Besides, it held that the Belgian obligations (including the obligation to pay the Belgian minimum wages concerned) were against the Treaty; paragraph 22 of the judgment.
[19] Joint cases C-49/98 C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, Finalarte ECR [2001] I-7831.
[20] Case C-164/99 Portugaia; ECR [2002] I-787.

the freedom of cross-border provision of services. [21] The case dealt with advertising on TV. However, the ECJ in *Arblade* confirmed the extension principle, as established in *Seco* and followed in *Rush Portuguesa* and *Vander Elst*. [22]

In *Finalarte* even the referring court, Arbeitsgericht Wiesbaden, clearly lent towards this neo- or ultra-liberal employer argumentation basing itself to a considerable extent on the corresponding German doctrine that I explain below in section 1.3.5. The national court asserted, according to Däubler, that both the German national posting law (Entsendegesetz) and the Directive infringed Article [ex] 59 EC. It found that the extension of collective agreements in the building sector rendered the activities of a foreign service-provider less advantageous. According to the court, this restriction cannot be justified by overriding requirements of interest. In fact, the court had doubts whether protection against competition by lower wages could ever meet that condition. This reasoning de facto challenged the previous case-law *Seco, Rush Portuguesa* and *Vander Elst*. [23] Däubler heavily opposed this reasoning of Arbeitsgereicht Wiesbaden, alone in the doctrine published in English so far as I am aware, by referring both to the same conditions for foreign service providers, enshrined in Article [ex] 60(3) EC, and to [ex] Article 91 EC concerning dumping within the common market. Däubler even referred, with logical grounds, to equal treatment under free movement of workers, hence to Article 48(2) (now 39(2)) EC, and to Article 117 (now 136) EC that refers to upward harmonisation (‘*…harmonisation while the improvement is being maintained’*). He stated that ‘A competition based on wages being 50% or 30% of those which are normally paid in the host country is just the contrary of ‘maintaining the improvement’’. [24]

The ECJ in *Finalarte* did not have to repeat the essential precedents’ *Seco, Rush Portuguesa, Vander Elst* and *Arblade* validity, as to the extension possibility in general. The main proceedings dealt only with the social fund procedure in paying holiday remuneration. The imposition of the social fund procedure of the host state in paying the holiday remuneration was accepted with the final condition that those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection (paragraph 42 of *Finalarte*). However, the *Finalarte* judgment was built upon the principles confirmed in *Arblade*.

In *Portugaia* the main proceedings dealt with a sum of some 68,000€ as outstanding wages according to the national minimum wage applicable. The company opposed paying this sum to the (German) state. This implied a claim that it was sufficient for it

[21] Case 352/85, ECR [1988] 2085, paragraph 34. The references to the disqualified economic aims in Finalarte (para 39) and Portugaia (para 26) are given in a context very different from that present in Bond van Adverteeders. Presenting them anyway shows that the Court always considers also the free movement aspects.

[22] See paragraph 41 of judgment Arblade. In Portugaia the Court (a Chamber) naturally followed this line (see paragraph 21) but clearly as a lapsus referred to paragraph 33 of Arblade that deals with abolition of restrictions on free movement of services.

[23] Wolfgang Däubler, Posted Workers and Freedom to Supply Services. Directive 96/71/EC and German Courts, IJL September 1998, Vol. 27, pp. 264-268, especially 265. – See that judgment Arblade was not in the national court’s reasoning in Finalarte because it was just a pending case at that time.

[24] Ibid. - The Treaty of Amsterdam repealed Article 91, and what is left of this protection against dumping in the Treaty is Article 96 (ex 101).

to comply with the home state wage rules. The proceedings were intended to order recovery of this pecuniary advantage obtained through a refractory conduct according to the German special administrative procedure 'Ordnungswidrigkeit' (Law on Regulatory Offences). The referring court had again doubts about the compatibility of the German minimum wage rules with the Treaty. [25] More precisely, it asked whether the grounds of the national law, the aim of protecting the national construction industry and the reduction in national unemployment for the purpose of preventing social tension, were consistent with Community law. [26] The ECJ ruled that the expressed purpose of the national law was not enough as such to render the national law incompatible but it did cause a closer scrutiny in that respect. [27] Otherwise *Portugaia* was a natural extension of the previous case-law.

In concluding the discussion about this question in the case-law, namely concerning the basic protection against competition from other Member States with lower wages, one may state that the answer is consistent and settled. The extension principle has been valid in cases that concern events that occurred before the Directive became compulsory, on 16 December 1999. Furthermore, it is justified to note that on this broader angle, the basic approach against social dumping or low wage competition, the Directive itself is as a balance-making instrument just a natural extension and confirmation of the previous case-law.

Another aspect to consider is that the Court in this pre-Directive case-law only in judgment *Vander Elst expressis verbis* stated the requirement of fair competition between undertakings on a cross-border, i.e. European level. Impliedly this requirement was reflected in all judgments establishing the extension possibility. In *Portugaia* the competition aspect was expressed in the grounds of the national law which were twofold. The grounds referred to both the protection of national industry (undertakings) *and* unemployed German workers. This only indirectly implies a European competition aspect.[28]

1.2.3 Labour Law Restrictions under the Treaty; *Arblade*-Test

The labour law restrictions on the free movement of services do follow the overall conditions developed by the case-law. A background factor is that Articles 49 and 50 (ex 59 and 60) EC are directly applicable after the transitional period until 1970, thus

[25] See paragraph 12 of the judgment.
[26] Ibid, paragraph 13.
[27] See paragraph 29 of the judgment: 'As the Court has already held, it is necessary to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures which it has adopted (Finalarte, paragraph 42).' – I come back to this in explaining the social fund system as part of the control policy, section 3.5, *in fine*.
[28] As such the idea of protecting workers against unfair competition with cheap labour is no novelty in EC law. See the infringement case partially cited at footnote 12, *supra*. As to judgment Portugaia, see i.a. footnotes 20-22, *supra*, and 55, *infra*.

they are possible to invoke validly also before national authorities and courts. [29] Article 49 EC requires, following Article 3(c) EC, the abolition of restrictions on free movement. Article 50(3) EC grants the service provider the right to move temporarily to another Member State 'under the same conditions as are imposed by that State on its own nationals'. The necessary elaboration of the conditions applicable comes from the case-law. A pre-question naturally is, whether there is any restriction on the free provision of services in nationally applicable terms and conditions of employment. I take it for granted here that conditions which are more favourable in the host state generally form a restriction, as they make the posting of workers less attractive.

In *Arblade* [30] the ECJ in a plenum made obviously the last coherent positioning of the conditions for restrictions accepted. They have centred on four basic notions or concepts, namely:

- overriding reasons of public interest justifying the restriction;
- mutual recognition (or equivalence);
- objective justification; and
- proportionality.

Thus, in *Arblade*, the Court laid foundations in four steps for the assessment of labour law restrictions on the free provisions of services. I call this the Arblade-test. The Court noted how Article 49 (ex 59) EC requires

> '[**i**] also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, which is liable to prohibit, impede or render less advantageous the activities of a provider of services established in another Member State where he lawfully provides similar services.'(paragraph 33).

'Rendering less advantageous' may arise even in the case of a relatively small amount of money. However, this is just a prerequisite and the first step in the general justification battery. The Court went on, as follows:

> 34. Even if there is no harmonisation in the field, [**ii**] the freedom to provide services, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, [**iii**] in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (paragraph 34).

Here the Court notes, after the standard formula of overriding requirements related to the public interest (ii), also the possible equivalence with the home state rules (iii). Double requirements are forbidden. However, these were the second and third steps.

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[29] Case 33/74 Van Binsbergen [1974] ECR 1299, paragraph 27, confirmed the vertical direct effect of Article 49 (ex 59) EC. Case 36/74 Walrave [1974] ECR 1405 extended it to rules of private law nature (horizontal direct effect). On this, see section 4.2, infra.

[30] To give the official name of the case: Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL (C-369/96) and Bernard Leloup, Serge Leloup and Sofrage SARL (C-376/96), [1999] ECR I-8453.

> 35. The application of national rules to providers of services established in other Member States must be [**iv**] appropriate for securing the attainment of the objective which they pursue and must not go beyond what is necessary in order to attain it. [31]

The last step (iv) sets forth the proportionality test. All of these statements are general justification tests. On the other hand, this test battery is completely developed in case-law. [32] Obviously, it was not necessary to present this general admissibility or justification test in a labour law case, concerning wages. On the other hand, the case involved also assessing the host state requirements on keeping the social documents. Next to this, the case shows that labour law does not escape the overall justification test applicable under the free provision of services that is essentially and finally an economic freedom in the Treaty. Thus, the reasoning shows the status of the social dimension (protection of workers) in this originally economic framework.

The Court staked out the status of social (i.e. labour law) in the general legal framework of free movement of services (only) as a continuum of its case-law, as follows:

> 36. The overriding reasons relating to the public interest which have been acknowledged by the Court include the protection of workers (see *Webb*, […], paragraph 19, Joined Cases 62/81 and 63/81 *Seco* v *EVI* […], paragraph 14, and Case C-113/89 *Rush Portuguesa* […], paragraph 18), and in particular the social protection of workers in the construction industry (*Guiot*, paragraph 16).

Hence, protection of workers in general may constitute overriding reasons of the public interest required. There is no need to discuss in detail the limits of the concept of 'protection of workers'. In any case, the references to *Seco*, paragraph 14, and *Rush Portuguesa*, paragraph 18, show that it covers pay provisions. Furthermore, the reference to *Webb* shows in principle the coverage of provisions outside pay as well (protection in hiring-out of labour in *Webb*). At the same time, regarding issues under EC Regulation 1408/71 on law-based social security schemes, the home state provisions apply in most cases to posted workers. The reference to *Guiot* confirmed the basic recognition for the special protection of construction workers. This

[31] The ECJ referred to, in particular, C-76/90 Säger, [1991] ECR Page I-4221 paragraph 15, Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32, Case C-55/94 Gebhard v Consiglio dell'Ordine degli Avvocati e Procurati di Milano [1995] ECR I-4165, paragraph 37, and Guiot [1996] ECR I-1905, paragraphs 11 and 13.

[32] Within free provision of services, judgment in joined cases 110 and 111/78 Ministère public and Chambre syndicale des agents artistiques et impresarii de Belgique ASBL v Willy van Wesemael and others [1979] ECR 35 was the first that operated with the 'general good' justification of restrictions. The case concerned activities of the fee-charging placement agencies. Paragraph 28 referred, besides to 'general good' as a justification, also, and as equal to that, to 'the need to ensure the protection of the entertainer', i.e. the artist placed. Soon after, i.e. in 1981 it was followed by judgment in case 279/80 Webb [1980] ECR; its paragraph 19 referred to 'safeguarding the interests of the workforce affected'. On that judgment in a PWD context, see section 1.3.6, *infra*, and in justifying a strike my submission in section 4.9.1, *in fine*.

protection is realised in many countries via social funds established by a national industry-wide collective agreement.

Had the Court rendered *Arblade* before the adoption of the Directive, its Preamble naturally would have referred to this conclusion. This, i.e. paragraphs 33 to 35 (or, to 36 in a labour law context), is what nowadays can well be called the 'Arblade-justification' or 'Ablade-test'. It is elementary to see that these four steps are complementary (they operate in turn). A restriction can be deemed as being incompatible with EC law on just the last step. If the earlier steps are passed that is insufficient to pass the test. The Court naturally applies this test also in post-directive cases, unless the PWD as an elaborating instrument includes precise provisions or incontestable interpretations imposing developments in it. The first post-directive case, namely *Wolff and Müller v. Pereira* [33] shows that the Court applied exactly this formula, i.e. also 'rules that do not go beyond what is necessary in order to attain the objective'. It did not elaborate or qualify the fourth step (proportionality) with 'whether the same result can be achieved with less restrictive means', as the Court did e.g. in paragraph 39 of *Arblade* when applying the test battery in that concrete case. This evolution might be due to the expiry of the implementation deadline of the PWD (in 1999) and the rights and duties thereby established for the Member States. Because even a '*same* result' is subject to interpretations, this distinction between these two formulas is subtle but real. The 'not beyond' formula is less open to undermining labour law elements than 'same result with less restrictive means'.

Further in its reasoning in *Arblade*, the Court in paragraph 38 acknowledged that substantive protection can be, indeed, must, I claim, be followed by appropriate control. The famous obiter dictum in paragraph 18 of *Rush Portuguesa*, with roots in *Seco*, was the point of reference here, too.

Finally, confirmation of the extension right, as a key element under protection of workers (i.e. public interest criterion (ii)) - in paragraph 41 of *Arblade* (with reference to *Seco* and *Rush Portuguesa*) impliedly meant that requiring higher pay for posted workers did not violate the equivalence criterion (iii). The extension right is finally its negation. Later on *Portugaia* (paragraphs 21 to 30) has shown that (under (ii)) this higher pay must 'confer a genuine benefit on the workers concerned, which significantly augments their social protection' (paragraph 29; on this see also footnote 55**,** infra), at least so as to remedy a protectionist purpose of a national law. On subjecting the application of host state's pay provisions to a proportionality test (iv) *Arblade* did not involve any discussion. It came later in cases *Wolff&Müller* (see especially section 2.2.5) and *Commission v. Germany* (see sections 3.3.3 and 3.4). Here it suffices to sum up that *Seco* established the extension right and *Arblade* anchored it as the answer of the Court to an express question of a national court. It is inherent in the Arblade-test.

[33] See case C-60/03 Wolff and Müller v. Pereira, nyr, explored in section 2.2, *infra*.

1.3. Posting of Workers in EC Law; The Prudent Marriage of Economic And Social Factors

1.3.1. History and Background of the Posted Workers Directive

Posting workers to carry out work in other Member States was not usual in the beginning of the Community. The *travaux préparatoires*, essentially the Spaak-report, only mention posting of personnel. [34] However, already in 1972 a first attempt to legislate was published by the Commission, namely a regulation under the heading of provisions on the conflict of law in employment relationships within the Community. [35] The Rome Convention of 1980 later partially substituted it, and the other reason to withdraw it was the profound opposition of the British government. The original proposal for the Directive had its roots in the Social Action Programme implementing the 1989 Community Charter of Fundamental Social Rights of Workers. It required governing the working conditions of posted workers. [36] A first draft Directive was published in 1991, [37] followed by a revised version in 1993. [38] The Council reached a political agreement – by qualified majority; UK voted against and Portugal abstained - on the contents of the Directive on 29 March 1996. The most important issue in the 'adoption saga', to use this qualification by Eeva Kolehmainen, was always the inclusion or exclusion of a threshold period for compliance with the pay provisions of the host country. The situation was in 1993, before the Commission shortened the period from three to one month in its revised proposal, that of the then 12 Member States. Only Belgium was, according to the Commission, officially against any compulsory threshold period. The European Federation of Building and Woodworkers saw already at that time that obviously at least Denmark, France and Luxembourg would join Belgium. Following national laws adopted in France in 1994, as well as in Germany in February 1996, the situation slowly but consistently turned against any compulsory threshold ('grace') period.

The reason to oppose any grace period was simply the need to block any social dumping by cheap labour. Being excessively difficult to supervise any (even a one month's) compulsory threshold period would have led to structural dumping by exploiting foreign workers. An essential impetus to this turn-around came from the new Member States, Austria, Finland and Sweden. Besides, Sweden anchored its labour market governance model (high importance of self-governed collective bargaining and agreements) as linked to its accession agreement. [39] However, an essential element in the preparations was the ongoing and increasing trade union

[34] Comité Intergouvernemental Créé par la Conférence de Messine, Rapport des Chefs de Délégations aux Ministres des Affaires Etrangères, avril 21, 1956 (Spaak report) p. 41.
[35] Proposition de règlement (CEE) du Conseil relatif aux dispositions concernant les conflits de lois en matière de relations de travail à l'intérieur de la Communauté; OJ C49, 18.5.1972.
[36] See the Action Programme, Part II, para. 2.
[37] COM (91) 230 final, SYN 346, 1.8.1991.
[38] OJ C187, 9.7.1993.
[39] See the Declaration No. 46 by the Kingdom of Sweden on social policy, annexed to the Accession Act of Austria, Finland, Norway and Sweden, OJ C241, 29.8.1994: In an exchange of letters between the Kingdom of Sweden and the Commission, the Kingdom of Sweden received assurances with regard to Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners.

lobby of EFBWW. It first managed to realize a zero-threshold in the construction industry, at the end with the active support of the European Construction Industry Federation FIEC. Second, it managed to gather a de facto blocking minority against Germany's proposal to make only a 'certain' (meaning a lowest possible) wage category as generally binding. The EFBWW found such a provision being discriminatory (even contradicting the Treaty) except in Germany where it was intended to cover also domestic workers outside the normal coverage of the national collective agreement in building and civil engineering; hence in cases where either the employer or the worker was not a member of the respective organisations. The way out was to enshrine in Article 3(1), second subparagraph, that national law or practice defines the minimum wage concerned. [40] I come back to the definition of minimum wages especially in section 3.4 (in fine), infra**.**

The position of the European Parliament was consistent from the beginning. It firmly opposed any compulsory grace period. [41] This was its essential and important contribution to this Directive, subject to co-decision procedure following the Treaty of Maastricht.

The role of the Council Presidencies was important in the preparations of the PWD, not the least the role of Professor Tiziano Treu chairing the Council of Ministers, as well as that of Professor Marco Biagi in drafting with him the overall compromise text adopted. Also of importance at the end was the role of the European Construction Industry Federation FIEC. Due to its firm position in support of the PWD, UNICE who for a long time opposed the directive, in the end reserved any official position. On the employer side at the end the UEAPME also supported the Directive as adopted.

1.3.2 Some Market Aspects Behind the Directive

The rationale behind the Directive tests also the limits of regulation in a market economy. Namely, for the basic proponents of the Directive, such as the European Federation of Building and Woodworkers, the basic justification of the Directive was and is the EC law guarantee given to the applicability of the national collective agreements, in the construction sector, to workers posted temporarily into another Member State. This means, however, just a partial protection in practice. Namely, in most of the Member States the wages paid in practice have been more or less widely higher than those enshrined in the national collective agreements rendered generally

[40] The countries ready to block the whole Directive regarding this issue were Finland, Sweden, Denmark, Belgium and Luxembourg. Counting on a guaranteed veto cast against any proposal for a directive by UK these countries formed de facto a blocking minority with 17 (+ 10) votes. The issue was important for the German conservative government; it finally lobbied with the formal – although reluctant as such - support of the Commission and a part of the Italian administration. - Securing the qualified majority behind the Italian compromise text became clear when the Spanish government decided to vote in favour.

[41] See e.g. the Legislative Resolution embodying the opinion of the European Parliament on the Commission proposal for the Directive, OJ C72, 15/03/1993 p. 85, and the Resolution on the posting of workers in the framework of the provision of services, OJ C166, 3.7.1995, p. 123.

binding (erga omnes) or being that de facto (the Danish-Swedish situation). [42] The influx of a labour force which is paid only or ready to work for the national minimum provisions automatically means a heavy pressure to lower the actual wages that are higher than the minimum. This is an economic fact that has been evident since work rules were made in Hansa-cities hundreds of years ago. However, as it is impossible to protect these higher wages by a national law or by an erga omnes declaration of a collective agreement, it is equally impossible on the European level. A notable legal exception is the mechanism of the German *Ortsüblichkeit* that permits a possibility of a special lawsuit on an individual basis, by invoking equal treatment within a site. Another one is in Swedish and Finnish laws that allow industrial action against a non-organised employer for a market salary to be paid to posted workers. [43]

If one moves from the Hansa era closer to modern times, let us say in the late 19th century, the national trade unions and, thereby, collective agreements started to emerge. An essential reason first for city-wide agreements was the increased mobility of manpower (bicycles, trains, later cars(!)) that challenged the income level of local workers. Later on, the local agreements developed in most Member States to national agreements. A European regulation (the PWD) is a logical further step in this continuum, which is already in some branches, such as in transport, a global dimension. [44] In this context the exclusion of merchant navy undertakings as regards seagoing personnel from the PWD is not founded at all, while it is extremely difficult to develop any workable alternative to the flag-state doctrine and practice. In the other transport sectors (rail, road, inland waterways and air traffic) the PWD covers national cabotage traffic.

From the point of view of employers the PWD is important because its aim is to guarantee fair competition between undertakings. The recent developments in the German construction industry are a graphic example of this. Until the 1990's the employer side was not interested in protecting the national wage mechanism. The reunification of Germany lead to quite a boom in construction, and the national manpower was insufficient. Workers were being posted to Germany from all directions with wages often as low as 30 to 50% of the German minima. When the situation changed, unemployment rocketed and, in addition, this cheap labour by definition pushed down the wage level, even to the extent that the national collective agreement no longer worked coherently as a standard, especially in East-Germany. The joint lesson of the German social partners in the construction sector was to give up partially with Tarifautonomie. The independence of the social partners in wage setting, that has its well known historical roots, culminated in Article 9 of the German Constitution (Grundgesetz). They accepted minimum wages covering all the workers in the industry in a situation where cheap and black labour flourished and law-abiding

[42] This is easy to see e.g. in the working condition surveys carried out by the EFBWW during 1990s.

[43] As to the right to industrial action, see Chapter 4, infra.

[44] The Chinese stone workers' case from Finland tells how much the world is changing. Namely, a Finnish stonework company ordered 12 underpaid workers posted from China to Finland. The Finnish user company was not regarded as employer. The estimated illegal profit (net) in the form of this underpayment in 17 months was 174,000 €. By charge of the State Prosecutor, a District Court condemned in 2004 the manager to a fine of 1,600 € and confiscated from the company 174,000 €, as diminished by further wage compensations. The case is under appeal.

employers already had deep difficulties. Bankruptcy figures were high, as well. The acceptance of binding minimum wages erga omnes, however, happened under the flag of allowing 'state intervention only as much as necessary'. On the employer side the metal and textile sectors strongly opposed erga omnes wages in construction, as did the confederation of employer organisations, Bundesvereinigung der Deutschen Arbeitgeberverbände (BDA). This was in a nutshell the background to the national posting law (Entsendegesetz, AEntG), enacted in February 1996. [45] Due to the political controversies even inside the conservative government, [46] it wanted to get the European Directive, besides its own European merits, as political backing for its own contested national law.

The example of the German construction industry, which could be painted in even darker colours, has lost none of its force. Its main lesson today is that when a labour market goes out of control such that free-riders and even wrong-doers influence an essential part of the standard, it is extremely difficult to get the market back under control. The compulsory minimum wages have been in force now for eight years in the German construction industry, with a remarkable degree of control, but even so the industry still suffers from the same problems that it did in the mid-90's. This experience reveals also an elementary aspect of market control or 'creating' labour law, namely the importance of the grass-root level, where the social partners as self-regulating market actors may often bring about effective informal control.

1.3.3 Once Again: Why a Directive?

A citizen may well ask, why was, and is, this directive so important. He might underline the question by referring to the Rome Convention and to the preceding case-law, notably to *Seco*, *Rush Portuguesa* and *Vander Elst*. Furthermore, the Treaty already included its anti-discrimination clause (Article 6 EC, now 12 EC) as well as the equal treatment clause in the free provision of services, namely Article 60(3) EC (now 50(3) EC), that entitled a service provider to provide services temporarily in other Member States under the same conditions as applicable to that State's national providers. Besides, the Rome Convention supplemented the Treaty. Finally, there was the Directive 91/533 concerning the information to be given regarding trans-national postings longer than one month.

A simplified answer is that the Directive essentially elaborates the regulation (judicial law-making) made in case-law. Next to this, the preceding case-law with respect to wages merely had the status of *obiter dictum* (although a strong one in *Seco*) which in principle could be reversed by later judgments. A directive naturally makes this less likely, if ever possible in this particular case. The PWD was the political confirmation

[45] For more details, see e.g. Koberski, Asshoff, Hold, Arbeitnehmer-Entsendegesetz, 2nd ed., Beck 2002, p. 9-14. The official position (in the so called Bargaining Committee) of employer organisations of other sectors (metal, textile, etc.) in the process of the erga omnes declaration in applying the AEntG of 1996 even led to lowering several times by the social partners in construction industry the wage level concerned. The amendment of the AEntG in late 1998 gave the Ministry the possibility to make the erga omnes declaration without the consent of the Bargaining Committee.

[46] The Liberal-Democratic Party inside the government opposed binding minimum wages and had strong support within the German Employers Confederation BDA.

of the European legislator (the Council and the Parliament) of the case-law. Furthermore**,** the structural change achieved by issuing a directive was to turn the possibility to extend the wage coverage to an obligation to cover posted workers by national minimum wages set up by law or, in the construction industry, by a generally binding (*erga omnes*) collective agreement. Furthermore, one may maintain that structural means are necessary in any effective implementation and supervision, means related above all to the use of power in the production chain. It is important to see also this (market interferences) legitimising aspect of a directive. This becomes clearer in Chapter II, infra, in explaining the liability issue.

The Preamble of the Directive characterised the structure of Article 3(1) PWD as a 'hard core' of clearly defined protective rules. It is, however, appropriate to note that in reality the provisions other than those concerning minimum pay and paid annual holidays are of a public law nature. [47] They would, therefore, be normally applicable to posted workers even without the Directive. On the other hand, the Directive increases clarity, e.g. with the reference to working time provisions of the host state. Such clarity can hardly be harmful. Furthermore, the 'hard core' list is of importance while the Member States may impose other provisions (like dismissal rules) on foreign service-providers only under the ordre public condition (and respecting the Treaty) in Article 3(10).

When reviewing the 'adoption saga' and the essential contents of the Directive, some issues need to be added to the list of reasons justifying the Directive: 1. the special treatment of temporary work; 2. no favourable treatment for companies from third countries; 3. defining the status of a 'worker' by the host country law (against bogus self-employment); 4. the establishment of co-operation between the national authorities; 5. recognition of the Danish-Swedish 'erga omnes de facto' collective agreements; 6. the possibility of covering collective agreements in any sector; 7. the possibility of instituting judicial proceedings in the host state; 8. a kind of definition of public policy (ordre public); 9. its elaboration by the declarations of the Council, Commission and Parliament; and 10. the right to strike not being affected by the Directive.

There are still weaknesses and some more or less grey zones. Methods of comparing the working conditions in force in the home and host states are perhaps the most prominent prima facie grey area; see Chapter 3.5, *infra*.

[47] Paid annual holidays are, of course, included in the Working Time Directive (Article 7) that requires roughly said four weeks' paid leave. National law in most Member States requires – after a certain service – five weeks. The PWD imposes these national holiday provisions on foreign service providers. - Däubler has paid attention – next to gender equality in Article 3(1)(g) - also to 'other provisions on non-discrimination' as being difficult to derive from EC law provisions (ILJ 1998, Vol. 27, p. 264-5). Later on the Anti-Discrimination Directives (00/43/EC on ethnic and racial discrimination and 00/78/EC on a general framework for equal treatment in employment and occupation) have set up the requirements that these 'other provisions on non-discrimination' (on belief or religion, disability, age and sexual orientation) apply to posted workers also by virtue of those directives.

1.3.4 Raison D'Être of the Directive

It is, of course, the cross-border effect of the Directive on the internal market that makes it legally really challenging. It operates with the basic notions of labour law, such as 'worker', 'pay' and 'collective agreement'. These notions do have earlier European definitions in case-law but decisions especially about the concept and consequences of 'collective agreement' under this Directive are up and coming. Regarding 'worker' the case-law under free movement of workers is quite comprehensive, even though there is no uniform European definition of 'worker', [48] and regarding 'collective agreement' the judgment *Albany* settled the basics of the status of sectoral collective agreements in relation to EC competition rules. Sectoral collective agreements were found to include inherent restrictions of competition and got a de facto constitutional protection in relation to EC competition rules. [49] Regarding minimum rates of 'pay' the ECJ has recently decided the first case, namely *Commission v. Germany* [50] that deals with the definition of minimum wage in the German construction industry. I explore it later in Chapter 3**.**

The internal market connection of the PWD is manifest. E.g. in the construction and cleaning industries the in-situ wages can be up to a half of total costs. At the same time the PWD manifests the inseparable nature of economic and social. For the employer, wages are primarily costs in a highly competitive market, for workers they are the main, if not single, means of providing for a decent life, to be social human beings. Excessive profits made by exploiting cheap labour are both economically, from the point of view of fair competition, unacceptable and socially unethical. The risk of dumping exists in any sector where workers and employees are posted, and today this may concern even high tech professions and/or production workers. Besides, the issue is linked also to undeclared work, as the German example from the construction sector shows. [51]

In publishing its first proposal for the PWD in 1991 the Commission presented in brief its view on the competition landscape and social point of view. It simply asserted that lower wages would distort competition between undertakings and would be from the social point of view 'completely unacceptable'. [52]

As usual, the internal market effect is laconically mentioned in the Preamble of the Directive; the first Recital notes how Article 3 EC requires removal of obstacles to the free provision of services. The third Recital denotes that 'the completion of the internal market offers a dynamic environment for the trans-national provision of services, prompting a growing number of undertakings to post employees abroad'.

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[48] On this theme, see e.g. Mikko Huttunen's dissertation, A Comparative Analysis of the Legal Position of Professional Sportsmen under Finnish, English and European Community Law: the Borderlines of Employment. European University Institute, Florence 2001, passim.
[49] Case C-67/96, Albany International ECR [1999] I-5751, paragraphs 59 and 60. For Albany, see the references in footnote 264, *infra.*
[50] Case C-341/02, judgment of 14 April 2005.
[51] See e.g. Gregor Asshoff, Baubranche: Illegal ist unsozial, WSI-Mitteilungen 11/2004. See also the Council Resolution of 20 October 2003 on undeclared work.
[52] Explanatory Memorandum to the proposal for a Council Directive concerning the posting of workers in the framework of the provision of services, COM(91) 230 final – SYN 346, Brussels, 1 August 1991, paragraph 12.

The fifth Recital then spells out the basic philosophy in the whole directive, as follows:

> (5) Whereas any such promotion [53] of the trans-national provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers;

This Recital needs to be read together with Recital 12 that, with the wording of *Rush Portuguesa*, paragraph 18, declared:

> (12) Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State; whereas Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means; [54]

This Recital introduced the extension possibility in the PWD and Article 3(1) enshrines it as the obligation of the host states. The Recital was during the drafting of the Directive the flag of the case-law backing up the Directive. While the Court (in plenum) rendered judgment *Vander Elst* in 1994 referring to *minimum* wages established by law or collective agreement (as the Court did in *Seco*), the Commission kept the wording of *Rush Portuguesa* in its proposal. The reason was to avoid any debate about the PWD possibly intending to set only the lowest wage category (like a 'minimum of minima') as binding erga omnes. In *Arblade* (paragraph 41) the Court referred both to *Seco* and *Rush Portuguesa* but used the *Seco* formula (mentioning 'minimum wages'). Allowing just the lowest wage category to be binding erga omnes by virtue of the corpus text (Article 3(1)) of the PWD was rejected at the end of the preparations. It is *a fortiori* clear that the PWD is intended to allow (in fact, it a priori requires!) the extension of the whole wage scale and other relevant pay provisions concerned, not just a lowest or otherwise reduced category. Anyway, the PWD applies within the framework of the Treaty. This, i.e. the Arblade-test, has its effect also on the extension right/obligation, highlighted in peripheral cases. [55]

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[53] This 'such' is one example of the 'flowers' in a text subject to many amendments. Indeed, there is no previous 'promotion' in the text, justifying the 'such' here. It is easier to read the Recital imaginably without the wording 'any such provision'. Essentially, the promotion refers to the growing number of postings, present in the third Recital.

[54] This obiter dictum in Rush Portuguesa Paul Davies has still in 2002 called 'a basic error of the craft of judicial decision-making'(!). IJL Vol. 31. No. 3. September 2002, p. 300. See, however, also footnotes 84 and 159, *infra*.

[55] There might be in future cases where the Court has to assess so to say extreme pay provisions, like a paid leave for 50th anniversary. If it exists only in the host state law or collective agreement, the question arises whether a posted worker is entitled to this paid leave. I take the liberty to not propose any answer here. - In the doctrine Richard Giesen has paid attention to paragraph 29 in Portugaia where the Court in the context of the extension possibility required the national courts "to determine whether those rules confer a genuine benefit on the workers concerned, which significantly augments their social protection." For this purpose, the ECJ demands a "careful assessment of the alleged benefits conferred on workers". Giesen, Posting: Social Protection of Workers vs. Fundamental Freedoms?

However, the putting on an equal footing of fair competition and the guaranteeing of respect for workers' rights is declared in Recital (5) and this is the only possibility of creating social justice in a market economy. The economic and social factors are interlinked and balanced, without any precedence being granted to either of them. Article 3(1) PWD puts this into practice, besides being in harmony with Article 50(3) EC which refers to temporary services in another Member State requiring the same conditions as the national service providers.

1.3.5 Some Basic Assessments of the Directive's Raison D'Être

Granting precedence to the economic dimension would obviously mean giving service providers the right to carry out 'temporary' works in other Member States with the pay provisions in force in the home state, that being in line with abolishing restrictions on cross-border services. This line has had several advocates (after Advocate General in *Seco*) in case-law, most importantly the company Arblade in case *Arblade* where it 'anchored' its view on the case *Bond van Adverteerders and others v The Netherlands State*. It shows how *economic* aims cannot constitute grounds of public policy (justifying restrictions on free movement of services) within the meaning of Article 46 [ex 56] of the Treaty. [56] In Germany there has been a lot of criticism of the doctrine since the mid-1990's, also about the conformity of the national law of 1996 (Arbeitnehmer-Entsendegesetz, hereinafter also 'AEntG') with the EC Treaty. Mutatis mutandis this criticism addressed also the PWD, and its acceptability under the Treaty. On the other hand, many German scholars opposed this criticism. [57] It is obvious that the further case-law (*Arblade*, *Finalarte* and *Portugaia*) left crucially less room for this type of criticism, and judgment *Wolff & Müller v Pereira Félix* [58] should normally put an end to it.

CMLRev. 40: 2003, p. 150-1. Unlike Giesen seems to hint, these requirements do not concern the extension possibility as such (the Court repeated it in paragraph 21) but need to be read in the context of the case, i.e. related to the fact that the grounds of the German posting law AentG reflected even open protectionism.

[56] Case 352/85 [1988] ECR 2085, para. 34.

[57] In Zeitschrift für Arbeitsrecht 1/2002, Volker Rieble and Jan Lessner 'rank' in their article *Arbeitnehmer-Entsendegesetz, Nettolohnhaftung und EG-Vertrag*, p. 37, footnote 34, as proponents of the criticism – more precisely said as finding the AEntG as not in conformity with the EC Treaty - Gerken/Löwisch/Rieble, BB 1995, 2370, 2372 ff; Beisiegel/Mosbacher/Lepante, JZ 1996, 668, 671; Eichenhofer ZIAS 1996, 55, 62f.; Strohmaier, RdA 1998, 339ff.; they refer as 'hesitant' ('zweifelnd') scholars to Hailbronner, EWS 1997, 401ff., and Koenigs, DB 1997, 225, 231; as accepting the AEntG being in conformity with the Treaty they refer to Blanke, ArbuR 1999, 417, 422ff.; Büdenbrender, RdA 2000, 193, 206; Däubler, EuZW 1997, 613, 614 ff.; Deinert, RdA 1996, 339; Franzen, DZWiR 1996, 89; Hanau, NJW 1996, 1369; Hickl, NZA 1997, 513, 515; Juncker/Wichmann, NZA 1996, 505, 512; Webers, DB 1996, 574, 577. As to Hailbronner's position, in his lecture ‚Beeinträchtigung der Dienstleistungsfreiheit durch nationale Meldevorschriften und Kontrollmaßnahmen' (in Wiesehügel and Sahl (eds.), Die Sozialkassen der Bauwirtschaft und die Entsendung innerhalb der Europäischen Union, p. 75-93, 77) he refers to the non-conformity of the Directive with the Treaty only as a theoretical possibility.

[58] Case C-60/03, judgment 12.10.2004, nyr. On this judgment, see section 2.2, *infra.*

During the preparation of the PWD there were scholars in Germany who suggested that, besides the national law (AEntG), the PWD would also be unconstitutional and would not conform to the Treaty. The criticism and questions about the constitutionality of the AEntG were based on the freedom of association that is guaranteed by Article 9 of the Basic Law (Grundgesetz, German Constitution). Thus, the claim was that the AEntG (and the Directive) deprived foreign undertakings of their right to regulate the working conditions of their workers under their domestic law. There was also a case questioning the constitutionality of the AEntG. The Constitutional Court dismissed such doubts/claims in its decision of 18 July 2000. [59] However, the German government was a firm proponent of the PWD as such, even though there was a remarkable dispute relating to the contents of the EC intervention in the field of pay, notably in defining the minimum wage under the PWD.

Within the German doctrine Volker Rieble and Jan Lessner provide us with a developed argumentation where they conclude that the AentG and PWD are incompatible with the Treaty. The basic lines of the argumentation are worth a detailed presentation even as a minority position because it tells something important about the legal nature and 'self-understanding' of the Community. They base their argumentation essentially on the free movement of workers, i.e. Article 39 EC. They find that in that provision we should acknowledge also a 'freedom-related' (freiheitsrechtlich) prohibition of restrictions that the worker could invoke against depriving him of his benefit in wage costs (Lohnkostenvorteil) and his chances of entering the labour market. Such an interpretation seems for them to be given already on the basis of 'convergence of the fundamental freedoms'. They find that on the other fundamental freedoms a step from prohibition of discrimination to prohibition of restrictions is to great extent fulfilled. As a further argument in the same direction they note the fact that the Treaty does not foresee any harmonisation of substantive working conditions. Then comes their clue: when the approximation should result from the free effect or play ('Spiel') of market forces, there must be wage competition (Lohnwettbeverb) in the labour market. [60] Hence, this line of thought leads to the conclusion and manifests that competition with low wages would be what the Treaty foresees. Their motto is that competition should be completely free, and they do not even discuss the model of a partial restriction of competition that the PWD and AEntG [61] entail, let alone the reference to the same conditions for temporary service-providers from another Member State, enshrined in Article 50(3) EC.

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[59] See case BVerfG - Kammer - 18. Juli 2000 - 1 BvR 948/00 - AP AEntG § 1 Nr. 4 = EzA GG Art. 9 Nr. 69. On this judgment in brief, see e.g. Koberski/Asshoff/Hold, p. 79-80.

[60] Rieble and Lessner, Arbeitnehmer-Entsendegesetz, Netto-Lohnhaftung und EG-Vertrag. Zeitschrift für Arbeitsrecht 1/2002, pp. 29-89, 46-47. While Rieble and Lessner mention Eichenhofer as one of those who have found the AEntG as unconstitutional (see footnote 57, *supra*), it seems fair to denote that he in his article 'Binnenmarkt und social dumping', Europäisches Unternehmensrecht 2001, p. 43-59, clearly presents the PWD (although referring only to a minimum wage, p. 49) as concretizing, not prohibiting, the free provision of services. Besides, in the same article Eichenhofer, although advocating in favour of more competition between national social policy regimes (p. 58), anyway at the end takes a clear stand against social dumping (p. 59).

[61] The AEntG does not impose on foreign employers the whole pay scale in the German collective agreement in construction but only two relatively low rates. See section 3.3.1, at footnotes 154 and 155, *infra*.

This conclusion, i.e. the requirement of free wage competition, submitted in 2002 just after judgment *Portugaia,* is in flagrant contradiction with the extension right, as confirmed by settled case-law (at that time *Seco, Rush Portuguesa, Vander Elst, Arblade* and *Portugaia*). Accordingly, it contradicts what the Court noted already in case *Commission v. France* in 1974: a protection under Article 39 (ex 48) EC against low-wage competition. Article 39 EC does not intend to allow such competition. [62] Furthermore, the argument of Rieble and Lessner is in flagrant contradiction with the PWD that imposes the extension of national minimum wages (if they exist). However, presenting the argument about Article 39 EC in 2002 shows the in-depth opposition of the market-orientated part of the German doctrine. But this argument is far from all of their thinking. For example, they present, with their market-orientated starting point, what seems to be a coherent development of the whole Arblade-justification test. [63] In so doing they, amongst other things, unwillingly admit that minimum wages erga omnes would fulfil the criterion of overriding reasons of public interest (Arblade-justification, point (ii)), [64] but only with difficulty do they, if at all, find it proportionate under the Arblade-justification, point (iv), [65] due to the protectionist grounds of the AEntG. In any case, the outcome of Rieble and Lessner is to highlight that neither the PWD nor the case-law requires national minimum wages.

The main criticism of Rieble and Lessner is directed at their submission that the PWD, in expressly combining fair competition and rights of workers, would infringe subsidiarity in Article 5 EC and the principle of a limited specified mandate for secondary EC law (Einzelermächtigung). This would be due to the fact that 'these majesty goals can only be achieved/realised according to procedures and requirements foreseen for that'. [66] It is difficult to take this submission seriously while Rieble and Lessner do not specify which procedures and requirements would be 'foreseen' and would respect subsidiarity and a limited mandate. It therefore has the look of collecting general ammunition so as to get rid of the liability of the principal contractor, subject to litigation in case *Wolff & Müller v. Pereira* since 2000 (on this case, see Chapter II). However, a possible 'extension' of this passage of Rieble and Lessner would lead to the assertion that only Article 96 EC is a 'foreseen' (and, hence, allowed) procedure against intra-community distortions of competition, which is besides an instrument in the hands of the Community. [67] However, there is nothing

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[62] See the case partially cited at footnote 12, *supra*. Rieble and Lessner do not mention this case.

[63] Rieble and Lessner, pp. 63-87.

[64] Ibid, p. 77-8.

[65] Ibid, p. 86. For completeness' sake I denote how they also submit that the German minimum wages perhaps infringe the prohibition of a double burden (Arblade-justification, point (iii)), because they include also a 'construction supplement'. According to Rieble and Lessner, that supplement may only partly be due to circumstances that do not arise in the case of Portuguese workers under Portuguese law, such as bad weather. However, they admit that this supplement may be regarded as a part of the minimum wage if it is seen as historically determined – as the German government submitted in case Portugaia (see paragraph 52 et seq. of the Opinion of AG Mischo) - and in that way an integral part thereof. Ibid, p. 80-1.

[66] Ibid, p. 50. My translation of 'Diese hehren Ziele können aber nur entsprechend der dafür vorgesehenen Verfahren und Anforderungen durchgesetzt werden.'

[67] This 'alternative' way to combat distortions of competition is elsewhere referred to by Rieble and Lessner, ibid, p. 85. Dörfler (see next footnote) discusses it as well. His conclusion is that Article 96 EC does not seem to be a valid legal base for national posting laws like the German AEntG, p. 183.

in Article 96 EC that excludes an instrument like the PWD. They can coexist, the PWD being *lex specialis* with respect to the posting of workers within the framework of the free provision of services.

Thomas Dörfler's dissertation on the liability of the principal contractor [68] follows the line of Rieble and Lessner, although not in all details. However, as to EC law, he does not take any clear stand on the conformity of the PWD with the Treaty but highlights that it cannot bring about any independent mandate for national laws like the AEntG. [69] As to the Treaty, he first contends that one could derive**,** as Däubler and Franzen have done, from Article 50(3) EC a principle of equal pay for equal work (at the same place). A 'direct' counterargument he finds also in the case-law of the ECJ, by referring to the home state principle of free movement of goods and even by presenting (although in a footnote) judgments *Webb, Säger* and *Arblade* as reflections of this principle. In reality, it is essential that only *Arblade* dealt with the extension of national wages of the host state and that it confirmed that possibility which had already been established in *Seco* and *Rush Portuguesa*. Reference to free movement of goods is justified for him while the case-law on basic freedoms is 'converging'. [70]

The non-effect of Article 50(3) EC Dörfler does not ground any further but presents, to pave way for his conclusion on wage competition, a striking bridge in EC law. Namely, he asserts that 'making use of the existing differences in the labour law standards in different member States is unobjectionable (unbedenklich) insofar as the labour rights follow common basic principles and guarantee a minimum standard for the protection of workers.' This is then followed by an unsuccessful salto mortale: 'the Member States have given such a minimum standard on the basis of the Community Charter on Fundamental Social Rights and Directives on minimum protection in safety and health.' [71] The end of the bridge is to outweigh the equal treatment principle in the free movement of workers while the posted workers do not seek entrance into the labour market of the host state. Already logical, in a way, is the conclusion on wage comparison: viability of wages paid to posted workers should be decided by comparing them only to those payable in their home states. His overall conclusion on wage competition is that a general interest of protection against distortion of competition cannot justify the obligation to pay minimum wages to

[68] Thomas Dörfler, Die Nettolohnhaftung nach dem Arbeitnehmer-Entsendegesetz. Möglichkeit ihrer dogmatischen Einordnung. Prüfung ihrer Vereinbarkeit mit Europäischem Recht (Net Wage Liability under the AentG. Possibility of Its Dogmatic Incorporation. Test of Its Conformity with EC Law), Tectum Verlag 2002.

[69] Ibid., p. 153-4.

[70] Ibid., pp. 196-7. The misleading effect is rather bold in the way Dörfler (ab)uses this case-law, namely by referring to the overall justification of restrictions on free movement of services: they are not justified if the interest concerned is safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established (Webb, para. 17, Säger, para. 15 and Arblade, para. 34). Hence, Dörfler here – in this crucial place of reasoning on the contents of EC law regarding wages - completely passes the fact that the ECJ in Arblade (para. 41) confirmed the extension possibility of national wages. This is no wonder in the sense that already in presenting Arblade as a part of the pre-Directive case-law he makes an identical 'silent move' and mentions only the administrative (or bookkeeping) side of Arblade; ibid., p. 105.

[71] Ibid., p. 197; my translation from 'Bei den EG-Mitgliedstaaten ist aufgrund der Gemeinschaftscharta über die sozialen Grundrechte und den Richtlinien über den Mindestschutz der Gesundheit oder Sicherheit ein solcher Mindestschutz gegeben.'

posted workers. [72] Despite these significant conclusions the prognosis of Dörfler was (in 2002, after *Portugaia*) that the ECJ one day would find the basic concept of the German AEntG to be compatible with the freedom to provide services. [73]

Steffen Görres discusses at length in his dissertation the conformity of the PWD with the free movement of services (Article 49 EC) and assesses it in the light of proportionality, 'promotion of fair competition', 'promotion of free movement of persons[!] and services' and 'promotion of the social protection of workers'. [74] He ultimately finds that the PWD follows a recognised goal, i.e. a minimum protection of workers, and is 'appropriate and suitable' ('erforderlich und angemessen') for securing the attainment of the objective which it pursues. Furthermore, for him, the protection of workers ultimately outweighs the restriction on free movement of services. Hence, he comes to the conclusion that the PWD does not infringe the free movement of services. [75] There is, however, a strong reservation that Görres illustrates when explaining the AEntG. Hence, the minimum (i.e. the minimum of minima) wages under the AEntG he holds to be compatible with the Treaty but not the extension of the whole wage scale, i.e. the wages for different categories of workers. In this context he wrongly explains, based on a 'general usage of language' ('nach allgemeines Sprachgebrauch') that the minimum rates of wage in Article 3(1)(c) PWD would mean just the lowest category that due to its 'internationally compulsory effect' covers all the workers concerned. He further wrongly maintains that the European legislator would not have been interested in a wage regulation qualified by skills, concrete tasks or setting up of wage categories. [76] His conclusion is that the present form of AEntG, which makes it possible to extend more than the very lowest possible wage category, would pass the limits (mandate) of the PWD. [77] Article 3(1), second subparagraph, PWD shows that here Görres is simply wrong. The decision whether only the lowest wage category or some more categories or other pay

[72] Ibid., p. 197-8. The preceding analysis, discussing the possibility to exclude wage competition (i.e. delimiting it to output competition ('Leistungswettbewerb')), Dörfler ends up by citing the grounds at the second question in Seco of AG VerLoren van Themaat where he found the use of cost benefits as a fundamental – and legitimate - feature of the Common Market (quoted in section 1.2.2, supra); ibid., p. 193. Dörfler passes the fact that the Court anyway confirmed the extension right of national wages in Seco and later in Rush Portuguesa, Vander Elst and Arblade.

[73] Ibid., p. 201 and the final conclusions of the dissertation, p. 237 (as a likelihood).

[74] Steffen Görres, Grenzüberschreitende Arbeitnehmerentsendung in der EU, Neuer Wissenschaftlicher Verlag, Wien 2003 pp. 174-221. He maintains that the proportionality test would be also in EC law threefold: suitability/appropriateness – necessity – reasonableness (Geeignetkeit – Erforderlichkeit – Angemessenheit). Hence, he asserts that the proportionality test under EC law would be in broad sense ('weitestgehend') identical with that under German law; ibid, p. 171. His reference is (in footnote 834) Schwarze-*Holoubek*, EU-Komm. Art. 49, Rn 95 m.w.N. That there is a clear difference between proportionality test in EC and German law, and that the test is only twofold (suitability – necessity) in EC law becomes clear in footnote 131, *infra*.

[75] Ibid, pp. 220-1 and the Resümee, p. 384.

[76] Ibid, p. 285.

[77] Ibid, p. 293-4. As shown especially in footnote 40, *supra*, there was a blocking minority against a directive allowing only the extension of a lowest wage category. See also my explanation on the European way to conceive the minimum wage, section 3.2 (in fine), infra. The PWD respects the national notions up to the extent that it does not impose the enactment of minimum wages.

provisions are extended, depends on the Member States as the unambiguous wording of the PWD states. Anyway, the logical conclusion must be that Görres finds, next to the AEntG, also the PWD to be compatible with Article 49 EC only if the minimum wage means the lowest wage category. In his thinking the lowest category finally represents a subsistence minimum. [78]

However, Rieble, Lessner, Dörfler and Görres are not and have not been the whole doctrine in Germany, far from it. I would refer (in addition to those in footnote 57, *supra*, who find the AEntG to be compatible with the Treaty) to Richard Giesen whose conclusion about the case-law until *Portugaia* was that the ECJ by and large succeeded 'in avoiding polarizing statements in weighing social protection and fundamental freedoms.' [79] Von Danwitz has held, after judgment *Portugaia*, that the ECJ has powerfully blocked with its case-law a race to the bottom. For him (as for me) the integration-related signal of this case-law is clear: the realisation of the free provision of services will by no means lead to a massive dismantling of the social protection of workers. In his conclusions he highlights that it is possible to combine the free market of services and social protection of workers as principally equal factors that limit and set up conditions on each other. [80] Deinert clearly argues on the same line as von Danwitz and he succinctly finds that the opinions of the supporters and opponents of the AEntG and Directive 'are based on their individual ideas in relation to the question whether the internal market allows one ruthlessly to exploit comparative cost advantages, or whether restrictions on the use of competition advantages are allowed for reasons of public interest, in particular to achieve social aims.' I agree with him.[81]

There seems to be no equivalent to 'Rieble and Lessner' in the French doctrine but rather the atmosphere linked to *Rush Portuguesa*. Thus, the starting point of Marie-Ange Moreau in explaining the Directive is the organisation of socially loyal competition in the EU. She denotes the role of the French national law of 1993 as a point of reference in preparing the PWD and maintains that the PWD elaborates and puts into effect, but does not put into disorder, the mechanisms or concepts used in international industrial relations. It also simplifies the protection of posted workers and shows the importance of the regulation of competition by taking care of the social

[78] Ibid, p. 293 where Görres finds how the AEntG (that imposes two wage categories on posted workers) has an impact 'widely over guaranteeing a subsistence minimum' ('eine weit über die Sicherung eines Existenzminimums hinausgehende Wirkung').
[79] Richard Giesen, Posting: Social Protection Vs. Fundamental Freedoms? CMLRev. 40:143-158, 2003, p. 152.
[80] Thomas von Danwitz, Die Rechtsprechung des EuGH zum Entsenderecht. Bausteine für eine Wirtschaft- und Sozialverfassung der EU. EuZW 8/2002 p. 237-244, 244. On the same line is Gabriele Peter under heading 'Europarechtliche Bedenken gegen das AentG' in Gabriele Peter, Otto Ernst Kempen und Ulrich Zachert, Rechtliche und rechtspolitische Aspekte der Sicherung von tariflichen Mindeststandards, WSI Januar 2003, pp. 34-37; http://www.boeckler.de/pdf/wsi_rechtsgutachten_mindeststandards.pdf.
[81] Olaf Deinert, Posting of Workers to Germany – Previous Evolutions and New Influences throughout EU Legislation Proposals, IJCLLIR, Autumn 2000, p. 221**.** Thus, Deinert de facto means also the argument of the Advocate General and outcome in judgment Seco, see section 1.2.2, *supra.*

costs of work. [82] She also highlights that the PWD may have effects beyond the definition of the status of a posted worker, namely by creating a potential model for the trans-national application of collective agreements and by laying the foundations for a concept of a reference wage in EC law. [83]

The debate in the United Kingdom does not offer many views on which to comment. However, after an analysis of the case-law up to *Portugaia*, Paul Davies denotes how the 'blanket permission' given (to extend the laws and collective agreements to posted workers in the obiter dictum of paragraph 18) in *Rush Portuguesa* was overstated. His further conclusion is that the Directive makes the same overstatement as to host-states' obligations and freedoms. However, his final conclusion is to wonder whether some brave spirit would challenge the legal basis of the Directive because it is 'incapable' of promoting freedom of cross-border services. At the same time he finds that it does a good job in protecting host-state employees and, much more controversially, the posted workers themselves. [84] I venture to assert that Davies himself overstates his case, at least with respect to the PWD. It is true that the obiter dictum in paragraph 18 of *Rush Portuguesa* did not refer to an extension right under the Treaty obligations and that it can therefore be called a 'blanket permission'. If so, already in *Arblade* the Court in any case placed the extension right in its Treaty context. Furthermore, the PWD elaborated the extension right and operates under Treaty obligations, see especially my explanation on judgment *Commission v Germany* in section 3.3.3, *infra*. Besides, Member States do not have free hands in adding matters to the hardcore list in Article 3(1) PWD but they need to respect the Treaty. Catherine Barnard offered in 2000 a neutral and succinct presentation of the main lines of the Directive. However, she denotes how it imposes an extra burden on service providers. On the other hand she recognises the prevention of social dumping, but by setting up only minimum wage rates; being one the few scholars who have noted, in public, the higher wages that are actually paid in many countries. Hence, she sees that the competitive advantage remains, even though it is reduced by the PWD. [85]

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[82] Marie-Ange Moreau, Le détachement des travailleurs effectuant une prestation de services dans l'Union européenne. Journal du droit international 1996 No 4, p. 889-908, p. 907.

[83] Ibid. Marie-Ange Moreau refers at the indirect conceptual effect of the PWD to Antoine Lyon-Caen (who chaired the round table where she made her presentation).

[84] Paul Davies, The Posted Workers Directive and the EC Treaty, Industrial Law Journal Vol. 31, No. 3, September 2002, 298-306, 306. In his earlier article 'Single Market or Protection of National Labour Law Systems?' CMLRev, Vol. 34, 1997, pp. 571-602, Davies expressed perhaps sharper criticism on the same line. However, he also predicted future developments, i.e. elaborating the 'wholesale justification' of the extension right in Rush Portuguesa, which becomes clear in footnote 159, *infra*.

[85] Catherine Barnard, EC Employment Law, second edition, Oxford EC Law Library 2000, pp. 170-180, conclusions p. 179. As to pre-Directive positions from the United Kingdom, one has to mention Brian Bercusson whose anti-dumping attitude characterizes his description in European Labour Law, Butterworths 1996, pp. 397-412, of the developments towards the Directive during the first half of 1990s. However, dealing with collective agreements in the draft directive (the Commission's revised proposal COM(93)225, OJ C187 9.7.1993) his conclusion was that the draft without proper grounds distinguished CBAs from laws (as did also the directive later, although it left the option to cover CBAs on every sector). He also reminded that judgment Rush Portuguesa did not include any such distinction between laws and agreements; ibid., p. 412.

In Sweden Lena Maier raised (in 2000) questions in her dissertation EU, arbetsrätten och normgivningsmakten (EU, labour law and lawmaking powers); first, the relationship between the legal basis of the PWD and the exclusion of 'wage relations' ('löneförhållanden' [86]) in Article 137(6) (now 137(5)) EC. Second, she also raises the principal questions whether wage differences lead to distorted competition and whether this is an internal market issue that can be remedied under the free provision of services. Regarding the first question, she notes the problems that would have occurred, not the least the exclusion of the United Kingdom, if Article 2 of the Maastricht Social Policy Agreement had been chosen as the legal basis of the PWD. Regarding the second question, she highlights that posting of workers brings the wage differences in a specific way inside a Member State. This is a counterargument e.g. to the statement in the Spaak report [87] that did not see a Community intervention as being necessary to iron out wage differences. However, the remedy to both types of problems that she has raised, she finds in the indirect transfer of competence that the Member States have accepted by adopting the Treaty with its Articles 57(2) and 66. The outcome is that the Community, based on the Treaty, has the competence to regulate wages. That is what the PWD does, although ultimately via the national pay provisions. [88]

In the Dutch doctrine. Mijke Houwerzijl takes for granted in her recent dissertation the combination of fair competition and worker protection. Accordingly, and given the enlargement of the EU, she sees the most prominent shortcoming to lie in the area of enforcement and she finds a liability clause for the user company to be needed. However, for her, even with its shortcomings the PWD may at least prevent the most severe forms of social dumping. [89]

As to predominantly European doctrine, one has to refer to the (to my mind overstated) warnings of Marco Biagi about social protectionism just after the adoption of the Directive. He, too, took for granted the balance making between fair competition and social rights. [90] The same point concerns Eeva Kolehmainen who concludes that the PWD is more about protecting national labour law systems and guaranteeing fair competition than about protecting posted workers. Protection of posted workers is for her a by-product of the pursuit of the objective of facilitating

[86] See that the Swedish ('löneförhållanden') and Danish ('lønforhold') versions of Article 137(5) EC do differ structurally from the others as they use this 'relations' (förhållanden/forhold) like in the expression 'industrial relations'.
[87] See Report of the heads of delegations to the foreign ministers at the Messina conference, 21 April 1956 (Spaak Report), Part One, Title 1, Chapter 2.
[88] Lena Maier, EU, arbetsrätten och normgivningsmakten, Jure Ab, Stockholm 2000, p. 350-353.
[89] See Mijke Houwerzijl, 'De Detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG' (The Posting of Workers Directive: About the Background, Content and Implementation of Directive 96/71/EC; with English summary). Kluwer, Europeese Monografieën 2005, p. 400-1.
[90] See Marco Biagi, The 'posted workers' EU directive: from social dumping to social protectionism. Bulletin of Comparative Labour Relations 1998, pp. 173-180.

free movement of services. [91] In her conclusions Ulla Liukkunen seems to adhere to the same line. [92]

1.3.6 Author's View; Summing up

The author shares the general view of the PWD as it stands, i.e. it achieves a balance between the market freedoms and social aims, although with the remark that the PWD is not neutral in relation to the competition existing before its adoption. Namely, the Directive (rather naturally) allows essential pressure to lower actual wages that often and sometimes even widely exceed the compulsory provisions (mainly in collective agreements) in many Member States. Another issue is whether national law allows the defence of actual wages or the actual wage level (in piecework ordered by the collective agreement but not necessarily guaranteed by it) even with industrial action (as in Sweden and Finland). Besides, the Directive leaves the possible (and obvious, for the new Member States) competitive advantage in social security costs untouched. As to other scholars, the line is clear in the sense that the argumentation on the line of Rieble, Lessner, Dörfler and Görres (representing a 'milder' position by accepting the 'subsistence minimum wages') deviates essentially from the European mainstream. This argumentation is market orientated to the extent that it disregards the social and political realities in the Member States. The EU cannot set up its goals irrespective of these realities. That is the bottom line reason why the ultra-market-minded argumentation finally does not have too many supporters in the legal doctrine, if any, outside Germany (and has been rejected by the ECJ since *Seco* in 1982). As such its existence as a clear-cut minority position illustrates the nature of the European Community, i.e. highlights that it is not a blind product and bearer of ruthless market thinking – that 'labour is not a commodity'. With respect to this issue, the underlying market concept essentially relies on settled case-law that will remain immovable, unless an amendment of the Treaty itself were to be enacted in the opposite direction. Such a u-turn (after the Single European Act and the Treaties of Maastricht, Amsterdam and finally Nice in 2000, the latest thus adopted after *Arblade*) is surely outside the scope of political reality.

Indeed, the gap in wages and costs between the old and new Member States in the enlarged EU once again highlights the crucial line drawn by the Court in *Seco*: posting of workers in the Community is not based on low-cost competition but on a reasonable compromise between the interests of workers and employers, the Posted Workers Directive being the means of enforcing this compromise. Had the Community not issued the PWD in 1996, enlargement would have created massive

[91] Eeva Kolehmainen, The Posted Workers Directive: European Reinforcement of National Labour Protection, IUE, 2002, p. 269.

[92] Ulla Liukkunen, the Role of Mandatory Rules in International Labour Law. Talentum Helsinki 2004, p. 224. In her reasoning there are, however, some points that I disagree with, like the statement (p. 177) that the PWD would mean 'exhaustive harmonisation' and that most of the matters in Article 3(1) PWD would belong to the 'field of EC law, which includes substantive harmonisation'. The by far most important matter, i.e. pay, EC law does not regulate at all unless with the special mechanism in the PWD, and for the other matters (like paid annual leave and working time) minimum requirements have been set by the EC. That is not harmonisation. The PWD is an act *of* the Community but, as to material contents of working conditions, it is essentially labour law *within* the Community.

pressure for such an instrument, with the alternative of the Member States operating independently, by virtue of the case-law. I recall how the ECJ confirmed the extension right also in *Vander Elst* and *Arblade*, i.e. in posting workers between two Member States (Belgium and France) with essentially similar level of wages and other costs in contrast to the gap between the fifteen 'old' and ten new Member States since enlargement.

Some comments are still needed about the PWD as a reflection of the fragile balance between market freedoms and social aims. As background I recall the extension right established in *Seco* and reconfirmed in *Arblade*. The latter established the key notion, namely 'protection of workers', as capable of justifying restrictions on the free movement of services. It came even closer to workers' specific interests by recognising the need for special protection of construction workers (paragraph 36, in fine). However, the reasoning in *Webb* (see footnote 9, *supra*) went even further. *Webb* – being the first great 'labour law judgment' within services (decided in 1981) and later referred to also by *Arblade*, paragraph 36, next to *Seco* and *Rush Portuguesa* – is, indeed, a graphic illustration of this fragile balance that in the end requires a choice. Namely, the ECJ wrote in *Webb*, as follows:

> '19 It follows in particular that it is permissible for Member States, and amounts for them to a legitimate choice of policy pursued in the public interest, to subject the provision of manpower within their borders to a system of licensing in order to be able to refuse licences where there is *reason to fear* that such activities *may harm good relations on the labour market* or that the *interests of the workforce affected are not adequately safeguarded*' (emphasis JH).

Hence, the bottom line was that precedence was given to 'the interests of the workforce affected'. 'Good relations on the labour market' may, of course, cover also the interests of (organised) national employers but 'interests of the workforce affected' is at the end an independent ground, and, besides, effective already in case of *fear* which is crucially different from any proven effect in future. These lessons from *Webb* are equally as valid in the debate about temporary work, the draft Directive on Services and overall 'flexicurity'. Their value is by no means diluted by the Court's later statement (in paragraph 20) on the necessity to take into account the guarantees given in the state of establishment.

Locating the PWD under the free provision of services was natural in the sense that the instrument is heavily competition-bound. However, that competition tie already has a (more or less declared) history of some 23 years (since judgment *Seco*) and it can be predicted that the present legal framework (balance and combination of the interests of workers and employers, finally an interpretation of the core element of the Community, i.e. the Internal Market) will remain in force for a corresponding time span in the future. On the other hand, this location under the free provision of services was necessary so as to come under QMV in decision-making. Besides, issuing the PWD after Amsterdam would have further involved a debate about Article 137 EC as a valid legal base for it, given its paragraph 6 (5 since Nice; I discuss Article 137(5) in section 4.3, *infra*). In any case, the PWD is a mix of economic and social (labour law) values. It includes in Article 3(7) as a typical labour law feature a reference to conditions better than those required by the PWD. Still, given the location of the

PWD under the free provision of services, [93] a 'mega-interpretation' is that these 'better conditions' need to comply with Article 49 (and 50) EC, i.e. with the Arblade-test. As to the practical applications of this mega-interpretation, in the following Chapters I will show that, outside normal pay provisions, a formal ceiling exists for the host state's conditions that can be extended to posted workers; it is, however, set reasonably high and dominated by the concept of protection of workers instead of economic market values.

In sum, the Posted Workers Directive is also a graphic example of the circuitous development of EC labour law. Neither the upward harmonisation of working conditions ensuing from the functioning of the common market (Article 136, third paragraph, EC still uses 'common' instead of 'internal'), nor the approximation of laws under Article 94 – as for other pre-Amsterdam labour law - has worked or been used as presumed in the Treaty of Rome. Thus, seen from its labour law angle, the PWD emerged in a roundabout way, in the end based on a constitutional interpretation of market freedom itself by the Court in *Seco*. It is anyway an integral part of EC labour law while, as to final material contents, it essentially relies on national law.

The Posted Workers Directive, especially as interpreted in the framework of the EC Treaty, is a focal point where the social and economic factors meet. However, these developments within the free provision of services rarely attract attention in discussions on a more general level about the relationship between economic market freedoms and (most often) national social rights. A graphic example is the article 'Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU' of Miguel Poiares Maduro, published in 1999. The article, excellent as such, discusses in particular Social Policy Articles of the Treaty, free movement of goods and persons (workers), pay equality (Article 141 EC), non-discrimination (Article 12 EC) and worker representation in European mergers. Comprehensively it refers even to strikes, though just as phenomena, without any discussion on their justification. It comes to the conclusion that the 'negative' impact of the European Economic Constitution on social rights has been limited and is a function of market integration and judicial harmonization of national social and regulatory policies, *not the result of a neo-liberal conception of the European Economic Constitution by the Court of Justice'* (emphasis JH). However, and this is my main point here, he deals with the whole impact of the free provision of services by only referring to national litigants wanting to 'favour economic freedom and change social policies at the national level'. [94] I maintain (expecting, no doubt, that Mr. Poiares Maduro agrees) that the developments in the field of the posting of workers crucially belong to the former quotation above with respect to the ECJ, while the latter is true as such (although it ignores the case flow in the ECJ). Namely, just consider for one moment what the effect would have been if the ECJ in *Seco* (in 1982) had decided (i.e. imposed) to tolerate low-wage competition as a fundamental feature of the common (internal) market, as was proposed by the advocate general. Reaching the extension right (or obligation) via a directive or directly through national posting laws would have been

[93] I recall that the ECJ already in Webb in 1981 (see the explanation in section 1.2.1, at footnotes 9 and 10, *supra*) stated that even pure cross-border hiring-out of manpower *a priori* falls under free provision of services and just secondarily under free movement of workers.
[94] Miguel Poiares Maduro, Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU, in Alston et al. (eds.), The EU and Human Rights, Oxford University Press 1999, pp. 449-472. The first citation is from pp. 454-5, the second from p. 455.

impossible because the service providers would have been entitled by virtue of the Treaty to use manpower with the standards of the home state, and amending the Treaty would require unanimity. The consequences in particular for the crisis in the construction industry in Germany since the early or mid- 1990's (see section 1.3.2, *supra*) would have been disastrous. This statement relies on the fact that the very unsatisfactory situation still continues, despite the minimum wages (*de jure*) applicable there since 1997. Also the spill-over effect of a 'reversed *Seco'* on other areas of EC law would have been obvious.

However, Poiares Maduro introduces at the end of his article also a discussion about Social Rights and Redistribution, i.e. redistributive justice at the European level. While the discussion proceeds at a rather general level with an EU constitutional perspective (which it is not appropriate for me to comment on in this study), redistributive justice is intended to reach also that 'among individuals'. I will confine myself here to denoting that the Posted Workers Directive (like the pre- and post-directive case-law) is intended to prevent a redistributive trend or change ('injustice' or his 'rough exploitation') affecting a worker by paying him less than the minimum established in the host state. It is redistributive justice in this rather limited sense. Its main purpose is to guarantee fair competition amongst domestic and foreign employers. There, too, a safeguard element is evident.

However, as it is intended to have concrete effects even on individual work contracts, the PWD requires further discussion on its implementation. That is the subject of the following chapters.

Chapter II

Liability of Principal Contractor

2.1. General Remarks

A growing feature of the area where the posting of workers is most common, i.e. in the construction industry, has been and remains the practice of subcontracting. It has in construction a threefold history. First, for decades, if not more than a century, specialised companies in sub-sectors, such as the plumbing trade, electrical installation, painting and (nowadays) scaffolding, have acted as subcontractors for principal contractors. Second, a more recent trend is to organise building work using an umbrella-model, meaning that the principal contractor employs workers, technicians and engineers only for the infrastructure (energy, water, maybe cranes, social premises and transport services) of a site whilst everything else is subcontracted. Third, there is a permanent trend to subcontract bulk work, such as cleaning on a site. [95]

During the last few decades we have seen, especially on larger sites, chains of subcontracting stretching to five to eight subcontractors. Growing work-only subcontracting (hiring-out of manpower) is typical in these chains while it exists also in simple subcontracting relationships. Finally, cross-border hiring-out has been growing during the last let's say 15 years, and the income gap between the old and new Member States guarantees its growth in future, too. However, hiring-out received special treatment in the PWD, which was intended to prevent any abuses. [96]

In sum, the prominent and still growing practice of subcontracting explains why several Member States have realised in one way or another also the wage liability of the principal contractor (or a company being the organiser of subcontracting). I will take the discussion of EC law via the German case *Wolff & Müller v. Pereira Félix* where the ECJ gave its preliminary ruling on 12 October 2004. [97] It merits a detailed discussion because the case reveals essential arguments linked to the extension right and, in particular, in respect of control policy and in the overall implementation of the PWD. It is also the first case decided under the Posted Workers Directive.

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[95] As a practical example I may refer to the site of the Council of Minister's new headquarter (Justus Lipsius) in Brussels during the 1990s. At various times the site board included some 30 to 50 subcontractors and not everyone was listed on the board. To illustrate the temptation to subcontract I refer to the renovation of Berlaymont (the Commission's headquarter) where a German company that specialised in asbestos removal engaged in 1996/7, via subcontracting, some 110 Portuguese workers that were not trained at all for their tasks. Further graphic and actual examples are presented in Cremers and Donders (eds.). The free movement of workers in the European Union, CLR Studies 4 (2004), pp. 48-51.

[96] Articles 1(3)(c), 3(1)(d) and 3(9) PWD and the Declaration 4 of the Parliament, Council and Commission attached to the Directive; doc. 10048/96 SOC 264, Council meeting of 24.9.1996.

[97] Case C-60/03, Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix, nyr.

2.2. Case *Wolff & Müller v Pereira*

2.2.1 Facts and Questions

Under Section 1(a) [98] of the German Arbeitnehmer-EntsendeGesetz (law on the posting of workers, hereinafter the 'AEntG'), as in force since 1 January 1999, the 'lead contractor' of building works is subject to the following:

> 'An undertaking which appoints another undertaking to provide building services within the meaning of Paragraph 211(1) of the third book of the Sozialgesetzbuch […] is liable for the obligations of that undertaking, of any subcontractor and of any hirer of labour appointed by that undertaking or subcontractor concerning payment of the minimum wage to a worker or payment of contributions to a communal scheme for parties to a collective agreement under the [appropriate provisions of the AEntG]. The minimum wage for the purposes of the first sentence, means the sum payable to the worker after deductions in respect of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay).'

Hence, this provision established the (minimum) wage liability of the principal contractor. Paragraph 19 of the judgment *Wolff & Müller v. Pereira Félix* reveals that the principal contractor is in a position of a guarantor who has waived the benefit of execution (*beneficium ordinis*). Furthermore, the wage liability covers the whole chain of subcontracting, but only with regard to net pay.

This provision was subject to a hectic debate in the Bundestag. However, it was also a political promise of the opposition before the elections in 1998. Given the earlier political and doctrinal debate in Germany, it was clear from the outset that this provision (as a structural factor) would be tested also in the light of European law. There were two possibilities as to the initiator in litigation, namely a worker concerned or the Holiday Fund (ULAK, nowadays called SOKA-BAU). The latter has an independent locus standi under the AEntG concerning holiday pay. Bricklayer José Filipe Pereira Félix took the initiative and brought a lawsuit about the outstanding minimum wage against his employer (subcontractor) and the principal contractor.

The ECJ presented the facts and proceedings in the case, as follows:

> 9. Mr Pereira Félix is a Portuguese national who, from 21 February to 15 May 2000, was employed in Berlin (Germany) as a bricklayer on a building site by a construction undertaking established in Portugal. The latter carried out concreting and reinforced-concrete work on that building site for Wolff & Müller.
>
> 10. By an application lodged on 4 September 2000 with the Arbeitsgericht (Labour Court) Berlin (Germany), Mr Pereira Félix sought payment jointly and severally from his employer and from Wolff & Müller of unpaid remuneration amounting to DEM 4,019.23. He claimed that Wolff & Müller, as guarantor, was liable, under Paragraph 1(a) of the AEntG, for sums in respect of wages not received by him.

[98] Inserted by Article 10 of the Gesetz zu Korrekturen der Sozialversicherung und zur Sicherung der Arbeitnehmerrechte (Law amending social security and safeguarding workers' rights) BGBl. 1998 I, 18.12.1998, p. 3843. To simplify a bit, I use in the following the expression liability of a principal contractor, or corresponding.

> 11. Wolff & Müller opposed the claims by Mr Pereira Félix, arguing in particular that it was not liable on the ground that Paragraph 1(a) of the AEntG constituted an unlawful infringement of the constitutional right to carry on an occupation under Article 12 of the Grundgesetz (Basic Law) and of the freedom to provide services enshrined by the EC Treaty.
>
> 12. The Arbeitsgericht Berlin upheld the claim by Mr Pereira Félix. The Landesarbeitsgericht (Higher Labour Court), before which the case was brought by Wolff & Müller, partially dismissed its appeal, [99] whereupon it appealed on a point of law to the Bundesarbeitsgericht (Federal Labour Court).

Thus, Mr. Pereira Félix sought payment of the minimum wage jointly and severally from his employer [100] and from Wolff & Müller. The amount claimed (some 2.000€ accrued in less than three months) shows essential underpayment, amounting to social dumping.

The Federal Labour Court (BAG) found that preconditions for establishing the liability of Wolff & Müller as a guarantor were met. It also adjudged that the liability as a proportionate restriction was compatible with the German Basic Law (paragraph 13). Furthermore, the referring court identified practical burdens in enforcing the liability (paragraph 14). It then questioned whether the infringement was justified. It first admitted that the workers got a genuine benefit contributing to their protection (paragraph 16) but deemed its effect limited and burdened by the practical difficulties on the (unlearned) workers' side in enforcing the liability. It then referred to the lessening value of this protection by reduced job opportunities in Germany, due to the liability threat (paragraph 17). Finally, the Bundesarbeitsgericht (who should normally be well aware of the rationale of national (labour) law, up to the political constrains in the legislative process) resorted to the explanatory memorandum to AEntG. The court pointed to its protectionist passages which were, assessed also - and in particular – objectively, primary considerations behind the AEntG, whereas the protection of posted workers (with a doubled or tripled wage for social reasons) was not (paragraph 18). This reasoning of the BAG had clearly benefited from the argumentation of Rieble and Lessner, as well as Dörfler. [101] I recall that Rieble and Lessner in their article of 2002 as its broad line contested the 'general interest' justification [102] of the AEntG in EC law with respect to any of its elements. Dörfler had similar severe doubts, although he supposed that the ECJ would find the German AEntG to be compatible with Article 49 EC. However, the essential difference between the BAG and Rieble/Lessner was that the BAG found the proportionality requirement fulfilled whereas for Rieble/Lessner (and Dörfler) the very opposite was the case. [103]

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[99] The Landesarbeitsgericht accepted the appeal as to overtime bonuses (Überstundenvergütung); see paragraph 8 of the report for hearing.

[100] The proceedings in the ECJ reveal no trace as to the position of the employer. Sometimes they just vanish which is particularly taken into account at least in the Austrian law.

[101] Indeed, the BAG at the end of its substantive reasoning (at the end of point VII.3) refers to the conclusions of Rieble/Lessner and Dörfler that the protectionist grounds of the AEntG make the whole law incompatible with Article 49 EC.

[102] See the explanation in the context of judgment Arblade, section 1.2.3, supra.

[103] I discuss this argumentation in section 1.3.5, supra. Rieble and Lessner present their negative proportionality conclusion on p. 87.

However, with the abovementioned grounds the BAG referred the following question for a preliminary ruling:

> Does Article 49 EC (formerly Article 59 of the EC Treaty) preclude a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective?'

Hence, the question was whether the joint and several liability violated Article 49 EC. Mr. Pereira Félix, the Austrian, French and German governments plus the Commission saw no essential problems therein because the provision was intended to serve the protection of the posted workers. Wolff & Müller took a different point of view. It carefully enlisted EC law grounds against the liability.

2.2.2 The Argumentation of the Principal Contractor

The point in national law of Wolff & Muller was that Paragraph 1(a) of the AEntG constituted an unlawful infringement of the constitutional right to carry on an occupation under Article 12 of the Grundgesetz (Basic Law). The ECJ naturally did not discuss this claim since the liability was under the scrutiny of EC law, not of any national law. However, other than this point the argumentation of Wolff & Müller [104] covered the four classical elements of the justification test:

- (i) The liability restricted the free provision of services in the form of a measure affecting all the (i.e. both domestic and foreign) actors concerned;
- (ii) it was not justified by overriding reasons of public interest;
- (iii) it meant a double burden on the free movement of services; and
- (iv) it was not proportional.

(i) Under this restriction argument Wolff & Müller set forth that the liability threatened to cause extra costs over and above the contract price. This risk was smaller for domestic subcontractors whose solvency, too, was better. This caused the need to obtain securities, which was easier for domestic subcontractors, due to their 'family bank' relationships. Abroad this liability ('Inanspruchnahme nach dem AEntG') was unknown and the risk for banks was therefore not possible to assess. Anyway, Wolff & Müller made an argument based on financial issues. [105] Next to this, it referred to

[104] See paragraphs 24 to 41 of the report for the hearing.

[105] As to these 'unknown' liability schemes abroad, see footnote 136, *infra*. Regarding securities Wolff & Müller referred also to judgment in case C-20/92 Hubbart [1993] ECR I-3777, paragraph 15, according to which a compulsion to provide securities for public authorities formed a restriction on services. In reality, in this case the Court found that

the laborious, if not excessively difficult, training and control measures that would be required for foreign subcontractors whose activities were in this way further burdened.

(ii) With respect to the 'overriding reasons' justification, Wolff & Müller asserted that economic reasons were decisive behind the liability and could never fulfil this justification criterion. Protection of workers was only a side purpose (Nebenzweck), and, besides, the liability diminished job opportunities of posted workers. Its effect would become fully realised when there were no foreign subcontractors. If convincing, the argument would quash the liability. Hence, Wolff & Müller 'expressed a pecuniary view' and this way focussed on money.

(iii) The 'equivalence' criterion (prohibition of a double burden) was handled by Wolff & Müller in the middle of the fourth criterion, the proportionality test. However, it boldly claimed that the liability violated proportionality because it led to a double burden. Namely (and this is spectacular in my view), it explained that the principal contractor, by paying the contract price to the subcontractor, had already fulfilled its obligations arising from its contractual relationship and had in this way concluded its monetary obligations to the workers of the subcontractor as well. So it goes, between the 'market actors', or 'Marktbürger'. Anyway, Wolff & Müller focussed once again on money.

(iv) Regarding the proportionality test, Wolff & Müller found that liability was not suitable, necessary or acceptable. It was not suitable because the principal contractor had no legal or factual capacity to check all the pay calculations. Broader on-site controls would be better, or, as an alternative novelty, a regulation under which the principal contractor would be obliged to pay a share – at every pay day - of the contract price e.g. to the Holiday Pay Fund (SOKA-BAU) against whom the workers could address their claims. At this point Wolff & Müller do not bother with the perhaps excessive economic difficulties that would be caused to foreign SMEs by such a scheme. A further violation of proportionality was in the chain of liability. It was impossible to control the behaviour of any 'third' parties, meaning sub-subcontractors. Enshrining the liability in law did not change anything in the proportionality test. Besides, the principal contractor did not just have high regression costs abroad but also all the risks of the high number of insolvencies in this sector. Hence, Wolff & Müller spoke about the risk of losing money.

Articles 59 and 60 must be interpreted as precluding a Member State from requiring security for costs to be given by a member of a profession established in another Member State who brings an action before one of its courts, on the sole ground that he is a national of another Member State. This would apply, by analogy, if Mr. Pereira Félix, or his barrister, were obliged to give securities in the main proceedings because he's a foreigner! - As a non-restriction alternative for the liability the company Wolff & Müller presented a partial withholding of the contract price which anyway would be financially difficult, if not impossible for many foreign SMEs.

As a general comment, one has to note that the principal contractors seem to be rather helpless, if we take their argumentation seriously. The only thing missing from the argumentation is the assertion that the subcontractor and his workers may act as a complot against the principal contractor and 'cash' the wages for a second time. Such a risk exists, of course, but, by analogy, it would be impossible to stop all the car traffic because of the risk of a certain level of drunken drivers.

The overall problem with this line of argumentation is that it describes a position of a principal contractor that is not in accordance with the reality of the construction industry. Namely, the principal contractors are not at the mercy of the subcontractors, but the power relationship is the other way round. The supply of manpower exceeds the demand. Besides, as the Austrian government noted, the principal contractors have to check the background, with perhaps extra costs and other burdens, of any unknown subcontractor, irrespective of the wage liability. [106] Hence, for good reasons the 'self-cleaning' (Selbstreinigung) of the sector was referred to during the legislative process.

How did the court react to this argumentation? Not well. It handled the issues in points (ii), (iii) and (iv) in a completely different way. Regarding point (i) it let the national court decide whether this liability forms a restriction on free movement but anyway guided the justification. However, it is appropriate to present the contents of the judgment on their own merits, not just as a counter-position to the argumentation of the principal contractor.

2.2.3 Rieble's and Lessner's Liability Argumentation

Most of the argumentation of Wolff & Müller is present also in that of *Rieble* and *Lessner*. The difference is that Rieble/Lessner and partially Dörfler go even further in a market-orientated direction and, essentially, discuss also the Directive. Before discussing any further judgment *Wolff & Müller v. Pereira*, I will recap the essential points in their thinking and look at these in some more detail.

I recall their wage-competition orientated paradigm: the PWD infringes the free movement of services (and workers), at least the proportionality requirement, by leading to the setting up of minimum wages, and the AEntG implementing it logically does the same. Furthermore, and logically for them, the liability established by the AEntG is not compatible with the Treaty (Articles 39 and 49 EC). At the same time, for Rieble/Lessner it forms an independent restriction on the free movement of services. [107] In the argumentation of *Rieble* and *Lessner* there is present, as 'helpful' up to expressis verbis, the drawing of parallels from the free movement of goods to the posting of workers in the framework of providing services. [108] Doing so is perhaps natural in the light of history. The EEC was founded as a predominantly economic community with less emphasis on the social factor. [109] However, the use in

[106] See paragraph 69 of the report for hearing.
[107] See the basic hypothesis of Rieble and Lessner on p. 44: liability may be shown to be incompatible with the market freedoms either as an accessory to minimum wage regulations or independently.
[108] See details in footnote 110, point (ii), *infra*.
[109] See e.g. Jari Hellsten, On Social and Economic Factors in the Developing European Labour Law. Reasoning on Collective Redundancies, Transfer of Undertakings And Converse

2002 of parallels, in fact rather straightforward ones, from the free movement of goods means boldly neglecting the convincing body of case-law since *Seco* in 1982, as well as the legislative postulate behind the Directive, that of combining the guarantee of fair competition and the right of workers. It is enshrined in the fifth recital of the Preamble to the PWD.

I will take the liberty of not discussing this argumentation of Rieble/Lessner [110] in any greater length in my corpus text here, apart from one essential exception. Namely, in exploring, along their liability-targeted path of arguments, the proportionality test in the justification pattern (see point (iv) supra). Rieble and Lessner maintain that there is no general, national or European, principle of equal pay for equal work. - I imagine that they admit/allow gender equality and Article 13 EC. - They assert therefore, that it follows that it is not possible to justify the restrictions on the free movement of services as combating distortions of competition by invoking such equal pay arguments. [111] This is in paradigmatic contradiction with the pivotal argument of *Rieble* and *Lessner*, according to which the PWD and AEntG infringe also the free

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Pyramids (Hellsten 2005). Swedish National Institute of Working Life, Work Life in Transition 2005:11.

[110] However, the argumentation of Wolff & Müller is present in the article of Rieble and Lessner at least, as follows. **(i)** Obtaining securities with greater difficulties for foreign contractors is a forbidden restriction (p. 57) and violates also the double burden prohibition (p. 80) for Rieble and Lessner. **(ii)** The purpose of AEntG Rieble and Lessner discuss especially on pp. 64-77. In assessing the 'economic' restriction Rieble and Lessner claim that the starting point must be the so-called 'Campus Oil' case-law. In *Campus Oil*, case 72/83 [1984] 2727, the Court accepted a restriction in oil trade based on a certain independent national supply. In judgments in case 172/82 Inter-Huiles, [1983] 555; C-203/96 Düsseldorp [1998] I-4075 and C-209/98 FFAD [2000] I-3743, the Court, according to Rieble and Lessner, found that restrictions on trade were acceptable if the measure concerned directly served environmental protection. Measures guaranteeing a critical mass for municipal waste treatment undertakings were of economic nature and, thus, not acceptable. Rieble and Lessner highlight that even if the public interest (protection of environment) was enshrined in the Treaty (Article 174(2) EC, ex Article 130(r)(2) EC), it could not (or, was not enough to) justify the restriction concerned. From these judgments concerning free movement of goods Rieble and Lessner draw a parallel with the case of minimum wages. The announced purposes of the AentG were of an economic nature and, therefore, not of public interest. For the Court, labour is not a commodity which Rieble and Lessner blame, up to the assertion that the Court has – at least in Portugaia – by fiction(!) lent the essence of protection of workers to national minimum wage provisions. See Rieble and Lessner, p. 74. They also refer to the comment of Koenigs (DB 2002, 431) that the question was not answered in Portugaia and half expected (empfielt) a new case. Well, the same issue was again in Wolff & Müller v. Pereira. **– (iii)** The equivalence criterion (prohibition of double burden) Rieble and Lessner discuss (pp. 78-82) again with a helpful (hilfreich) reference to the origin of the prohibition in the free movement of goods (p. 80). However, their conclusion is that the posted workers are well enough protected in their country of origin (p. 82). **(iv)** Regarding the proportionality test Rieble and Lessner argue by claiming from the outset that the liability is as such a disproportionate measure (p. 87). Otherwise they argue here with grounds somewhat differing from those of Wolff & Müller while the conclusion is the same.

[111] Rieble and Lessner, p. 85: 'Es gibt […] keinen allgemeinen Grundsatz gleichen Lohns für gleiche Arbeit – weder innerstaatlich noch auf europarechtlicher Ebene. Somit lässt sich mit der Herstellung solcher Bedingungen auch unter dem Aspekt der Bekämpfung von Wettbewerbsverzerrungen kaum der Eingriff in die Dienstleistungsfreiheit rechtfertigen.' They further refer to MünchArb/Löwisch/Rieble § 268 Rn. 122.

movement of workers under Article 39 EC. [112] Namely, it is exactly equal remuneration that is enshrined in Article 39(2) EC, prolonged by the Regulation 1612/68 EEC. Anyway, for *Rieble* and *Lessner* it is defendable and even natural to pay less for posted workers than for those who remove on their own initiative. Logically, for them, it is not proportionate to require equal treatment in remuneration and the liability as a measure of enforcement. Indeed, proportionality seems to have 'quite many' dimensions. However**,** the equal pay aspect pushes the issue ultimately close to, if not inside of, constitutional values. The concept of Article 39 EC in the thinking of *Rieble* and *Lessner* is simply not correct. [113]

It is noteworthy that *Rieble* and *Lessner* have under the proportionality test also arguments that remain in the framework of services. Namely, they claim that the 'purpose and goal' (Zweck und Ziel) of the liability are disproportionate; [114] that there should be just the normal responsibility of the principal contractor, requiring first execution against the employer; and that professional clients other than building companies should not be burdened. The first mentioned gets answered in exploring judgment *Wolff & Müller v. Pereira*, infra; the second (requiring just the normal guarantor status) remains as a possible claim, and the last mentioned requires the comment that it would drop even significant works from the ambit of the liability if undertakings outside the rank of construction companies were not covered. Private persons are not covered.

However, while *Rieble* and *Lessner*, too, discuss the Directive in this context, it is appropriate to note its key provision, i.e. Article 5. It reads, as follows:

> 'Measures
>
> Member States shall take appropriate measures in the event of failure to comply with this Directive.
>
> They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.'

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[112] See section ‚Freizühigkeit der "mitgebrachten" Arbeitnehmer', Rieble and Lessner p. 44-47. There the argumentation goes so that we should acknowledge in Article 39 EC also a 'freedom-related' legal ('freiheitsrechtlich') prohibition of restrictions which the worker could invoke against depriving him from his benefit in wage costs (Lohnkostenvorteil) and his chances of entering the labour market; p. 46.

[113] See also the text in section 2.3.5 supra.

[114] Martin Franzen in SAE 2003, 181, 190-197, as explained by Bernd Sandmann, Die Entwicklung des arbeitsrechtlichen Schrifttums im Jahr 2003, ZfA 4/2004, p. 544, refers, as to proportionality, to judgment Mazzoleni, C-165/98 [2001] ECR I-2189, and finds that the posted worker does not need at all the liability of the principal contractor. The (other) regulations protecting him (like the PWD) would be enough. Accordingly the restriction on free movement of services would not be balanced but disproportionate. He has explained exactly the reference of BAG in the proceedings Wolff & Müller v Pereira. Anyway, the ECJ handled proportionality in a completely different way, see section 2.2.5, *infra*. – Mazzoleni was a sui generis decision on permanent 'frontier posting' that does not amount to an effect on 'normal' posting cases.

Noteworthy as a structural factor is the submission of *Rieble* and *Lessner* that the mandate (Ermächtigung) in the implementation of the Posted Workers Directive does not cover a wage liability of the principal contractor that is independent of its contractual obligations (verschuldensunabhängig). They refer also to the 'fact' that Article 5 PWD (Measures) deals only with a 'threat of omissions in the implementation'. On the same line, as not leading to any liability, they read 'obligations under this Directive' in Article 5(2). They further denote how the Directive does not include any third party's liability. In this way, too, they contest the liability of the principal contractor covering all the subcontractors in the chain. And they denote Article 5(1), qualified by them with a 'certainly' ('zwar'), whose violation may only lead to an infringement procedure against a Member State (impliedly, not to any liability). [115] These submissions essentially stem from the wording of Article 5 but only if read in isolation. Anyway, the application of Article 5, as read and applied in its context, is the core of the case. I will return to this in exploring the judgment.

However, *Rieble* and *Lessner* conclude their argumentation against the liability in the light of the Directive by referring to the so far culmination of the very *acquis*, i.e. the lack of horizontal direct effect of the directives. For them, this would prevent such a liability. Indeed, what could be more convincing than a kind of a European 'Grundnorm' à la Kelsen… *Rieble* and *Lessner* further denote that the horizontal direct effect is impossible in a relationship between 'market citizens/actors' (Marktbürger). [116] Indeed, for *Rieble* and *Lessner* both Herr Maurer Pereira Félix (with his hopefully healthy hands) and Wolff & Müller (with a yearly project value of 670 M€ [117]) are just 'Marktbürger'. In reality there is no such legal connection between the lack of horizontal effect and liability. It was difficult enough to gather the qualified majority behind the PWD even without inserting liability in its text. That is why it is together with other means of enforcement not *expressis verbis* mentioned by the Directive but was left to the Member States. As such, the examples in Austrian, Belgian and French laws were available in winter 1995/6. [118]

Mr. Pereira Félix did not base his lawsuit on any alleged direct effect of the Posted Workers Directive. Neither did the question subject to preliminary ruling include a reference to it. Therefore the Court did not have to decide thereupon. But it had sufficient in applying the Directive in the traditional context.

2.2.4 Dörfler's Liability Argumentation

I first recall how Dörfler, despite his deep criticism of the justification of the AEntG, predicted that the ECJ would one day accept the AEntG as being compatible with the

[115] Rieble and Lessner, ZfA 1/2002, p. 51

[116] 'Hingegen sieht die Richtlinie keine unmittelbaren Ansprüche des Arbeitnehmers gegen den Generalunternehmer vor, da die unmittelbare Wirkung von Richtlinien nur im vertikalen und nicht im horizontalen Verhältnis (Marktbürger untereinander) möglich ist.' Ibid.

[117] See http://www.wolff-mueller.de. The group has some 2.700 employees.

[118] On the other hand, Article 6 PWD was a necessary provision in the Directive so as to impose the establishment of a complementary forum for judicial proceedings in the host state, given the Brussels Convention on jurisdiction and execution of judgments (replaced now by EC Regulation 44/2001).

Treaty. He, too, found that the liability forms an independent restriction on the free provision of services while it represents only indirect discrimination. [119] However, his discourse on the justification of the liability by using the concept of overriding requirements of general interest is in fact rather short. In essence, he states how the liability is 'an extension of the legal position' (eine Erweiterung der Rechstellung') of the worker [120] but moves immediately on to discuss its possible justification as an instrument under the social security regulation 1408/71 (a discussion in vain) and the general interest in liability in insolvency situations. Regarding the latter he finds that the Insolvency Directive gives a comparable protection under home state law, unless outside its three months' time limit. [121]

The main arguments of Dörfler come under the proportionality test. He finds that liability is appropriate for securing the attainment of the objective which it pursues, while it, however, at the same time diminishes the amount of foreign posted workers. [122] Reasoning on the necessity argument ('not to go beyond what is necessary') then brings about the essential result. Firstly, Dörfler misleadingly refers, in particular by analogy to the free movement of goods, to the prohibition of double control established in van Wesemael [123] (and somewhat reformulated in *Webb*) and then wants to reinforce his argument by citing paragraph 51 of *Arblade* where the Court discussed the question of paying employers' contributions to a social fund both in the home and host state. As in fact Dörfler himself explains, the basic situation is that there is no relevant liability under home state law unless based on a more than unlikely agreement between the principal contractor and his foreign subcontractor. Hence, it is not a situation of double burden in the sense of EC law. In his final conclusions of the whole dissertation he still finds that the posted foreign workers do not need any principal contractor liability. [124] Secondly, Dörfler discusses, nearing or partially joining the line of *Wolff & Müller*, less restrictive measures, such as paying wages of foreign workers to the authorities(!) (which he himself refutes i.a. as discriminatory), bank guarantee (refuted as not appropriate), enhanced state control (which would justify even repealing the liability), exclusion of liability in insolvency situations (as in Austria) and finally the use of liability but only limited to culpability, thus requiring *culpa in eligendo/contrahendo* or corresponding reprehensible conduct by the principal contractor. [125]

Dörfler's conclusion under the necessity assessment is that less restrictive alternatives for liability do exist which further leads him to conclude that the existing liability form is disproportionate, and especially with respect to foreign subcontractors is not compatible with the free provision of services. [126]

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[119] Discussion on open (direct) discrimination, Dörfler, pp. 132-146, with the conclusion on p. 147 that the liability is a restriction of other type ('eine sonstige Beschränkung'). Discussion of the justification of the liability is on pp. 201-217.
[120] Ibid., p. 202.
[121] Ibid., p. 207.
[122] Ibid., 209.
[123] Ibid., 209-210; joined cases 110 and 111/78 Van Wesemael [1979] ECR 35.
[124] Ibid., p. 238.
[125] Ibid., pp. 212-216.
[126] Ibid., p. 217.

2.2.5 Substantive Part of Judgment Wolff & Müller

In the previous cases *Arblade*, *Finalarte* and *Portugaia* the Court did not apply the Posted Workers Directive because the events concerned had occurred before 16 December 1999, that being the deadline for its implementation. In *Wolff & Müller* the works were carried out in spring 2000 and the Directive therefore applied. [127] Hence, in the judgment the Court noted this as well as the presence of a situation provided for in Article 1(3)(a) of the Directive. It then proceeded to an assessment and application of Article 5 PWD.

As became obvious from the submissions of *Rieble* and *Lessner*, they read Article 5 word by word but in isolation. The Court first put Article 5 into its proper context (in paragraph 28) by taking Article 5 as intending to implement the basic substantive provision in the Directive, i.e. Article 3(1)(c) that includes the obligation to pay the minimum wage. Or, in terms of the Directive, that is what the undertakings have to *guarantee* (as it stays in every language) to their workers.

The Court further noted (paragraph 29) from Article 5 how the Member States have to ensure, in particular, that the *workers posted* have available to them adequate procedures in order *actually* to obtain minimum rates of pay. This style of writing might be regarded as too simple for the European legal audience, but given the way e.g. (or in particular) *Rieble* and *Lessner* have interpreted Article 5, it clearly has its place. Anyway, it seems essential to see that here the Court first distilled the obligation of the Member States to guarantee that something *actually* happens, i.e. that the Directive has real teeth.

The Court then for its part relied (in paragraph 30) on the wording of Article 5 PWD but concluded, as a continuation to paragraph 29, that it was apparent that the Member States have a wide margin of appreciation in determining the form and detailed rules governing the adequate procedures under the second paragraph of Article 5. As is the case with all directives, Article 249 EC sets up the framework. It here means that Article 3(1) PWD forms the goal (i.e. that the undertakings guarantee…) whereas Article 5 deals with the form and methods, to use the language of Article 249, so as to achieve it. Hence, the outcome first is that it is up to the Member States whether they establish any liability of principal contractors or other clients. Contrary to what *Rieble* and *Lessner* maintain, the Directive clearly includes a mandate for the Member States to set up the wage liability, while they have no obligation to do so.

Furthermore, it was self-evident (and based on settled case-law, of course) to add (in paragraph 30) that in 'applying that wide margin of appreciation [the Member States] must however at all times observe the fundamental freedoms guaranteed by the Treaty…and, thus, in regard to the main proceedings, freedom to provide services.' Observing the freedom to provide services essentially means to subordinate the national law implementing the PWD to the four step justification test (that Rieble and

[127] Paragraph 24 shows how the Court may take into consideration also rules of Community law which the national court has not referred to. The Court referred to the Directive as a forthcoming binding instrument of EC law already in judgment Arblade (paragraph 79) in 1999.

Lessner call the 'van Waesemael/Webb formula'). That is what the Court applied as settled case-law, also in *Arblade*, *Finalarte* and *Portugaia*. The decision on whether there is, by the liability, a restriction on services the ECJ left for the national court, [128] highlighting the necessity to take into account also the position of a principal (general) contractor established in another Member State (paragraph 33). They are few, but they have the same liability as domestic principal contractors.

For the case that the national court would find the liability as a restriction on services, the Court repeated the standard formula of the public interest justification of restrictions (paragraph 34), coming to the protection of workers (paragraph 35) as an overriding reason for that interest, this being the cornerstone of labour law within the free provision of services, as confirmed in paragraph 36 of *Arblade* (referred to here via judgment *Portugaia*). In other words, extension of minimum wages (a must under the PWD) pursues an objective of public interest, as stated also in paragraph 36 of *Wolff & Müller v. Pereira.* Then comes the simple move that 'the same is true in principle' with respect to 'measures intended to reinforce the procedural arrangements enabling a posted worker usefully to assert his right to a minimum rate of pay.' This was no surprise, since already judgment *Seco* in 1982 referred to appropriate measures in guaranteeing observance of the rules concerned (as did *Rush Portuguesa*, *Vander Elst* and *Arblade*). However, the requirement for 'procedural arrangements to ensure observance' of worker protection as corollary ('likewise') to this protection was again noted in paragraph 37. The approach is clearly different from that of *Rieble* and *Lessner*. Namely, while they primarily maintain that the obligation to extend minimum wage provisions is not compatible with the Treaty, rendering also the liability incompatible, they essentially, as a secondary issue, find that the liability would also be an *independent* restriction on services (and, moreover, even a case of direct discrimination). [129] Finally it is worth noting that the Court did not even mention the discrimination aspect.

The question subject to preliminary ruling and the observations of the BAG included again the priority purpose of the AEntG, namely that of protection of the national job market rather than the remuneration of workers. As in *Portugaia*, decisive is whether there is a genuine benefit to the workers, which significantly augments their social protection, while the stated intention of the legislator may only lead to a more careful assessment of the benefits (paragraph 38). The BAG also referred to practical difficulties since the foreign workers are not fluent in German and do not know German law, and to the diminishing job opportunities as a consequence of the liability (paragraph 39). This the Court first balanced by stating how the liability 'none the less' adds a second and normally more solvent debtor which on an objective view is such as to ensure the protection of posted workers, supported also by the main proceedings themselves, with the worker as a plaintiff (paragraph 40). Thus, the Court stated how the host state law *added* another and normally more solvent debtor. This implied that there was no equivalent rule in the home state. This is all we find of the equivalence test in this judgment.

[128] The Court noted in paragraph 32 how the application of host state rules is *liable* to prohibit, impede or render less attractive the provision of services by subcontractors from other Member States,

[129] See e.g. the conclusion on p. 89.

As a new aspect in relation to *Portugaia* and as a direct consequence of the application of the Directive the Court stated (in paragraph 41) that unfair competition, by paying the workers less than the minimum rate of pay, 'may be taken into consideration as an overriding requirement capable of justifying a restriction on the freedom to provide services' if the other provisions of the justification pattern are met. The other provisions mean in practice the equivalence and proportionality tests. It is however difficult, if not impossible, [130] to imagine an equivalent norm in the home state law rendering the liability superfluous. Anyway, the Court continued by stating (in paragraph 42) that there is not necessarily any contradiction between fair competition and ensuring worker protection, as demonstrated by the fifth recital of the PWD.

The Court left the proportionality test under EC law, as often happens, for the national court but gave further guidance to it, given the submissions of Wolff & Müller and the grounds for the question referred to for preliminary ruling, that the principal yardstick must be ensuring the protection of workers, not the position or possibilities of the principal contractor as a guarantor, or the legislative grounds of the AEntG, (paragraphs 43-44). I recall how Wolff & Müller invoked under proportionality different difficulties such as those in control, guidance, chain responsibility and regression. All these grounds were de facto dismissed by the ECJ. The only ground of Wolff & Müller still prima facie 'open' was the proposal of paying, as an alternative for the whole liability, a share of wages e.g. to the Holiday Pay Fund (SOKA-BAU) against whom the workers could then claim the minimum wages. Such a proposal is purely hypothetical. Besides, it was at the same time based on difficulties in control. Thus, by placing the protection of the worker concerned as the yardstick, this alternative, too, was de facto dismissed as a ground. Besides, the BAG had already found that the liability passed an even broader proportionality test under German law (see paragraph 13 of *Wolff & Müller v Pereira*).

In substantive terms the proportionality test in EC law requires that the measure must be apt to ensure attainment of the objective pursued (appropriateness) and must not go beyond (necessity) what is necessary in that connection (paragraph 43). Hence, it differs from the proportionality test under German law according to which there is

[130] I see, of course, the theoretical situation that there is liability in the home state law but none in the host state law, and that the posted worker would try to get the home state liability applied by either the host or home state court. Article 6 PWD entitles one to institute proceedings in the host state but still, under private international law, it is far from clear that the host state court would apply the home state law. On the other hand, it is not guaranteed that a home state court would render a default judgment, if the principal contractor did not show up as a defendant, or that the host state authorities would execute a default judgment by a home state court. See that the Commission has published a proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II") COM/2003/427 final. According to that proposal (Article 9(5)) where it is clear from all the circumstances of the case that the non-contractual obligation is manifestly more closely connected with another country, the law of that other country shall apply. As such, it would apply also to the liability rules of another Member State. I still doubt whether any court would apply the liability rules of another state against a principal contractor of a state where there is no such liability. However, the question is merely academic while any prudent worker (or his lawyer) chooses *forum domicilii* whenever such *lex fori* includes the liability – as in Wolff & Müller v Pereira.

also a third element, namely a more general reasonableness test (Angemessenheitsprüfung). This third and at the same time rather vague element by definition tends to limit the rank of measures regarded as justified restrictions on the free movement of services. [131] However, as in case *Wolff & Müller v Pereira*, also in its judgment of 20 July 2004 the BAG found that the joint and several liability did not violate the German proportionality principle. [132] The liability scheme justified itself simply based on the responsible position of the principal contractor in the subcontracting decision. The BAG took account also of regression and the possibility of requiring guarantees. The subcontractor was from a third country (Croatia) which excluded according to BAG any preliminary ruling by the ECJ (paragraph 27). The latter decision is not justified in every case due to Article 1(4) PWD, according to which 'Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State'. However, there was no such claim in the case (see especially paragraph 8).

It has to be emphasized that the BAG, in *Wolff & Müller v. Pereira*, came to be guided by the ECJ to make the protection of workers the very yardstick of the proportionality test. Furthermore, it must be emphasized that the national court, in applying the principle of proportionality, applies a principle of Community law, not the German proportionality test. [133] In the case of posted workers it means that a

[131] On this in brief, see e.g. von Danwitz, Die Rechtsprechung des EuGH zum Entsenderecht, EuZW 8/2002, p. 241. He highlights for good reasons the difference between the German and EC law proportionality test. Von Danwitz denotes that at least since early 1990s the ECJ has refrained from the use of reasonableness in the proportionality test. He refers to an already convincing set of plenum judgments: Germany v. Council [1994] ECR I-4973, paragraph 91 et seq.; Germany v. Council [1995] ECR I-3723, paragraph 42; UK v. Council (The Working Time Case) [1996] ECR I-5755, paragraph 57; Germany v. Council and Parliament (Directive on deposit-guarantee schemes) [1997] ECR I-2405, paragraph 54; and (from a Chamber) Kellinghusen [1998] ECR I-6337, paragraph 33. Besides, the twofold formula was used, of course, also in judgments Arblade (paragraph 35) and Portugaia (paragraph 19). The former referred i.a. to cases Case C-76/90 Säger, [1991] ECR I-4221, paragraph 15; Case C-19/92 Kraus v Land Baden-Württemberg [1993] ECR I-1663, paragraph 32; and Case C-55/94 *Gebhard* [1995] ECR I-4165, paragraph 37. The latter referred to Case C-205/99 Analir and Others [2001] ECR I-1271, paragraph 25, and Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraph 25). This overwhelming and settled case-law operates with the twofold formula of the proportionality test: appropriateness/suitability – necessity/'not beyond'. Thus, this formula is no novelty, indeed, in paragraph 43 of Wolff & Müller v. Pereira. I recall how Görres has suggested that the test would be threefold also in EC law, thus covering also the (German type) reasonableness of the measure concerned, see footnote 74, *supra*. However, he does not refer to any EC case-law, no wonder.
The (erroneous) application of a threefold proportionality test by Görres has also obvious consequences. In assessing the reasonableness of the extension of more than one (the lowest) wage category by the AEntG he seems to even somewhat regret (under 'Extension of competition disadvantages' – 'Erstreckung von Wettbewerbsnachteilen') that the foreign companies become deprived of their competition advantage in Germany. On the basis of the protectionist effect he draws the conclusion that such an extension is not reasonable (ist unangemessen) and is therefore not justified, ibid, pp. 288-291. The outcome does not correspond to the PWD. It allows the extension of the whole wage scale, see section 3.2 (in fine), *infra*.
[132] Case 9 AZR 345/03 of 20 July 2004, paragraphs 26-7.
[133] As to the role of national courts and the guidance often given by the ECJ, see e.g. a nutshell explanation of Takis Tridimas, The General Principles of EC Law, Oxford University

national court must also take into account the Posted Workers Directive, with its obligation to ensure that the posted workers receive the minimum pay covered by the Directive. A further relevant aspect is the wide margin of appreciation granted to Member States in implementing the directive (paragraph 30 of *Wolff & Müller v Pereira*). For its part this limits the proportionality assessment.

The overall conclusion of the ECJ, on the basis of the Arblade-justification test as elaborated by the PWD, was that Article 5 PWD, interpreted in the light of Article 49 EC, does not preclude the German liability scheme. As to the substance, there was finally no surprise in this case, unless it was the BAG first pushing the German law under EC law scrutiny with grounds that were partially the same (the purpose of the AEntG) as in *Portugaia*. However, in its decision of 12 January 2005 the BAG put into practice the justification line established by the ECJ. The BAG referred to the requirements of fair competition and protection of workers, and also found that the risk of liability costs for principal contractors is more controllable than that of losing the wage for the posted workers. The conclusion was that the liability is not a disproportionate restriction on the free provision of services. [134]

It is illuminating that the ECJ did not discuss ex officio the nature of the guarantee, i.e. applying and perhaps accepting only a benefit of execution scheme instead of a scheme operating with joint and several responsibility. This was one of the claims by Rieble and Lessner, while Dörfler foresaw a culpability scheme. However, both types of claim will normally not come in future, because the Court in this case already accepted a scheme with a joint and several responsibility. It was natural to leave without comments in the judgment the submission of Wolff & Müller as to the equivalence criterion; i.e. that by paying the contract price the principal contractor would already have discharged a sufficient monetary performance to the worker of the subcontractor.

It was equally natural to require the application of the PWD within the limits set up by the Treaty. That is the case for any European directive. Still missing is an interpretation of the PWD expressly in the light of Article 50(3) EC. It refers to the same conditions between domestic and foreign service-providers. However, that aspect is in fact included in the Court's reasoning (in paragraph 33) when it guided the national court in assessing the possible restriction on the freedom to provide services. It stated that principal contractors from another Member States are bound by the same liability as domestic ones.

In sum, in *Wolff & Müller v. Pereira* the Court applied the heaviest part of the Posted Workers Directive, i.e. the minimum rates of pay, as reinforced by a structural measure in national law, i.e. the liability of the principal contractor. It did this by highlighting the basic philosophy behind the Directive, that of combining fair competition and the rights of workers, and respecting the powers of the Member

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Press 1999, p. 160-2. When the validity of a Community act is challenged, the ECJ decides also the proportionality aspect. In preliminary rulings the ECJ may decide the proportionality issue itself or leave it for the national court within specifically variable guidelines. In enforcement (infringement) proceedings against Member States the ECJ naturally always determines conclusively whether a national measure or practice infringes Community law in the light of proportionality. Op.cit, p. 160, footnote 196.

[134] See decision of 12 January 2005, 5 AZR 617/01, paragraphs 72-74.

States in implementing the Directive. The Court in a natural way extended the work of the European legislator. [135] On the other hand, that work (the PWD) has its roots in case-law since *Seco* where the Court decided the basic contents of the internal market with respect to wages in the free provision of services.

2.2.6 Effect of *Wolff & Müller* on Other Liability Schemes

There are relevant wage liability schemes in at least Austria, Belgium, Finland, France, Italy, the Netherlands and Spain. [136] They sometimes operate in close connection with social security and/or even tax liability. The main line of analogy is clear: while the Court in Wolff & Müller found a wage liability scheme with joint and several responsibility to be compatible with the free provision of services, i.e. the broadest possible interpretation, the corresponding or 'milder' wage liability schemes, as they normally are, are likewise to be regarded as restrictions that are compatible with EC law. The opposite would normally require a striking discriminatory element to be inherent in a given national scheme. On the other hand, social security and tax schemes both involve a sui generis question on the addressee of the contributions concerned. In the majority of posting cases it obviously is the home state. However, there are no reports on any cross-border application (or even attempts of such) of these schemes and so they fall outside of this reasoning.

Based on these national schemes the European Parliament in a resolution of 15 January 2004 concerning the implementation of Directive 96/71 called on the Commission to examine i.a. a European legislative framework or other forms of provision governing liability in the case of subcontracting. [137] While such a scheme by definition must treat purely domestic and cross-border cases on an equal footing, it

[135] As a whole, the judgment also terminates any debate about the compatibility of the PWD or its legal basis with the Treaty.

[136] The Austrian scheme is in Article 7(c) of the Arbeitsvertragsrechts-Anpassungsgesetz – AVRAG. For wage liability in Belgium, see the Loi sur le travail temporaire, le travail intérimaire et la mise de travailleurs à la disposition d'utilisateurs, Wet betreffende de tijdelijke arbeid, de uitzendarbeid en het ter beschikking stellen van werknemers ten behoeve van gebruikers of 24 July 1987, Articles 31(3), 31(4) and 32(4). Liability regarding social security contributions in Belgium is enshrined in the Loi révisant l'arrêté-loi du 28 décembre 1944 concernant la sécurité sociale des travailleurs, Wet tot herziening van de besluitwet van 28 december 1944 betreffende de maatschappelijke zekerheid der arbeiders of 27 June 1969, Article 31bis; it covers also the payment of certain wage components via a social fund. As to France, see L-124.8 in the Code du Travail (Labour Code). In Italy a Legislative Decree issued by the Government on 3 September 2004 stipulated a liability scheme. In the Netherlands wage liability is based on Article 4 of the national collective agreement for construction sector (COA BOU). In Spain the Ley del Estatuto de los Trabajadores (Real Decreto Legislativo 1/1995 of 24 March), Article 42(2) establishes joint and several liability of the principal contractor regarding wages and (under certain conditions) social security obligations. The Ley General Tributaria 58/2003, of 17 December, Article 43(1)(f) imposes on the principal contractor a deficiency guarantor's liability regarding the social security contributions.

[137] Document P5_TA(2004)0030, Implementation of Directive 96/71/EC; European Parliament resolution on the implementation of Directive 96/71/EC in the Member States (COM(2003) 458 - 2003/2168(INI)), paragraph 6.

is arguable that the EU could not enact such a legislative instrument within the free provision of services but only under approximation of laws.

Amongst the national schemes, the Finnish one obviously has its own unique features. It contains a secondary threat of confiscating unfair profits gained by paying wages that are lower than the required national minimum concerned. It merits a more detailed discussion.

2.2.7 Finnish Scheme

In Finland there are two possible remedies under the legislation. First, all the relevant sector-wide collective agreements are declared erga omnes and do cover posted workers. Enforcement mechanisms other than a (highly unlikely) lawsuit of the worker are to be found both in law and in collective agreements (supposing that the employer does not join a Finnish employer organisation for the posting period). Namely, since May 2004 the Penal Code defines the payment of too low wages as a criminal offence (discrimination and profiteering-like discrimination based on nationality; the latter with a maximum imprisonment for two years). This may lead also to confiscation of the illegal benefit gained by paying the illegally low wages. The confiscated profit/benefit belongs to the state. A crucial point is that the confiscation can be directed also against persons other than those committing the crime, hence also against the client or principal contractor on whose account the posted workers have worked. Confiscation cannot be applied to the extent that the posted workers concerned do present their wage claims. Until 2002 merely a de facto theoretical possibility for a wage claim prevented the confiscation. Experience so far is confined to one essential judgment of a district court. However, this is subject to appeal. The case involved 12 Chinese stoneworkers posted to Finland as hired-out manpower! The illegal and confiscated benefit of the user undertaking from the work carried out which was of seventeen months duration was estimated to be 174,000€, as diminished by possible further wage compensations.

The confiscating system fits directly into the anti-fraud principle demonstrated by the ECJ in *Centros*: a Member State is entitled to take measures designed to prevent companies or individuals from improperly or fraudulently – and to the detriment of public or private creditors - taking advantage of provisions of Community law, at least by forming a posting company in another Member State. [138]

Second, a quasi-binding wage liability of the principal contractor in the construction sector is stipulated in the Outside Labour Agreement. The principal contractor is liable to guarantee – as a guarantor that has kept the benefit of execution - payment of wages, final payment for piecework included, and holiday pay, all earned on the site concerned. However, such claims are precluded if they are not declared to the principal contractor within seven days of the due date. This obligation anyway is

[138] Case C-212/97 Centros [1999] ECR I-1459, paragraph 24. In the field of free provision of services, it referred to Case 33/74 Van Binsbergen v Bedrijfsvereniging Metaalnijverheid [1974] ECR 1299, paragraph 13, Case C-148/91 Veronica Omroep Organisatie v Commissariaat voor de Media [1993] ECR I-487, paragraph 12, and Case C-23/93 TV 10 v Commissariaat voor de Media [1994] ECR I-4795, paragraph 21.

deemed to effect only *inter partes*, i.e. it does not extend to a lawsuit against the principal contractor (position of the Labour Court of Finland since 1981; it is the single national instance); it ultimately places an obligation on the employers' organization to urge the principal contractor to pay these wages but it is only a moral obligation for the latter. In the model agreements for subcontracting (hiring-out included), the principal contractors take on this responsibility but with a corresponding right to set-off the cost from the remaining contract price; on this basis the regime works well in practice. [139] The wages paid under this regime cannot be covered by the state guarantee regime (directive 74/02/EC on Employer Insolvency).

The merits of these two schemes must be assessed in brief also in the light of case-law and the PWD.

Penal sanctions have been accepted by the ECJ already in *Arblade* (paragraph 43) with the prerequisite that

> 'those provisions must be sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply'.

The pay provisions in the collective agreements are available on the Internet. To get them is not excessively difficult. [140] As to the languages, any serious employer can surmount the language barrier, whenever needed in cooperation with his contract partner in Finland. The two of them cannot enter into an agreement without a language that both parties understand. The confiscation part of this penal scheme is justified by analogy with the liability assessed and accepted in *Wolff & Müller v Pereira.* [141] The agreement-based liability (Outside Labour Agreement) is difficult to imagine being challenged under EC law after *Wolff & Müller v Pereira* because the ECJ in that case accepted a stronger scheme, i.e. a law-based liability (operating *de jure* with joint and several responsibility).

[139] If the principal contractor is not a member of the employers' organisation, his collective agreement-based responsibility does not work as such but the Finnish trade unions may use different industrial actions so as to impose corresponding payments on him; they can naturally do the same against any non-organised subcontractor or temporary agency;
[140] The social partners additionally produce simplified brochures on the key provisions.
[141] That is why I do not see that a detailed scrutiny of the confiscation scheme under the Arblade-test is necessary in this reasoning.

Chapter III

On Minimum Wages under the PWD

3.1 General Remarks

The PWD is a landmark also in the sense that it has pay or remuneration as its object. It regulates pay, namely minimum pay. In so doing it first invalidates assertions that pay falls completely outside EC competence due to Article 137(5) EC. [142] As also the Convention drafting the Constitutional Treaty has noted, that provision does not define exhaustively the Community competence on pay. [143] Next to the PWD, there are several other EC law instruments that at least indirectly stipulate rules on pay. Posting of workers is one example of issues within the Internal Market that in the evolution of EC law has imposed changes on the legal thinking of labour law experts and the wider audience.

While the modifications of the German *Tarifautonomie* are a flagrant example of a change imposed by European developments, a similar, even if less dramatic, example may be picked up from the Swedish debate. At the national level there is broadly a consensus between the social partners and state that that the public authority shall not interfere in proper wage setting (compulsory state mediation is another issue). Accordingly, there is (as in Denmark) no *erga omnes* system of collective agreements but the de facto same result is achieved based on the high degree of organisation among employers, as augmented by concluding (with or without industrial pressure) separate company level agreements (*hängavtal*) with non-organised employers. For Sweden the possibility of keeping this system within the EU legal framework was an important precondition in negotiations on its access. Both countries heavily supported the PWD, since Denmark negotiated in 1993-4 the so-called Christophersen-compromise in Article 3(8) that was intended to safeguard the Danish (and later Danish-Swedish) system of a factual erga omnes effect of collective agreements. However, the interference of the European legislator in wage setting was no problem for social partners or governments in Copenhagen or Stockholm. This was notwithstanding the fact that the Danish and Swedish versions of Article 137(5) EC still are –as they were already in Article 2(6) of the Maastricht Social Policy Agreement - different from the others by referring to 'pay *relations*' (*lønforhold*, *löneförhållanden*). Here 'relations' has a similar meaning as in the expression 'industrial relations'. [144]

At the European level the United Kingdom opposed the Directive by invoking the lack of EC competence in the field of pay which Article 2(6) of the Maastricht Social Policy Agreement manifested. In the enlarged Community we have seen the first initiative to dismantle the erga omnes structure created by the PWD, in the form of a

[142] As to different conceptions on this provision, see Jari Hellsten, Reviewing Social Competence of European Communities, EC Legislative Process Involving Social Partners and Legal Basis of European Collective Agreements. Labour Policy Studies No. 259, Ministry of Labour (Finland) 2004 (Hellsten 2004); available also by http://www.mol.fi/mol/fi/99_pdf/fi/06_tyoministerio/06_julkaisut/06_tutkimus/tpt259.pdf

[143] See paragraphs 26-28, p. 14 of the Report of WG XI. Document CONV 516/1/03, REV. 1.

[144] See further Section 4.3, footnote 202.

complaint in January 2005 by Latvia against the Swedish application of the PWD. It is linked to the *Laval* case that I will explore in chapter 4.

3.2 Pay Jungle in Construction Industry

The construction industry received special treatment in the PWD since the Member States have to cover by the national erga omnes collective agreements also workers posted temporarily into their territory. This obligation the Council and the European Parliament described in Article 3(1) PWD in the strongest possible terms, at least such was the intention, by referring to Member States who shall 'ensure…that undertakings … guarantee workers posted the … terms and conditions of employment…'. [145]

These conditions mean those laid down by law or collective agreements (erga omnes) in the construction sector, as defined by the Annex to the Directive. The Annex de facto repeats the definition in the safety and health directive 92/57/EC covering 'temporary and mobile' construction sites. Behind this special treatment was the particular nature of the sector: workers move but products are stationary. On the other hand, the picture of the providers includes in most Member States a handful of big companies (or group of companies), followed by a reasonable number of 'mid-size' companies that are often active more broadly than just locally. Next to these groups, a myriad of small companies are active within the sector, and some of them are specialised in the hiring-out of manpower. Besides, self-employment exists in every Member State although its amount and effect varies greatly, including even bogus self-employment (Scheinselbständigkeit). In undertaking projects, use of subcontracting is widespread. In general terms, one may describe the provider side as diversified. One dimension is its link to the grey and even black economy.

Essential variations exist also on the workers' side regarding the stability of employment relationships. Within bigger companies stable employment relationships for a part of the workers are not unusual which on the other hand may be the case for certain key workers even in smaller companies. As a contrast, e.g. in the Danish construction industry most workers are still in fixed-term contracts covering normally the actual site under construction. They are used to it and want to keep it.

More diversification stems from natural circumstances like weather conditions, as well as from economic conjunctures, resulting in repeated unemployment periods. Some work is seasonal, such as asphalt laying in Northern Europe. Some work requires highly qualified workers with considerable education and training (nowadays equipped also with computer skills) while bulk work exists as well, making it possible for nearly all healthy men and women to carry out it. Cultural diversification (in immigration) means differing numbers of foreign *permanent* workers (like the Portuguese in Luxembourg).

[145] The PWD might spice up the debate on a horizontal direct effect of directives; I have to pass it here. The same concerns interpretation of national (implementation) law in conformity with the objectives of a directive; see e.g. joined Cases C-397/01 to C-403/01 Pfeiffer, judgment of 5.10.2004, nyr.

This diversification in natural and economic circumstances seems to be one explaining factor in the diversification of pay forms and practices. However, the pay provisions in the European construction industry are, as they a priori are in other industries as well, bound to historical developments since the Middle Ages. They reached their present form normally in the era following the Second World War. Social protection with social funds and social security, together with enhanced training, due to new technical developments, has emerged since WWII.

Today pay diversification means linking actual pay to a multitude of factors, such as training, experience, age, site, sub-sectors (some ten in Finland), profession (there are tens), practical on-site circumstances, new production or maintenance, length of service, area within the state (like East-Germany or the minimum wage areas in France), remote location, paid public holidays and applications of shortened working time. Most often pay is calculated by hour but performance-related pay still forms an essential feature. It (i.e. a fully performance related pay) is still the main pay form in new production in Sweden and Finland. The final time frame for pay calculations may be as long as 12 to 18 months, as for nuclear powers stations or landmark projects like the Great-Belt tunnel-bridge combination in Denmark, which was under construction for some eight to ten years in all. Partial performance-related pay exists as well, comprising a stable and a varying part. As an ultimate example of this pay diversification I would mention the performance pay scheme in the collective agreement of the Finnish plumbing trade, the clue being that in new production the works and workers on a site form one single entity, within which a joint pay is calculated. The scheme was adopted in the 1950s in order to prevent a distribution of tasks that may result in greatly varying earnings between the plumbers. At the same time it means subordination to the fully performance-related pay form; like in bricklaying: by laying 1000 bricks a day, or laying just 300; the fluctuation in earnings is linear when the worker is paid by the brick.

Due to the diversity of the terms and conditions applicable, the European social partners – FIEC and EFBWW – have never made any serious attempt to formulate for the construction sector any European minimum wage even in the form of a general definition. The Member States have taken the same line. Anyway, a sui generis proposal came from the German government at the end of the preparations of the PWD, which was intended to enshrine first the lowest wage category in a national collective agreement as generally binding (erga omnes). Later on, the proposal was in the form of a 'certain' category, as specified by the Member States. In practice this was intended to legitimise the lowest category as generally binding (erga omnes). [146]
The counter-proposal was the text finally adopted in Article 3(1), second subparagraph, which leaves the definition for the Member States. The definition inevitably includes first (i) a decision whether the minimum wage comprises more integral parts. If there are several elements both in home and host states, then (ii) a further stocktaking on the way to compare these wage components is necessary.

[146] The first national posting-law in Germany (Arbeitnehmer-Entsendegesetz) of 26 February 1996 realised this concept. The amendment of 1998 (the Korrekturgesetz) repealed the requirement to use (only) the lowest category as the generally binding minimum wage.

Such a flat rate (as age-related) is applicable especially in the United Kingdom from 1999 [147] while most of the other Member States include the holiday pay and other supplements as integral parts of the minimum wage concerned. [148] The philosophy behind the Directive is intended a priori to respect national concepts as such, up to the extent that, according to Declaration No. 5 attached to the Directive, the PWD 'does not entail any obligation to make provision on such [minimum] wages'. E.g. in the Belgian case gross remuneration means taking into account various site-, career- etc. related elements that altogether form the basis for the calculation of the 13th month and the bad-weather payments concerned. The same principal approach, hence a minimum wage comprising several integral parts, prevails – next to Belgium – also at least in the Nordic countries, France, Netherlands, Austria, Luxembourg and Italy. In these countries normally the whole pay scale and supplements are a priori applicable to posted workers. I will present the German intermediary system in explaining the infringement case Commission v. Germany.

3.3 Infringement Case *Commission v Germany*

3.3.1 Background

Case *Commission v. Germany* [149] involved again the debate on the contents of the minimum wage concerned, but this time, as the first case thereof, under the PWD that became compulsory on 16 December 1999. The Commission based its infringement claim on the fact that Germany does not recognise, with the exception of 'construction supplement', 'all allowances and supplements' paid in the home state as an integral part of the minimum wage payable for workers posted into Germany. The ECJ rendered its judgment on 14 April 2005. It deals with the interpretation of the second subparagraph of Article 3(1) PWD that reads, as follows:

> For the purposes of this Directive, the concept of minimum rates of pay […] is defined by the national law and/or practice of the Member State to whose territory the worker is posted.

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[147] The adult rate of the minimum wage (for workers aged 22 and over) is now (until October 2005) £4.85 (7€) per hour, according the National Minimum Wage Regulations 1999, SI 1999/584, as amended. As to the mostly positive experiences about these regulations, see e.g. Bob Simpson, The National Minimum Wage Five Years On: Reflections on Some General Issues, Industrial Law Journal Vol. 33 No.1, March 2004, pp. 22-46.

[148] The Belgian specialty is that the domestic employers paid contributions for the law-based holiday pay within the national law-based social security system. Belgium has imposed these contributions on foreign companies only if their workers posted exceptionally are subject to Belgian (i.e. host state) social security rules.

[149] See Case C-341/02, nyr. The ECJ presented the action, as follows (paragraph 1 of the judgment): 'By its application, the Commission of the European Communities requests the Court to declare that, by not recognising as constituent elements of the minimum wage all of the allowances and supplements paid by employers in other Member States to their employees in the construction industry who are posted to Germany – with the exception of the bonus [construction supplement] granted to workers in that industry – and consequently by leaving out of account the wage elements actually paid by such employers to their employees thus posted, the Federal Republic of Germany has failed to fulfil its obligations under Article 49 EC and Article 3 of Directive 96/71/EC […]'.

The judgment i.a. shows that the case developed in the course of the proceedings in the ECJ. However, to make it more understandable for a European audience it is appropriate first to explain in brief the German minimum wage system in construction.

A natural feature of the German system is that the minimum wage consists of two separate elements, namely the hourly wage rates and holiday pay. The social partners fix the hourly rates that the State has declared generally binding (erga omnes). The holiday remuneration is paid via the holiday pay fund (now called SOKA-BAU). That scheme was subject to a preliminary ruling in case *Finalarte*. [150]

The German system means comparing the hourly minimum wage against that payable to the worker under the home state rules, and comparing respectively the holiday pay in Germany against that under home state rules. The home state rules may of course mean finally the terms and conditions in a work contract while the holiday pay rates are normally fixed collectively, either by law or collective agreement.

A further national feature is the simplification made in setting up the minimum hourly rates. There are separate minimum rates for the building sector (Baugewerbe), painting works (Maler- und Lackiererhandwerk), roof works (Dachdeckerhandwerk) and certain dismantling works (Abbruchgewerbe) but this division by sector or profession was not an issue in the infringement case. [151] I will therefore explain the system only on the basis of the collective agreement for the building sector. However, in all these branches the minimum rates vary between East- and West-Germany (including Berlin). Next to this, workers are divided according to their professional qualifications into two wage categories since 1 September 2003. [152] A third integral element of the minimum wage is the 'construction supplement' (Bauzuschlag), 5.9 per cent to its rate, as calculated for these four minimum rates (not of any total gross wages etc.), and subject to a brief discussion in case *Portugaia*. [153] The regulation setting up the minimum rates indicates the construction supplement separately, as well indicating the sum of the basic rate and supplement. [154] These sums are generally meant when speaking about the minimum wages concerned.

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[150] See joint cases C-49-50/98, etc.

[151] For electrical installations on building sites (Elektrohandwerk) there have been separate minimum wages since 1997 until 2001.

[152] Dritte Verordnung über zwingende Arbeitsbedingungen im Baugewerbe, BGBl I p. 3372, 27 August 2002.

[153] Paragraphs 52 to 60 of the Opinion of Advocate General. The debate reveals that the construction supplement has historically been defined on the basis of three separate parts compensating the permanent change of sites and consequences of weather conditions. However, as the German government has noted (see paragraph 53), 'With the evolution of the law of collective bargaining, the supplement has gradually lost its original function of compensating for specific forms of hardship and has today become, quite irrespective of its origins, a fixed component of the wage packet'.

[154] The rates per hour in force (slightly lowered(!) until 31.8.2007) in the building sector are, as follows: West-Germany (Berlin included), wage category 1 10.20€, wage category 2 12.30€; in East-Germany the respective figures are 8.80€ and 9.80€. See Fünfte Verordnung über zwingende Arbeitsbedingungen im Baugewerbe of 29 August 2005; Bundesanzeiger Nr. 164 vom 31. August 2005. The East-West division as well as the establishment of two categories according to skills etc. were not tackled in the infringement case.

The (four) rates construed in this way are de facto essentially lower than those resulting from a strict application of the pay scale and other pay terms and conditions in the national framework collective agreement between the organised social partners. [155] The holiday pay rate (a percentage, now 15.1% of the total gross wages) is the same for domestic and posted workers. The lower rates for posted workers are applicable also to German workers *ipso jure* outside the binding effect of collective agreements (either the worker or the employer is non-organised). This has the consequence that posted workers are not discriminated against in terms of EC law.

Anyway, it is essential to see that the German minimum wages (in construction) mean also an essential simplification because the whole pay scale and many supplements (including e.g. the winter pay scheme) are not applied to posted workers. This serves both the control and the free provision of services by improved legal certainty. As a price for this simplification and lower minimum rates Germany does not accept that performance- or quality-related bonuses can be part of the minimum rates. [156]

3.3.2 Main Submissions

In its application the Commission held that the German legislation took account only of the general bonus granted to construction workers (construction supplement; Bauzuschlag in Germany) in comparisons between the minimum pay rates payable in Germany and the remuneration actually paid (paragraph 17 of the judgment). According to the Commission this prevented service providers in other Member States from offering their services in Germany. Furthermore, the Member States could not impose, as host states, their payment structure in comparisons (paragraph 18). More particularly, the Commissions accused Germany for not recognising the 13th and 14th salary months or contributions paid to social funds as constituent elements of the minimum wage (paragraph 19).

The German government opposed the application i.a. with the ground that it intended to amend its instructions (the explanatory notes; the 'Merkblatt') so that they would recognise, in principle, as constituent elements of the minimum wage allowances and supplements that do not 'alter the relationship between the service provided by the worker and the payment which he receives' (paragraph 20). The government further argued that special working hours which involve particularly high quality requirements or special constraints or dangers, have a greater economic value than that of normal working hours and that the corresponding bonuses (supplements, primes) must be excluded in comparisons. If taken into account, 'the worker would be deprived of the economic counter-value corresponding to those hours of work'

[155] One may note regarding skilled workers an overall difference of 30% (or more). The collective agreement for employment relationships between organised management and labour for building works (BRTV-BHG) in West-Germany includes six general wage categories, the scale being (as from 1 April 2003) 10.36€ to 16.98€ per hour. In specialised works (here in fire protection) the scale tops 19.22€ per hour. The so-called Ecklohn (wage category IV without the construction supplement) was respectively 13.96€. In East-Germany the scale was 8.95€ to 15.14€, the top 17.14€ and the Ecklohn 12.45€. Wage category IV means minimum hourly wage for a worker who can carry out independently the tasks of a skilled worker.

[156] The explanation of the minimum wage is on the website www.zoll.de.

(paragraph 22). The government finally argued that the Commission incorrectly assumed that the German rules would require the foreign employer to pay the additional German bonuses in the case of work featuring special difficulties (paragraph 23).

3.3.3 Reasoning of the Court with Comments

The Court started its assessment (in paragraph 24) by recounting its established case-law on the right to extend the minimum remuneration rules to service providers from other Member States. [157] Judgments *Rush Portuguesa* (with its overall extension right concerning provisions in law and collective agreements) and *Vander Elst* (with a reference to extension of minimum wages) were not referred to this time while *Seco* of 1982 is referred to, together with *Guiot*, *Arblade*, *Mazzoleni* and *Portugaia*. Hence, the Court presented this 'catalogue' of case-law exactly as in *Portugaia* in 2002. It is anyway essential to see that in presenting the EC law in issue the Court, naturally as such, denoted (in paragraph 3 of the judgment) the 12th recital in the Preamble to the PWD that repeats the overall extension right of *Rush Portuguesa*. However, it seems that this 'exegetical' evolution highlights the need to set aside, in this post-PWD era, any further debate about the basis of the difference between *Rush Portuguesa* and *Vander Elst*. A special reason might be in invalidating at the same time the argument that the latter, and even the PWD, would mean the right to extend only the 'minimum of minima' rates of pay. [158] On the other hand, the chosen 'catalogue' in paragraph 24 clearly reflects the need to avoid any (at least future) debate about the limits of the extension obligation on the basis of the overall extension right of *Rush Portuguesa*. [159] Its literal application would mean extending

[157] Joined Cases 62/81 and 63/81 Seco and Desquenne & Giral [1982] ECR 223, paragraph 14; Case C-272/94 Guiot [1996] ECR I-1905, paragraph 12; Joined Cases C-369/96 and C-376/96 Arblade and Others [1999] ECR I-8453, paragraph 33; Case C-165/98 Mazzoleni and ISA [2001] ECR I-2189, paragraphs 28 and 29; and Case C-164/99 Portugaia Construções [2002] ECR I-787, paragraph 21). There is again – as in Portugaia, paragraph 21 – the 'beauty spot' that the point of reference in Arblade should be paragraph 41 where it referred to Rush Portuguesa, paragraph 18.

[158] This is the leading, in fact misleading, explanation of e.g. Görres in his dissertation. See footnote 131, second paragraph, *supra*, and my explanation in section 3.2. (in fine), *supra*.

[159] Noteworthy as such, the Court omitted a reference to Rush Portuguesa already in judgment Finalarte in 2001. Also the question concerning the length of paid annual leave for posted workers the Court answered in brief by referring to the minimum nature of the Working Time Directive (with a corresponding national margin of discretion) and to the statement that Articles 59 and 60 (now 49 and 50) EC did not in principle preclude the extension of the national holiday rights (paragraphs 55-59). However, Kolehmainen describes this negligence of Rush Portuguesa in Finalarte as 'striking' (Kolehmainen, p. 141). Without wanting to point out especially to Kolehmainen, I call this description an example of the 'totem effect' of Rush Portuguesa, common to the European posting audience. One exception is, of course, Paul Davies, who i.a. predicted in 1997 (judgment Arblade was rendered in 1999) that 'the wholesale justification of national labour regulation, which Rush [Portuguesa] seems to accept, is vulnerable to attack and qualification at any time'; Davies, Posted Workers: Single Market or Protection of National Labour Law Systems? CMLRev. 34: 571-602, 1997, p. 596. After Portugaia, the PWD and Commission v Germany the totem definitely belongs to history (or, to its place in the Preamble of the PWD, only). For clarity's sake it is appropriate to note that Kolehmainen refers (loc.cit.) also to the application of the general justification test in

'every point and comma' of the pay provisions in the host state and this idea is certainly alien to a discussion about the German system. Instead of extending 'every point and comma' of the German pay provisions in construction, it is a simplified system. Further on, in *Rush Portuguesa* (as well as in *Vander Elst)* the extension right was noted as *obiter dictum* while in *Arblade, Mazzoleni* and *Portugaia* there was a deliberate question thereof, submitted by the national court for preliminary ruling. A final reason to exclude *Rush Portuguesa* from the 'catalogue' might well lie in the formal inconsistency of its literal application with the now confirmed, in fact rewritten inclusion of proportionality assessment in the use of the extension obligation. I will explain this below.

Connecting, necessary as such, the established case-law to the PWD (in paragraph 25 of *Commission v. Germany*) is, as to its wording, perhaps not the most successful while paragraph 25 declares that the case-law referred to 'is enshrined in Article 3(1)(c) of Directive 96/71'. [160] Still, more important than these 'exegetics' is the fact that the ECJ presents the PWD, more particularly the extension obligation, also as an extension of the case-law since *Seco*. That is undeniable.

There is also an evolutionary step in rewriting the overall legal framework for assessing the extension rules in the present post-PWD era. At first glance it looks bigger than it finally is. However, it is in the second phrase of paragraph 24 that the Court qualified the extension rules, as follows:

> The application of such rules must be appropriate for securing the attainment of the objective which they pursue, that is to say, the protection of posted workers, and must not go beyond what is necessary in order to attain that objective (see to that effect, inter alia, *Arblade and Others*, […] paragraph 35, *Mazzoleni and ISA*, […] paragraph 26, and Case C-60/03 *Wolff & Müller* […] paragraph 34). [161]

This passage means that the proportionality requirement of the Arblade-test applies also to the extension of minimum wages. In *Arblade* the passage referred to paved the way for the overall positioning of labour law (or protection of workers) in the legal framework of the free provision of services (concluded in paragraph 36 of *Arblade*). [162] *Mazzoleni* concerned a variably permanent and exceptional working in two Member States, and *Wolff & Müller* concerned an enforcement measure (liability of

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posting case-law since judgment *Guiot* (paragraph 13). However, nowhere in her dissertation does she seem to refer to Davies' quoted 'prediction'.

[160] In reality only judgments *Seco* and *Guiot* of those referred to in paragraph 24 (see footnote 157, *supra*) are pre-PWD era, the other four (Arblade, Mazzoleni, Portugaia and Wolff & Müller) are post-PWD and could not affect the contents of the PWD. The Council and Parliament had decided them already in 1996. In French the case-law referred to in paragraph 24 was 'consacrée' in Article 3(1)(c) PWD.

[161] This 'inter alia', as to labour law cases, meant e.g. Finalarte where the proportionality assessment applied to payment of holiday remuneration via a social fund and the extension of the scheme to cover the posted workers, too (paragraph 49). In Portugaia the proportionality assessment was not spelled out but it referred (paragraph 23) in more general terms to a possible infringement of Articles 59 and 60 (now 49 and 50) EC in the use of the extension right.

[162] See section 1.2.3, supra.

principal contractor; see Chapter II). How to explain this structure where every word (including judgments referred to) counts? My view is that labour lawyers should not 'burn their sleeves' with this use of proportionality. [163] It must be assessed on the basis of its wording, in its context and in the light of the practical results.

As to the wording, of equal importance to declaring the use of the proportionality assessment to be necessary, is the declaration of 'the protection of posted workers' as its yardstick. The full Court in *Arblade* established the application of the proportionality assessment to the protection of workers in general. In *Mazzoleni* a small chamber stated it *expressis verbis* in relation to the extension right, hence not regarding it as any radical move. [164] In *Wolff & Müller* the Court continued this proportionality path, at the same time by de facto dismissing the proportionality application suggested by the company Wolff & Müller. [165] Anyway, more important than the applicability *per se* of proportionality is the framing of its use by establishing the yardstick. At this particular point it is not 'the promotion of free movement of services', higher/lower economic burden for foreign service providers, [166] guaranteeing fair competition between undertakings or any other interest of the undertakings but the core of the labour law side of the PWD: the protection of workers. In this context the protection covers also individual work contracts. [167]

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[163] Kolehmainen defends the interpretation that only the 'expansion clauses' in Article 3(10) PWD (possibility to cover matters outside the hard core list in Article 3(1) or collective agreements on sectors other than construction) would fall under the Arblade-test (she calls it ORPI-test – from overriding requirements of public interest), including proportionality. Hence, matters under Article 3(1) would not be subject to the Arblade-test, and, thus, not subject to any proportionality assessment. I understand this as a prima vista maximal impact of labour law thinking in this context. She bases this on the wording of the PWD – obviously meaning that only Article 3(10) refers at the use of the extension right to the qualification 'in compliance with the Treaty'. Her second reason is that the opposite (i.e. finding the proportionality test applicable also to the list in Article 3(1)) would undermine the rationale of the Directive. She describes the outcome (in early 2002) as being that the interpretation of the ECJ remains to be seen. Op.cit., p. 146-7 and 266. The wording of the PWD easily creates, indeed, the illusion that the list in Article 3(1) would completely fall outside the Arblade-test. However, the reference to the Treaty obligations in Article 3(10) was only intended to highlight them in applying Article 3(10), not to qualify Article 3(1) at all. The rationale argument is stronger, of course, and seems to endorse the PWD as a more straightforward labour law instrument etc. Anyway, with respect to a directive not even the rationale argument is, or cannot be, fully convincing – and did not convince the ECJ in Commission v. Germany - which becomes clearer in my explanations, infra. In general terms is Article 59 EC, in the light of which the PWD is to be interpreted, directly effective; see e.g. case 33/74 Van Binsbergen [1974] ECR 1299 at 1311-2. Escaping the application of such a provision of the Treaty with the principles in its settled case-law requires amending the Treaty or modifying it with a protocol adopted in the same procedure; adopting contradictory secondary legislation is not enough. A classical example is case C-262/88, Barber [1990] ECR I-1889, paragraphs 37 and 42-3 where the Court found that the two equal treatment directives concerned could not free one from obligations emanating from the Treaty (Article 141, ex 119). It only ruled out the retroactive effect of its judgment.

[164] The yardstick (protection of workers) was declared in paragraph 30 of Mazzoleni.

[165] See section 2.2.5., supra. The judgment declared the yardstick in paragraphs 42-43.

[166] See the Commission's explanations in paragraph 18.

[167] I can see that the proportionality assessment may have practical consequences e.g. cases concerning pay provisions in respect of the personal status of an employee (like sickness pay, paid anniversaries etc.). Such cases may be complicated, especially depending on their

As to the context, the normative 'complex' [168] in issue simply means a practical application of the PWD in the light of the Treaty rules on the free provision of services. These Treaty rules are accompanied by the established case-law with its equally established proportionality assessment that naturally extends to the interpretation and application of the PWD's concrete provisions. In this cross-border context pay is a category of EC law (*acquis)* whatever interpretations we may have, especially on Article 137(5) EC. To my mind it excludes only a self-initiated Community intervention on pay by virtue of *that* Article. However, pay is (also) a category of EC law even if the PWD (second subparagraph of Article 3(1)) leaves the primary definition of the minimum rates of pay for the Member States. Furthermore, had the PWD been established on another legal base (such as Article 94 EC), proportionality would enter into its interpretation and application simply by virtue of Article 5(3) EC. It is also worth mentioning that the 'not beyond' formula of the proportionality test was used in paragraph 24 to express the necessity element instead of the 'same result to be achieved with less restrictive means'. The crucial point finally is, of course, the practical impact and results of the proportionality assessment. They comes later in this case.

However, this ('the PWD/extension right applies in the Treaty framework') was the normative structure within which operates the Member States' right to define the minimum rates of pay. In practical terms the dispute in the case concerned the question as to 'which allowances and supplements a Member State must take into account as component elements of the minimum wage, when it checks whether that wage has been correctly paid' (paragraph 27). In the course of the proceedings the German government amended its instructions (the explanatory note) by reversing the 'rule-exception' relationship. Thus, earlier the rule *excluded* from comparisons certain supplements and bonuses. It was reversed to *include* in comparisons certain supplements and bonuses. Following that amendment, account was to be taken of all additional payments made in so far as the 'relationship between the service provided by the worker and the consideration which he receives in return is not altered in a manner detrimental to the worker' (paragraph 30). This meant that e.g. quality-bonuses or those linked to special constraints in the work could not 'eat' or consume the minimum wage. Hence, it is to be highlighted that the amendment left in dispute what was to be taken into account, as becomes clear below.

A further evolutionary step during the proceedings concerned the treatment of 13th and 14th salary months. Germany envisaged taking these into account as constituent elements of the minimum wage 'on condition that they are paid regularly, proportionately, effectively and irrevocably during the period for which the worker is posted to Germany and that they are made available to the worker on the date on which they are supposed to fall due' (paragraph 31). Given the in principle positive

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linkage to the law applicable without the PWD (e.g. due to variable length of service or just an artificially agreed law of a third country etc.). For space reasons I will set aside any detailed reasoning thereon.

[168] As opened with a few more words this normative complex means a Member State applying its minimum pay rules as part of Community law (PWD) and therefore subject to its general principles of law, like proportionality. Further parts of the complex are the Rome Convention and Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

reply of the Commission, the Court confirmed this as being in conformity with the PWD (paragraph 32). The judgment does not reveal whether Germany based this (natural) concession on Declaration No. 9 of the Commission, Council and Parliament attached to the PWD. It enshrines the principle that in wage comparisons 'account should be taken, when remuneration is not determined by the hour, of the relationship of the remuneration to the number of hours to be worked and of any other relevant factors'. The reference to 'any other relevant factors' may naturally mean the control aspect. One has to remember also the purpose of publishing the Declarations and to give them in so doing a stronger status than the Declarations usually have. This time the Declarations are in line with the Directive's purpose and elaborate it.[169] However, the outcome at this point fully conforms to Declaration No. 9.

Germany urged that the same principle with respect to the 13th and 14th months be applied also to extra holiday bonuses paid abroad (only a *pro rata temporis* payment on the due dates during the posting period 'eats' the minimum wage; paragraph 34). The Court, however, found it unclear whether the complaint concerning contributions for the holiday bonus (and holiday pay) formed a separate head of complaint and dismissed the application for that part (paragraphs 34-37).

As mentioned, Germany amended during the proceedings its general instructions concerning different bonuses. Following that amendment, account was to be taken of all additional payments made in so far as the 'relationship between the service provided by the worker and the consideration which he received in return is not altered in a manner detrimental to the worker' (paragraph 30). Since the amendment concerned only the manner of construing the rule, the principal dispute remained. The Commission still wanted bonuses to be taken into account on a basis broader than the definition used by Germany. In issue here were, in particular, quality bonuses and bonuses for dirty, heavy or dangerous work (paragraph 38).

The decision of the Court was twofold but straightforward, as follows:

> '39 Contrary to what the Commission submits, allowances and supplements which are not defined as being constituent elements of the minimum wage by the legislation or national practice of the Member State to the territory of which the worker is posted, *and* which alter the relationship between the service provided by the worker, on the one hand, and the consideration which he receives in return, on the other, cannot, under the provisions of Directive 96/71, be treated as being elements of that kind.'(italics added)

Hence, the Court first gave importance to the definition adopted by a Member State. This implies that, in theory, there could be elements altering the relationship between the employer and the worker but which nevertheless would fall under the national definition of the minimum wage. Anyway, allowances and supplements, if first

[169] On a similar line concerning such declarations, see case C-368/96 Generic et al. [1998] ECR I-7967, paragraphs 26-27. – It is an issue as such why the Institutions obviously have not taken any additional action so as to publicise the Declarations. It is impossible, or at least excessively difficult to find them on the Internet, notwithstanding that the purpose was to release them to the public. See e.g. Council document 10048/96 (for the Council meeting of 24.9.1996) 'Statements for entry in the Council minutes', Addendum 1 (SOC264, CODEC 550), footnote on page 1.

defined as falling outside the minimum wage, altering the relationship between the employer and worker cannot be treated as part of the minimum wage under the PWD. I call this an alteration-clause.

The Court gave the reasons for this decision in a rather succinct way, as follows:

> '40 It is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation must be provided to the worker for that additional service without its being taken into account for the purpose of calculating the minimum wage.'

This passage is far-reaching and interesting in many dimensions. First, the reason was not just 'normal' but 'entirely normal'. It was something clear without any reasonable doubt or need of further proof. Second, it states a socio-economic 'common ground' in any market economy and, besides, is valid at least throughout the history of minimum wages. Third, the reason is not derived from any law books (or data banks, nowadays) or leading articles of the Treaty but from 'real life'. Fourth, coming closer to the passage's consequences (instead of thinking of its roots), the statement with its 'additional work or work under particular conditions' clearly covers performance-related pay more broadly than in relation to quality, hence also pay elements in relation to quantity or time. This is of importance even in situations, which are quite common in the Nordic countries, where the remuneration consists of so-called direct performance related pay. [170] In a nutshell: the passage operates with changes in the relationship between employer and worker; it is of labour law.

Given the incorporation of proportionality into the 'normative complex' applicable in this case, the substantive outcome in paragraphs 39 and 40 also leads to the question whether there is any trace of a proportionality assessment. No, as the wording makes clear. The Court does not consider whether the outcome goes beyond what is necessary in order to attain the objective of protection of workers. This leads to the conclusion that in 'entirely normal' pay cases a real proportionality assessment does not take place, that it would finally be merely a safety valve for the free movement values or against social protectionism. What is clear, however, is the fact that the Court kept here, too, protection of the worker as its yardstick.

The formal outcome in the case was to condemn Germany for infringement since it had not established the 'alteration-clause' – with the exception of accepting a general construction supplement as a constituent part of the minimum wage - in its minimum wage instructions before the end of the period laid down in the reasoned opinion of the Commission. However, in reality the Commission mainly lost its case, and, indeed, the Court dismissed the application regarding the alteration-clause. The loss is just clearer in relation to the original formula in the application: an alleged inclusion into minimum wage of all allowances and supplements paid, even after the posting.

A further direct conclusion is equally clear. In its application the Commission contended that a Member State cannot, as a host state, impose its remuneration structure in comparisons (see paragraph 18; in the application it was the method of comparison). The judgment means that it may do so, although not without limits,. Put

[170] See the explanation in section 3.2, supra.

the other way round, had the Court affirmed the Commission's application, it would have either required Germany to try to impose the excessively laborious German bonuses (in addition to the minimum wage) or in practice it would have ruined the minimum wage control with respect to workers posted into Germany. This is because the artificial bonuses laid down by the work contracts might not actually have been paid at the end of the contract. The German system is not arbitrary but is de facto a simplified (and low-rate) solution to the German terms and conditions applicable. In so doing it does not result in a higher economic burden for foreign service-providers, on the contrary. The system equally fulfils the requirements set up in paragraph 43 of *Arblade* while it is relatively simple and easily accessible. [171]

One might ask whether there was an alternative way of conceiving the status of Member States as rule-makers on this occasion, hence an independent status outside the judicial control of the ECJ. This would be based, of course, on the wording of second subparagraph of Article 3(1) PWD. [172] The answer is simple, indeed. Namely, given the obligations emanating directly from the Treaty, such exclusion would be impossible by a directive. It would be also fully inconsistent with the fact that it is the PWD, hence EC law, which incorporates the obligation to extend the national minimum wages to posted workers. Furthermore, it would be equally justified to ask what would be the rule-maker status (in pay) of the Member States without the PWD. In that situation the Member States would still not escape the judicial control of the ECJ. In fact there has not been such a case and it will naturally no longer arise given the PWD. [173] Thus, in sum, the way in which the Court established the position of the Member States as a rule-maker corresponds to that intended by the PWD.

3.4 From *Seco* to Alteration Clause - Entirely Normal?

In sports the forthcoming match is always the most important, but in legal reasoning history normally weighs more. Judgment *Commission v. Germany* in a way closes the circle started by *Seco* in 1982 and succeeded by *Rush Portuguesa* (1990), *Vander Elst* (1994), *Guiot* (1996), *Arblade* (1999), *Finalarte* [174] (2001), *Portugaia* (2002) and *Wolff & Müller* (2004). None of these successors includes a passage expressis verbis

[171] We may also state that the judgment respects the German system. By contrast, the treatment of the Belgian minimum wage system in Arblade, paragraphs 46-47, without explanation provisionally excluded from the minimum wage the 13th salary month (timbres-fidélité) and bad-weather payments for construction workers. Thus, the ECJ applied a flat-rate minimum wage. The exclusion was provisional while the Court, wisely enough, left the final contents of the Belgian minimum wage for the national court to confirm. Judgment Commission v Germany, together with PWD, means that the provisional exclusion in Arblade belongs now entirely to legal history.

[172] Basing the Member States' exclusion from the judicial control of the ECJ by virtue of Article 137(5) EC is not worth any real consideration. As is natural, there is nothing e.g. in the judgment Commission v Germany indicating that such an issue need be raised, let it be considered by the Court. If true, it would have been an issue to be noted *ex officio*.

[173] The Commission invoked also Article 49 EC. The Court, having established the failure to fulfil the obligations on the basis of PWD, found it unnecessary to examine the action in respect of Article 49 EC (paragraph 42).

[174] It dealt with the realisation of a part of the extension right, namely holiday pay, and merits to be counted in this continuum. Judgment Mazzoleni I comment briefly in footnote 177, *infra*.

amending the line of a predecessor, although the Court has shown its capacity to make relevant moves even by omitting references to previous case-law. All this leads to the conclusion that in general terms the Court has developed its line with natural steps: from *obiter dicta* via questions and answers in preliminary rulings to the application and interpretation of the PWD, in the light of the Treaty. However, various assessments exist by scholars as to distinguishing turning points or deviating passages. [175] From today's perspective it seems justified to conclude that while *Seco* (including the basic concept on the contents of the common/internal market, i.e. legitimating state measures – the extension right of minimum wages - against low-wage competition within temporary provision of services) and *Rush Portuguesa* clearly were important for social Europe, *Arblade* was and still is the landmark in case-law, not just in confirming the extension right but particularly in establishing the status of das Sozial (i.e. protection of workers, construction workers in particular) in more general terms in the field of the free provision of services, hence in the core of regulating the Internal Market. One can condense the outcome by stating that the protection of workers justifies proportionate restrictions on the free provision of services.

Arblade was, however, a pre-PWD case. In this sense *Commission v Germany* is, if not a landmark, a long-standing statue anyway. It interprets, as does *Wolff & Müller*, the Directive. It is natural to think that the Directive and its appropriate application by the Member States is the source for the formal rewriting (I do not submit it is a substantive change) of the normative complex in which fixing the definition of the minimum wage operates. The rewriting meant declaring the status of the proportionality assessment therein but with protection of workers as its yardstick. Finally the proportionality assessment remains as a safety valve for free market values and against social protectionism. As is 'entirely normal' in the internal market business, not everybody is happy.

This outcome (protection of workers justifies proportionate restrictions) is, of course, also a specification of the contents in Article 50(3) EC: temporary provision of services in another Member State under the *same* conditions as those applicable to domestic service providers. That proviso, too, must be read in the light of the Arblade-test.

3.5 On Pay Comparisons in General

As mentioned, *Commission v. Germany* de facto decided that the host state is entitled to establish the method of comparison of working conditions, albeit within the limits set by the Treaty. This line drawing still necessitates some further remarks on these comparisons.

[175] Some examples on highlights: both Kolehmainen (op.cit, p. 125-135) and Davies (IJL Vol. 31, No. 3, September 2002, p. 301 et seq.) present Arblade as a landmark decision while only Davies really analyses the consequences of the four-fold Arblade-test (while he doesn't use this name). Kolehmainen concentrates on the practical application of the justification principles (Arblade-test) in that particular case. Giesen, who in general terms accepts the balancing of social protection and fundamental freedoms in case-law (see section 1.3.5, at footnote 79, *supra*), regrets that the extension right in Portugaia was left up to the national authorities and courts (see footnote 55, *supra*).

However, comparing the national schemes and pay provisions is not an easy task if one takes just time-related wages with their many components. Furthermore, the decision on the practical use of performance-related pay might be simple in a clear majority of cases as in the new construction of buildings (or civil engineering projects) that do not include e.g. new materials, production methods or safety and health aspects requiring time-related remuneration. Normally the collective agreements concerned include the necessary and detailed rules on the use of performance-related pay. [176] Anyway, e.g. comparing a time-related pay scheme to a performance-related one is something that the EC should not impose but should respect the a priori right of the host state concerned to use such a method in remuneration and to set up the rules if a comparison is to be made between a time-related and performance-related scheme.

Putting fine-tuning aside right now we may distinguish two basic methods of comparison: a benefit-by-benefit model and a package model. [177] The German case is a graphic example of the former: hourly wages and holiday remunerations are compared respectively and separately. On the other hand, the agreement between the Dutch and Belgian social partners in construction in 1997 established that there is a sufficient equivalence between the benefit packages in those countries. The agreement at the same time meant also that the social partners and the authorities do not require payments of the separate benefits (in practice: the holiday pay) concerned via the respective social fund in the host country (hence when Belgians work in the Netherlands and vice versa). Instead, in posting situations the companies continue paying via the home state fund. The agreement is equipped with a safety valve including a possibility for individual workers to require a comparison of benefit-by-benefit. This is due to the fact that legislation in both countries is based upon the comparisons benefit-by-benefit. The package comparison between these two countries is thus an exception in formal terms. The social partners anyway find that the package method in this Belgian-Dutch case gives a feasible and sufficiently reliable application. Individual requests for benefit-by-benefit comparisons have obviously been rare, if they so far exist at all. The Belgian-Dutch agreement is declared binding erga omnes at least in the Netherlands. [178]

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[176] It seems that e.g. in negotiations of the on-going Laval case in Sweden the Construction Workers' Union would have accepted that the Latvian workers would carry out the works for an hourly wage, the amount of which is the crucial point. The Swedish collective agreement concerned takes the performance-related remuneration as the principal object of local negotiations in wage setting.

[177] As a third alternative I may mention comparing the annual earnings that Advocate General proposed in the case C-369/96 Arblade [1999] ECR I-8453. The Court in judgment Arblade left it without any reference. Such a comparison includes a lot of vagueness and unsure factors, such as partial unemployment, whose effect makes it finally desktop wisdom. Such comparisons have only a theoretical and extra-judicial knowledge value. – The comparison present in case C-165/98 Mazzoleni [2001] ECR I-2189, including even the impact of taxation and welfare services, deviates from the comparison of gross wages intended by the PWD. However, it was also a sui generis case in the field of frontier work.

[178] On this agreement, see e.g. the summarised country report on the Netherlands by Mijke Houwerzijl, in Cremers and Donders (eds.), The free movement of workers in the European Union. CLR Studies 4 (2004), p. 101. Technically the bilateral agreement has been transferred to a provision of the Dutch collective agreement in construction, subject to the erga omnes declaration; statement of Mijke Houwerzijl on 18 February 2005. As to Belgian law, see the

As mentioned, the *ratio* of the Directive is more in favour of the benefit-by-benefit model. Namely, Article 3(7) refers to more favourable conditions applicable. Furthermore, the Directive in Article 3(1) treats minimum rates [179] of pay (including overtime rates) and paid annual holidays separately. Furthermore, the Declaration No. 9 attached to the PWD refers to comparisons on the basis of remuneration per hours worked. The EFBWW study of 2004 reveals that the comparison of benefit packages strictly speaking applies only between Belgium and the Netherlands. Another issue is that the German social partners (i.e. their holiday pay fund, now called SOKA-BAU) have joined this agreement in the sense that Germany does not require Dutch and Belgian companies, who pay contributions for the holiday pay fund in their respective countries, to pay the contributions in Germany. Accordingly, German companies continue paying contributions in Germany when carrying out works in Belgium or the Netherlands.

The European social partners in the construction industry, EFBWW and FIEC, have noted, after discussions lasting some seven years, the impossibility of imposing a more elaborate European model for the comparisons. Under the heading 'Bilateral actions in favour of a Europe-wide approach' they took in their joint statement of 2004 the favourability principle as the starting point, clearly having Article 3(7) PWD and the benefit-by-benefit approach in mind. They further noted that 'the comparison of labour conditions is complicated because in practice it is comparing apples and oranges.' They therefore note as a positive development that 'social partners of several Member States with similar socio-economic developments and structures conclude bilateral agreements to recognize each others' collective agreements, minimum wages and/or paid holiday schemes.' [180]

One has to highlight that the comparison is essentially easier in cases where there is a clear difference between benefits applicable in the home and host states, as is the case between the old 15 and the 10 new Member States. Whereas the overall difference between the benefit levels is one to three or four, a discussion like that on the benefit-by-benefit or the package comparison does not really emerge. The best provisions apply. Where it does, the Community, ultimately the Court, would best serve the promotion of free movement of services by guaranteeing that such a comparison is based on objective grounds, as well as taking account of the diverse forms of national practices, in particular in the field of contractual relations (Article 136 EC).

There remains the formal question about overlapping or double payments of employer's contributions to social funds running, above all, holiday pay schemes in

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summarised country report by Prof. Dr. Yves Jorens and Filip Van Overmeiren. They refer to the national law of 5 March 2002 implementing the PWD. It de facto repeats the text of Article 3(7) PWD and means a benefit-by-benefit comparison. Ibid, p. 71.

[179] The plural form 'minimum rates' (les taux de salaire minimal, Mindestlohnsätze) was meant to be an intentional choice in every language while the Swedish and Danish versions anyway are in the singular (minimilön, mindsteløn).

[180] The joint statement is included in Cremers and Donders (eds.), The free movement of workers in the European Union. CLR Studies 4 (2004), pp. 138-141; see p. 140, paragraph 7. The social partners also note how 'between Member States with unequal socio-economic conditions the application of the favourability principle is not so difficult as the best provisions will apply.'

several countries. In *Arblade* (paragraph 51 and the second ruling) the Court confirmed that the host state cannot require payments to its fund 'where the undertaking in question is already subject, in the Member State in which it is established, to obligations which are essentially comparable, as regards their objective of safeguarding the interests of workers, and which relate to the same workers and the same periods of activity.' At the same time, the Court left the backdoor open for such an imposition by the host state (paragraph 54) if it confers on workers 'an advantage capable of providing them with real additional protection which they would not otherwise enjoy.' As the Declaration No. 7 attached to the PWD shows, the PWD intended to cover the contributions to the social funds in the host state. [181] However, an interpretation based on the Treaty obligations leads to the application of this Declaration in the light of the requirement set up in paragraph 54 of *Arblade*. Real additional protection must exist for justification.

[181] The Declarations are e.g. the Council document 10048/96 (for the Council meeting of 24.9.1996) 'Statements for entry in the Council minutes', Addendum 1 (SOC264, CODEC 550).

Chapter IV

On the Right to Strike in EC Law

4.1 Background

As a relevant conceptual remark I denote that, like many other labour law scholars, I use the phrase 'right to strike' in its broad sense, hence, as a synonym for 'industrial action' and 'collective action to defend the workers' interests'. Unless otherwise indicated, therefore the phrase 'right to strike' also covers forms of action other than those within a valid contract of employment, such as blockades and secondary boycotts. Thus, sympathy actions are covered, but with the reservation that in this study I pass over the delicate question of cross-border sympathy action. 'Industrial action' usually means any form of action threatened or taken by a party in order to protect or promote its interests, which may lead to the disruption of production or economic activities more generally.

The issue of the right to strike in EC law is deeply connected with the topic in my three previous Chapters, i.e. the Posted Workers Directive (PWD). The PWD operates in its Article 3(8) on three types of collective agreements: (i) those declared to be of universal application (erga omnes); (ii) those generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned, and (iii) those concluded by the most representative employers' and labour organizations at national level which are applied throughout the national territory. Agreements type (ii) and (iii) are secondary and subject to additional provisions on equal treatment between domestic and foreign undertakings. It is no secret that type (ii) (national) agreements was intended to cover the Danish-Swedish situation of a de facto erga omnes of the collective agreements concerned, due to the high degree of organisation in those countries. The national agreements are in Denmark and Sweden normally complemented with separate company level agreements (substitute agreement; 'hängavtal') concluded by the national trade unions or their local constituents with the non-organised employer, whether domestic or posting workers from another Member States. [182] The substitute agreement practice is well established also in Finland. In the Nordic labour law tradition the substitute agreements incorporate also a peace clause with the same effect as that in the principal national agreement.

However, each of these three types of agreement (hence, company level agreements as well) may raise the question about the right to strike in the context of a posting situation, either when striving to reach such an agreement during collective bargaining or in applying it. The inevitable question arises about the protection of the right to strike in relation to the fundamental freedom to provide services in the EU/EEA. I will simplify this reasoning by setting aside the issue of strikes carried out to reach a national collective agreement. One may state in brief that by virtue of the equal treatment principle (Articles 12 and 50(3) EC) a national trade union obviously may

[182] On the Nordic Collective agreements see e.g. Jonas Malmberg, The Collective Agreement as an Instrument for Regulation of Wages and Employment Conditions, in Peter Wahlgren (ed.): Stability and Change in Nordic Labour Law. Scandinavian Studies in Law, Vol. 43, Stockholm 2002, pp. 189-213; on substitute (accession) agreements pp. 196-7.

direct its industrial action also against a foreign employer posting workers. This leads us to concentrate on industrial action in support of claims on a substitute agreement.

Even if the right to strike were to be silently inherent in the context of the PWD, its Preamble makes the position clear by stating explicitly in Recital 22 that 'this Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions.' It expresses the principle and conviction of the Council and Parliament to not interfere in that a priori national law on collective action. It can be seen that this is in line with Article 2(6) of the Maastricht Agreement on Social Policy, now enshrined in Article 137(5) EC, according to which '(t)he provisions of this article shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs.' I will come back to this provision later in my reasoning. Anyway, the PWD applies as an elaborating instrument in the legal framework of the Treaty, particularly in the framework of Articles 49 and 50 EC. Hence, in trying to answer the question about the relationship between the right to strike and the freedom to provide services a preliminary issue that needs to be discussed is whether Articles 49 and 50 EC do have a horizontal direct effect; whether they can be relied on in industrial action disputes between private parties. Indirectly this question does cover also the question about the compatibility of national strike rules with the EC Treaty. Both questions have become subject to a preliminary ruling of the ECJ in the case C-341/05 *Laval un Partneri* (hereinafter '*Laval'*), where the Arbetsdomstolen (Labour Court of Sweden; a single national instance for collective labour disputes, collective agreements included) has decided to request it. In shaping this legal complex under EC law one has to distinguish carefully between the rules on priority of collective agreements (see the reference question B below) that at the same time regulate also the applicability of the statutory peace clause (the Swedish lex Britannia) and their application in concrete cases. [183]

[183] (Interim) Decision 49/05 of the Arbetsdomstolen (Labour Court of Sweden) on 29 April 2005 (www.arbetsdomstolen.se) in the case Laval un Partneri Ltd v. Svenska Byggnadsarbetare-förbundet (Swedish Building Workers' Union), Svenska Byggnadsarbetareförbundet, avdelning 1 (the union's local department No 1), and Svenska Elektrikerförbundet (Swedish Electricians' Union). The Latvian company claims with its suit that the Building Workers' Union, its local department No. 1 and Electricians' Union have resorted to industrial action incompatible with Article 49 EC and are liable for damages. The company had posted workers from Latvia to Sweden and paid some 30-50% of the viable Swedish wages. The Building Workers' Union urged the company to sign a substitute collective agreement, with the Swedish level of wages and benefits. The company refused and the union resorted – after many negotiations - to industrial action (boycott and blockade) concerning the construction site in Vaxholm, supported by the Electricians' Union. The outcome was that the company withdrew from the works concerned but continues the legal proceedings. A sympathy action is allowed under Swedish law if the principal action is legal. The case involves also variable details in the Swedish benefits a priori or allegedly applicable to the workers posted. I leave them aside now and look at the case purely from the perspective of proper wages. I use the expression 'right to strike' in describing the events there, although in practice it was industrial action that was more in the form of a blockade that affected electrical installations and various works outside the activities of the company Laval. - The second interim decision that includes the reference questions with their (summarized) grounds the Labour Court of Sweden published (in Swedish, only) on 15 September 2005; see <http://www.arbetsdomstolen.se/pdf/ab133.pdf>.

4.1.1 First Reference Question in *Laval*; Recital (22) of the Preamble to the Posted Workers Directive

Hence, in its first question the Labour Court of Sweden asks, as follows:

> Is it compatible with rules of the EC Treaty on the freedom to provide services and the prohibition of discrimination on the grounds of nationality and with the provisions of 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 for trade unions to attempt, by means of industrial action in the form of a blockade, to force a foreign temporary provider of services in the host country to sign a collective agreement in respect of terms and conditions of employment such as that set out in the above-mentioned decision of the Arbetsdomstolen, if the situation in the host country is such that the legislation intended to implement Directive 96/71 has no express provisions concerning the application of terms and conditions of employment in collective agreements?

The working conditions subject to a targeted substitute agreement were a practical solution based on those prescribed by the national sector-wide collective agreement in the construction industry. The first question requires general argumentation on the contents of the right to strike (industrial action) in EC law. However, I do not present in detail the argumentation of the parties in the *Laval* case in the national court. In general terms, the employer side maintains that the industrial actions concerned are unlawful as violating Articles 12 and 49 EC, as well as the PWD. The first mentioned (Article 12 EC) I take as a corollary argument under Article 49 EC (which I discuss also *juncto* Article 50 EC). The main argument in EC law of the union side has been that the EC is not competent at all to regulate the right to industrial action. I will discuss this issue as a further preliminary question to the right to strike in EC law (see section 4.3).The last mentioned argument (that the action violates the PWD) merits only a brief discussion here, given the recital No. 22 of the Preamble to the PWD, according to which the Directive does not prejudice the national right to 'collective action to defend the interests of trades and professions'.

This recital was not based on a last minute thought, but resulted from careful consideration during the preparation of the PWD. It was generated especially by the accession of Austria, Finland and Sweden in 1995. As to Sweden, it was directly linked also to the labour market Declaration attached to the Accession Act. It was intended to safeguard – in the form of assurances given by the Commission – 'the Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners'; see footnote 286, *infra.* This was fundamental in gaining the general public's support for the accession.

Recapping the recital textually, it is notable that it is not limited to the right to strike *sensu stricto*. It is intended to cover also different lawful sympathy actions that are typical especially in Sweden and Finland. It was also fully in line with the right to strike/industrial action as defined within the ILO (see section 4.4.2, especially at footnote 217, *infra*). Textually the recital leaves no uncertainty about the fate of the 'PWD argument' of the company Laval; it fails. Contextually the recital's impact is clear in principle. When read as a part of the preamble of the PWD, it is essential to

see that recitals 1, 2, 3 and 5 link the PWD directly to the completion and functioning of the Internal Market. The principles of the Internal Market are governed by the Treaty. Hence, whereas no secondary EC legislation can overrule the Treaty, the logical conclusion in this broader context is that recital 22 of the PWD does not guarantee any full immunity for national rules on strikes or industrial actions in general. [184] It is, of course, of value also in interpreting the Treaty itself because the reasonable assumption is that secondary legislation is intended to elaborate and in a way to extend the Treaty, but not to contradict it. In conclusion, it is the interpretation of Articles 49 and 50 EC that decides, and not Recital 22) of the PWD.

4.1.2 Second Reference Question: Lex Britannia

The second question of the Labour Court of Sweden deals with the specific structure in Swedish labour law, as follows (my translation):

> The Swedish Medbestämmandelagen (Law on workers' participation in decisions) prohibits industrial action taken with the intention of circumventing a collective agreement concluded by other parties. That prohibition applies, however, pursuant to a special provision contained in part of the law known as the 'lex Britannia', only where a trade union takes measures in respect of industrial relations to which the Medbestämmandelagen is directly applicable, which means in practice that the prohibition is not applicable to industrial action against a foreign undertaking which is temporarily active in Sweden and which brings its own workforce. Do the rules of the EC Treaty on the freedom to provide services and the prohibition on discrimination on grounds of nationality and the provisions of Directive 96/71 constitute an obstacle to an application of the latter rule - which, together with other parts of the lex Britannia also mean in practice that Swedish collective agreements become applicable and take precedence over foreign collective agreements already concluded - to industrial action in the form of a blockade taken by Swedish trade unions against a foreign temporary provider of services in Sweden?

Hence, lex Britannia means that the prior agreement rule does not cover a foreign company bound by a prior collective agreement abroad, and which therefore is not subject to the Swedish Co-determination Act (that is at the same time the Swedish 'Collective Agreement Act'). In general terms this 'gaining of precedence' is nothing more than the host state law 'gaining precedence' by virtue of the PWD in Member States where minimum wages apply to posted workers directly by virtue of law or an *erga omnes* declaration of a state authority. However, lex Britannia now becomes subject to preliminary ruling on the basis of both discrimination and the Arblade-test – in case that discussion on the horizontal direct effect of Articles 49 and 50 EC first leads to an affirmative conclusion.

[184] Also Sigeman, professor emeritus in labour law, notes this; see Tore Sigeman, Fri rörlighet för tjänster och nationell arbetsrätt, Europarättslig Tidskrift 3/2005, p. 481.

4.2 Horizontal Direct Effect of Articles 49 and 50 EC

A natural source in addressing the direct effect issue is the case-law of the ECJ. It started in 1974 with case *Van Binsbergen* [185] where the Court confirmed the vertical direct effect of Article 59 EC. Soon after, in case *Walrave* [186] the Court extended the direct effect to cover also rules of a private law nature. It stated the basics, as follows:

> '16 Articles 7, 48, 59 [now 12, 39 and 49] have in common the prohibition in their respective spheres of application, of any discrimination on grounds of nationality.
>
> 17 Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services.
>
> 18 The abolition as between Member States of obstacles to freedom of movement for persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Treaty, would be compromised if the abolition of barriers of national origin could be neutralized by obstacles resulting from the exercise of their legal autonomy by associations of organizations which do not come under public law.
>
> 19 Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulation and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.'

Hence, Article 49 EC covers also rules of a private law nature. Anyway, the Court, whilst it referred to the risk of inequality, did not discuss inequality stemming from material differences in the rules concerned, whether public or private. However, the conclusion of the Court (paragraph 34 and the ruling) was that the first paragraph of Article 49 EC, [187] 'in any event in so far as it refers to the abolition of any discrimination based on nationality, creates individual rights which national courts must protect.'

In *Donà v. Mantero* [188] the Court in 1976 confirmed that non-discrimination covered the rules of a private sporting association. It equally confirmed that also Article 60(3) EC - at least in so far as it seeks to abolish any discrimination against a person

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[185] Case 33/74 Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid.[1974] ECR 1299.
[186] Case 36/74 B.N.O. Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie et Federación Española Ciclismo [1974] ECR 1405.
[187] Article 49, first paragraph reads: 'Within the framework of the provisions set out below, restrictions on the freedom to provide services within the Community shall be prohibited in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.' – As to legal consequences of Walrave, e.g. Andrew Clapham, Human Rights in the Private Sphere, Clarendon Press, Oxford 1996 (a revised and updated version of his doctoral thesis of 1991), pp. 249-252, equated them with those of Defrenne II in gender equality at pay (case 43/75 [1976] ECR 455), thus proving within the free provision of services the horizontal direct effect of non-discrimination based on nationality (conclusion on p. 252).
[188] Case 13/76 Gaetano Donà v Mario Mantero [1976] ECR 1333.

providing a service by reason of his nationality or of the fact that he resides in a member State other than that in which the service is to be provided - has a horizontal direct effect and creates individual rights that national courts must protect (paragraph 20). According to Article 60(3) (now 50(3)) EC

> […] 'the person providing a service may, in order to do so, temporarily pursue his activity in the State where the service is provided, *under the same conditions* as are imposed by that State on its own nationals.' (emphasis added)

In delimiting the reach of the free provision of services the Court used the economic nature of the activities as the very yardstick. Sports activities fell under the prohibition in so far as they were of economic nature while purely sporting interests fell outside (paragraph 19).

In 1977 in case *van Ameyde* [189] the Court further confirmed that 'for discrimination to fall under the prohibitions contained in […] articles [52 and 59] it suffices that such discrimination results from rules of whatever kind which seeks to govern collectively the carrying on of the business in question.' The case concerned the operation of the so-called green card system in vehicle insurance.

In case *Bosman* [190] the questions for preliminary ruling concerned only the interpretation of Article 39 (ex 48) EC, more particularly the transfer rules of professional football players. However, the Court (in 1995) in its reasoning (paragraphs 83 and 84) repeated the essential points in paragraphs 18 and 19 of *Walrave*, quoted above.

In judgment *Deliège* [191] the Court again and with main proceedings in the field of the free provision of services confirmed the principles in *Walrave* (paragraphs 17 and 18) and *Bosman* (paragraphs 82 and 83). Most recently the Court (in 2002) in *Wouters* [192] did the same and stated, also this time within the framework of the free provision of services, as follows:

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[189] Case 90/76 S.r.l. Ufficio Henry van Ameyde v S.r.l. Ufficio centrale italiano di assistenza assicurativa automobilisti in circolazione internazionale (UCI) [1977] ECR 1091, paragraph 28.

[190] Case C-415/93 Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman [1995] ECR I-4921. Referring to judgments Walrave and Bosman, Bruno de Witte notes that the fundamental freedoms in the common market exceptionally have the horizontal direct effect, thus regarding the collective regulation by private organizations, such as a sports federation. Bruno de Witte, The Past and Future Role of the European Court of Justice in the Protection of Human Rights, in Philip Alston et al. (eds.), *The EU and Human Rights*, Oxford University Press 1999, p. 874.

[191] Joined cases C-51/96 and C-191/97 Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo (C-51/96) and François Pacquée (C-191/97) [2000] ECR I-2549, paragraph 47.

[192] Case C-309/99 J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervener: Raad van de Balies van de Europese Gemeenschap ECR [2002] I-1577.

120. It should be observed at the outset that compliance with Articles 52 and 59 [now Articles 43 and 49] of the Treaty is also required in the case of rules which are not public in nature but which are designed to regulate, collectively, self-employment and the provision of services. The abolition, as between Member States, of obstacles to freedom of movement for persons [and to free provision of services [193]] would be compromised if the abolition of State barriers could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations not governed by public law (Case 36/74 *Walrave and Koch* [1974] ECR 1405, paragraphs 17, 23 and 24

[193] As a lapsus the English version does not refer in this sentence to the free provision of services. The French version does (as the Dutch, Swedish etc.). Taken substantively, the wording of the first sentence – while it refers only to collective regulation of self-employment and the provision services but not to paid labour – may provoke a misleading interpretation. Namely, that the horizontal direct effect of Article 49 (and that of Article 43) would *a priori* not cover the collective regulation of terms and conditions of employment. Such an interpretation falls, first, due to the simple fact that the Court referred to paragraph 17 of Walrave (that includes also 'regulating in a collective manner gainful employment'). Second, the context in Wouters proves the fully unconvincing nature of such an interpretation. Namely, the case dealt with the possibility of prohibiting a lawyer-accountant partnership in national law - without the prohibition being i.a. in breach of Articles 43 and 49 EC. While lawyers of course may act both as independent economic actors (respectively as members of such a coalition of lawyers) and as salaried employees ('workers' in terms of the Treaty), any formal decision on such a partnership certainly falls under the business powers of the employer. In their respective last answers both the Advocate General Léger (Opinion of 10 July 2001, relying on 'lawyers' independence and professional secrecy' in the work of 'lawyers practising') and the Court (relying on the 'proper practice of the legal profession' BUT defining the lawyers as 'Members of the Bar') allowed such a national prohibition. However, and this is my third point, AG 'for the sake of completeness' discussed (in paragraphs 48 to 55) in brief the nature of lawyers' activities and distinguished (in paragraph 52) also a third category: 'Second, it may happen that lawyers do not really work under their employer's direction and that their remuneration is directly linked to the latter's profits and losses. In that case, lawyers belong to the borderline categories mentioned by Advocate General Jacobs in his Opinion in Pavlov'. However, lacking a precise question and sufficient information on the status of salaried lawyers in the Netherlands, he reasoned further – as did the Court – only on the basis that lawyers are undertakings in the sense of Article 81(1) EC. Anyway, in reasoning for his last answer, he characterised (in paragraph 234 which corresponds to para. 120 of the judgment) Articles 43 and 49, as follows: 'Let me make the preliminary observation that the Treaty provisions on freedom of movement for persons and the free movement of services are not applicable only to measures taken by the public authorities. They also extend to measures of another kind which seek *to regulate, collectively, the employment of workers* and the provision of services. Articles 52 and 59 of the Treaty may therefore apply to rules adopted by associations or bodies such as professional associations.' (my emphasis). The AG referred to Walrave, Donà, Deliège and Angonese (while the Court replaced Deliège by Bosman, obviously by reasons not relevant in this reasoning). The inevitable conclusion is that the Court – while it accepted the national ban of partnership between members of the Bar (not 'lawyers practising'!) and accountants – by omitting a reference to paid labour in its paragraph 120 of Wouters did not grant any general exception for paid labour from the horizontal direct effect of Article 49 (or from that of Article 43). In Wouters it took no position in that respect. - As to the interpretative value of the AG's opinion in this particular question, see the qualification by Ole Due in footnote 14, *supra.*

[194]; Case 13/76 *Donà* [1976] ECR 1333, paragraphs 17 and 18; Case C-415/93 *Bosman* [1995] ECR I-4921, paragraphs 83 and 84, and Case C-281/98 *Angonese* [2000] ECR I-4139, paragraph 32 [195]).

This case-law is settled and conclusive in the sense that Article 49 (ex 59) EC has the horizontal direct effect on *collective* regulation of terms and conditions of employment. It may thus be invoked, within these limits, in judicial proceedings between private parties. It would be artificial to maintain that an industrial action striving to achieve collective regulation would escape the direct effect because the action itself is not a regulatory measure. Such a plea would artificially detach the action from its purpose and is therefore not convincing as a justification. Another issue is that there might be actions without any regulatory purpose, such as political ones or those directed against (or for) a purely business decision that formally belongs to the employer's discretion. Their justification I leave aside now. As to Article 50(3) EC, there is only one judgment (*Donà*) showing its direct horizontal effect concerning discrimination on the grounds of nationality but it was, however, delivered in 1976 by the Court sitting with seven judges. There is no reason that Article 50(3) EC should have lost its character as having the horizontal direct effect, at least concerning discrimination. I therefore conclude that Article 50(3) EC also has the horizontal direct effect, nowadays obviously at least within the scope of Article 13 EC.

4.2.1 Reach of Horizontal Direct Effect of Articles 49 and 50 EC

The scope of EC law is not unlimited. The Community is based on conferred powers. I will first try to illustrate in brief the limits of Articles 49 and 50 EC as it appears from case-law so far.

The Court most recently discussed these limits in the sports case *Deliège* and concluded that sporting is subject to 'Community law only in so far as it constitutes an economic activity within the meaning of Article 2 of the Treaty'. [196] Furthermore, the concept of economic activities may not be interpreted restrictively [197] and, according to settled case-law, the pursuit of an activity as an employed person or the provision of services for remuneration must be regarded as an economic activity within the meaning of Article 2 of the Treaty. [198] Hence, everything included under

[194] This time the Court referred also to paragraphs 23 and 24 of Walrave where it had linked the scope of Article 59 (now 49) EC to that of Article 48 (now 39) EC.
[195] Judgment Angonese concerned the free movement of persons.
[196] Paragraph 41. The ECJ referred to Walrave, paragraph 4, and Bosman, paragraph 73.
[197] Deliège, cited above, paragraph 52, with the reference to Case 53/81 Levin v Staatssecretaris van Justitie [1982] ECR 1035, paragraph 13.
[198] Deliège, paragraph 53, where the Court referred to judgment Donà, cited above, paragraph 12, and Case 196/87 Steymann v Staatssecretaris van Justitie [1988] ECR 6159, paragraph 10. Further in this sense, e.g. in Case C-275/92 Schindler [1994] I-1039, paragraph 19, where the ECJ, referring to Donà and Steymann, confirmed that lotteries are "economic activities". Similarly, thus indicating the broad meaning of 'economic activities', judgment Jany stated how (self-employed) prostitution is a provision of services for remuneration which falls within the concept of economic activities; Case C-268/99 Jany et al. [2001] ECR I-8615, paragraph 48. In the same judgment the ECJ stated that it is not for the Court to substitute its own assessment for that of the legislatures of the Member States where an allegedly immoral

the heading of economic activity is subject to EC law and may at the same time be a prima facie forbidden restriction on free provision of services. It is self-evident that strikes will not fall outside EC law on the supposed grounds that they are not economic activities and are at most just social activities or something similarly 'non-economic', since they are aimed at stopping or hindering such activities. Otherwise we know on the basis of e.g. *Steymann* that, to fall under economic activity, it is sufficient for something to be of genuine and effective work and not such as to be regarded as purely marginal and ancillary. [199] However, we may conclude that a strike may fall outside EC law due to its marginal or ancillary nature. It is a kind of a natural *de minimis* principle and obviously applicable under both EC and national law.

In *Deliège* the Court concluded that a certain sporting rule does not in itself, as long as it derives from a need *inherent* in the organisation of a competition, constitute a restriction on the freedom to provide services under Article 59 (now 49) of the EC Treaty. In this way the Court set up an essential limit. In *Society for the Protection of Unborn Children v Grogan* the Court found that the prohibition of abortion, enshrined in the Irish constitution, fell outside the scope of EC law and did not assess it the light of Articles 49 and 50 EC. It also protected information on legal abortion abroad only in so far as the clinics concerned were involved in the distribution of information. [200] The Court did not discuss at all the effect of freedom of expression, enshrined in Article 10 of the European Human Rights Convention. The doctrine has widely criticized this.

However, as these two examples show, in assessing the status of a strike in EC law a further preliminary question is whether it falls within the ambit of EC law at all, more particularly under Articles 49 and 50 EC. Only if it does, can the legal question arise about restricting the free provision of services and about its possible justification.

4.3 Right to Strike in the Ambit of EC Law?

What does the Treaty say about the right to strike? Are there relevant delimitations of EC competence regarding other matters?

First, the Treaty of Rome said nothing directly about the right to strike, but it did oblige the Commission in Article 118 to encourage cooperation between the Member States particularly in the fields of labour law and working conditions, as well as in matters relating to the right of association and collective bargaining. However, the inherent assumption was that the Council was not expected to act in these fields. Besides, the Treaty of Rome in Article 2 stated that the leading task of the Community was to promote 'harmonious development' of economic activities and also 'accelerated raising of the standard of living'; the Treaty of Maastricht qualified economic activities with their 'harmonious and balanced' developments (which is now 'harmonious, balanced and sustainable'). Article 118b EEC, inserted by the Single European Act, referred to 'relations based on agreement' between management

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activity is practised legally (paragraph 56). However, in ordre public (public policy) issues a national margin of discretion exists.

[199] Steymann v Staatssecretaris van Justitie (see the previous footnote), paragraph 13.

[200] Case C-159/90 The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others [1991] ECR I-4685.

and labour at the European level (which is now situated in Article 139 EC). Then, outside the Treaty of Maastricht, the 11 Member States in their Social Policy Agreement (Article 2(6)) stipulated that the provisions of that Article 'shall not apply to pay, the right of association, the right to strike or the right to impose lock-outs'. This provision was later incorporated into the Treaty of Amsterdam as Article 137(6) EC and the Treaty of Nice just changed the number to 137(5). It is the only place where the Treaty mentions expressly the right to strike. Second, according to Article 137(2) and 137(1)(f) EC, the Community may issue unanimous directives on 'representation and collective defence of the interests of workers and employers, including co-determination, subject to paragraph 5'. This provision is accordingly copied from Article 2(3) of the Maastricht Social Policy Agreement. Third, a particularly relevant peg in the Treaty is Article 95(2) EC, enshrined by the Single European Act, which excludes 'provisions relating to the rights and interests of employed persons' from qualified majority voting. Fourth, there is no clause in the EC Treaty excluding any European harmonisation of strike laws as there is, with slightly variable material contents, in the case of education (Article 149 EC), vocational training (Article 150 EC), culture (Article 151 EC) and public health (Article 152 EC). The Treaty of Maastricht added these provisions. Fifth, regarding the right to strike there is no exclusion as there is, since the Treaty of Rome, for national systems of property ownership (Article 295 EC), national security and trade in arms, munitions and war materials (Article 296 EC) and for exceptional security circumstances (Article 297 EC).

There are two main avenues to interpret the Treaty at this point and, more particularly, Article 137(5) EC. [201] A 'constitutional' interpretation line goes that Article 137(5) is intended to exclude all the matters referred to there from the competence of the EC, or to demonstrate such exclusion. [202] Also Article 2 of the so-called Monti-Regulation

[201] As to the different interpretations on Article 137(5) EC especially regarding pay, see Hellsten 2004 (footnote 142, *supra*), passim.
Lord Wedderburn has held – immediately after Maastricht - that a Community instrument on freedom of association would be possible on the basis of Article 94 (ex 100) EC. It implies that the right to strike is not 'constitutionally' excluded from the Community competence by Article 137(5) EC. Lord Wedderburn, Freedom of Association and Community Protection: A Comparative Enquiry into Trade Union Rights of the European Community and into the Need for Intervention at the Community Level, May 1992, paragraph 35.1; a stencil for the European Commission – never published that I know of. I refer also to Lenaerts and van Nuffel who have written how regarding pay, freedom of association and rights to strike and lock-out 'no reliance may be made on Article 137 (paragraph 6)'. Lenaerts and van Nuffel (ed. Bray), Constitutional Law of the European Union, 1999, p. 229.
[202] There is, of course, a close tie between pay and the right to strike. I recall how the Danish and Swedish versions of Article 137(5) EC refer to 'pay relations' (lønforhold, löneförhållanden) which in the Danish and Swedish labour market context – with an emphasized status of collective agreements - feeds the interpretation that Article 137(5) EC defines and excludes the overall EC competence in these relations, strikes included. Textual support this argument finds in the wording of Article 137(1)(f) (ex 137(3)) that refers to issuing directives on representation and collective defence of the interests of workers and employers, including co-determination, *subject to paragraph 5*.
On this 'constitutional' interpretation regarding pay, see also Lena Maier (footnote 88, *supra*) pp. 275-285. Her own conclusion anyway is that it is unclear whether Article 137(5) EC excludes community competence under other Treaty provisions; p. 422 (p. 461 in the English summary). In 'Utstationering av arbetstagare och det svenska kollektivavtalssystemet. En

2679/98 and Recital 22 in the Preamble to the PWD, both with references to national law regarding strikes or fundamental rights, are then explained as reflections of this constitutional exclusion. Continuing this line, the legality of a strike is subject only to national law (or international obligations of the Member States). Hence, an extreme constitutional interpretation of Article 137(5) would mean holding that the right to strike falls entirely outside the legislative competence of the EU. It would on this basis be consistent to hold that a strike (like national strike rules), due to Article 137(5) EC, falls equally outside the scope of Articles 49 and 50 EC. No further discussion about the limits or application of these provisions in this context would be needed. However, such an interpretation (i.e. the entire lack of legislative competence

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rättslig analys' (SACO 2005) she concludes that Article 137(5) EC does not guarantee a full immunity for strikes and national strike law in relation to EC law; pp. 53-54. Further in the Swedish discussion, noteworthy is that Jonas Malmberg has denoted the lack of strike cases in the ECJ without any reference to Article 137(5) EC: Malmberg, Metoder att motverka låglönekonkurrens i Sverige (Methods in opposing low wage competition in Sweden; exists only in Swedish) in Malmberg (red.) Låglönekonkurrens och arbetstagares integritet, Arbetslivsinstitutet 2000:2, p. 19. Tore Sigeman has denoted that Article 137(2) and (5) EC do not, as a logical consequence, rule out Community competence in matters covered by Article 137(5) EC under Article 94 EC. He states that, whatever is the regulatory competence of the Council of Ministers regarding industrial action, the ECJ does not seem to be prevented from judging various private (industrial) actions in relation to the four market freedoms and nationality-based discrimination. As grounds he refers to cases C-265/95, Commission v. France, and C-112/00, Schmidberger; see Sigeman, footnote 184, *supra*, pp. 481-2.
In German literature Birk has firmly expressed the argument that Article 137(5) EC cannot be assumed to be a guarantee of the national right to strike in relation to fundamental economic freedoms in the EC Treaty just because it does not exclude the right to strike from the Treaty; see Rolf Birk, Arbeitskampf und Europarecht, Oetker et al. (Hrsg.), 50 Jahre Bundesarbeitsgericht, Münchner Beck 2004, pp. 1165-1178, especially pp. 1166-8. I take the liberty to denote Birk's basic position – let it be an initial one, concerning "a widely unwritten page" (ibid., p. 1165) - on the right to strike in EC law. Thus, he finds that, when we take into account the several concrete references to that right in the relevant European documents (the 1989 Community Charter of Fundamental Social Rights of Workers, reference to European Social Charter in Article 136 EC and the EU Charter of Fundamental Rights of 2000), the starting point must be that there exists "already today" (i.e. in 2004) a right guaranteed (‚verbürgt') in EC law. In the next phrase he refers to the use of that right within the limits of proportionality and in a legal field where the fundamental freedoms in the Internal Market are not unlimited (ibid., p. 1177). Proportionality and limiting the fundamental market freedom will be discussed especially in sections 4.9 and 4.10., *infra*. The European Social Charter is presented in section 4.4.4, *infra,* and it is dealt with more fully in footnote 294, *infra.*
Novitz has reiterated the position that Article 137(5) EC excludes the matters concerned from the Community's regulatory competence and, as a ground, refers to the principle that a specialized treaty base should prevail; as a conclusion she predicts that there is 'little to protect this entitlement from progressive erosion' by the market freedoms. See Tonia Novitz, The Dialogue between the EU and ILO, in Alston (ed.), Labour Rights as Human Rights, Oxford University Press 2005 (Novitz 2005), p. 218-9. To be fair, one has to remember that Novitz regards EC regulation in principle as possible (although unlikely) under Articles 94 or 308 EC; *ibid*. The essential point is that Novitz does not discuss the situations where the ECJ has to strike a balance between market freedoms and the right to strike. If nothing else that at least reveals how Article 137(5) EC does not conceal a solid escape and/or delimitation of the Community competence. The lessons from cases 283/81 CILFIT [1982] ECR 3415, paragraph 20, and Albany, paragraph 60, show us that Article 137(5) EC must be interpreted finally in the light of an effective and consistent interpretation of the EC Treaty as a whole.

with respect to strikes on the part of the EU) would not solve all the essential problems. Accordingly, it would not be consistent. Also a strike which is perfectly and undoubtedly legal under national law (as when the collective agreement concerned has expired) may certainly be in conflict with EC market freedoms (including the free movement of workers) that have a horizontal direct effect, or with equally effective non-discrimination provisions in Articles 12 and 13 EC. It is evident, finally by virtue of *effet utile* and primacy of EC law, that the supposed prerequisite of a lacking legislative competence, based on Article 137(5), would not *a priori* and as such exempt all the nationally legal strikes from the possible effect of the EC law concerned. Such strikes are within the scope of the Treaty. It then also means de facto a debate (or, judgment!) about the (basic) contents of the right to strike under this EC law (I will discuss it later in this chapter). Hence, even the constitutional interpretation of Article 137(5) does not free us from discussing the contents of the right to strike under EC law with the horizontal direct effect.

The other interpretation line takes as its basis the whole Treaty and reads Article 137(5) EC literally which leads to the conclusion that an EC intervention in strike law would be possible with another legal base, such as Article 94 or 308 EC, or based on the agreement of the European Social Partners. [203] This interpretation line explains Article 137(5) EC merely as a demonstration of the reluctance of the Member States to enact any EC strike directive without in any way excluding the issue as a whole from the formal competence of the Community. On this interpretation line as well, the material contents of the right to strike remain essentially national or subject to international treaties (see section 4.4 et seq., *infra*) while EC law implies mainly a principal protection of the right to strike in relation to the market freedoms and proper competition rules. Article 28 of the EU Charter of Fundamental Rights is a demonstration of this basic protection also under EC law, with an expressed reference to it (see further section 4.4.6, *infra*).

That the right to strike falls under EC competence has particularly the following additional grounds at the Treaty level. First, the location of labour law and working conditions in Article 118 EEC did not prevent the Community from enacting the labour law directives on Collective Redundancies and Transfer of Undertakings in the 1970s. Second, Article 95(2) (ex 100a(2)) EC excludes 'provisions relating to the rights and interests of employed persons' expressly from qualified majority voting, not from the Treaty. Use of Article 94 (ex 100) in the 1970s as a basis for labour law directives naturally was behind this delimitation of qualified majority voting. Third, Article 2(6) of the Maastricht Social Policy Agreement essentially was a late attempt to get the United Kingdom to accede to that agreement. Fourth, essential is that while Maastricht's Article 2(6) was enacted outside the Treaty, it would be even illogical to argue that it would somehow restrict the scope of the original Treaty or that reflected by Article 95(2) (ex 100a). Its incorporation into the Treaty of Amsterdam was rather a political compromise than a legal exclusion. Fifth, the PWD regulates pay and collective agreements in a cross-border context and for its part shows the

[203] On the same line (a directive on the right to strike is conceivable under Articles 94 or 308 EC; the author shares this view) writes also Tonia Nowitz in her dissertation International and European Protection of the Right to Strike, Oxford University Press, 2003, p. 162. Anyway, her previous conclusion is that 'the members of the EU seem to have denied that organization the competence to adopt directives relating specifically to 'the right of association, the right to strike or the right to impose lockouts''; p. 33.

unconvincing nature of the constitutional interpretation of Article 137(5) EC. Sixth, Article 136 EC refers to the European Social Charter and the 1989 Community Charter of Fundamental Social Rights of Workers, and both of them include the right to strike. Seventh, Article 28 of the EU Charter of Fundamental Rights of 2000, including the right to strike, would be meaningless for EC law if the constitutional exclusion by Article 137(5) EC were valid. Finally, nothing in or around Article 137(5) EC shows that it would invalidate the effect of international law, either under Article 307 EC or by virtue of general international law. I will discuss these below in sections 4.5 and 4.6.

The forthcoming *Laval* case in Sweden obviously means that the ECJ has to take stock also on Article 137(5) EC. It seems likely, however, that the ECJ will not embrace the constitutional interpretation thereof, probably with some additional grounds linked to its own position. First, the constitutional interpretation would drop essential internal market 'interferences' from the control of the ECJ which militates against its mission as the guardian of the Treaty, including the principles of primacy of Community law and uniform application of the *acquis*. Second, as the judgment *Schmidberger* shows, the ECJ has without any doubt determined itself competent to judge, in an internal market context, on fundamental rights (freedom of expression and freedom of assembly) guaranteed in the ECHR. [204] Another issue is how the ECJ will express its grounds in judicial language, case-law included. The experience of the sports judgments (*Walrave, Donà* and *Deliège*) shows that the Court may confine itself to a laconic statement based on the concept of economic activities in the sense of Article 2 EC: a strike within the sphere of economic activities is subject to EC law. This kind of line drawing would mean that not all aspects of the right to strike would fall under EC law. As in the case of pure sporting interests, [205] there is certainly at least the policy and internal decision-making of trade unions that fall outside the judicial control of EC law and courts. [206] Anyway, it seems necessary to reason further on the basis that the ECJ, despite Article 137(5) EC, will deem itself competent and compelled to judge on the right to strike in the framework of the free provision of services.

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[204] Case C-112/00 Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich [2003] ECR I-5659, paragraphs 71-94. - I use the abbreviation 'ECHR' for the European Convention for the Protection of Human Rights and Fundamental Freedoms and 'EHRC' for its Court (like 'European Human Rights Court')

[205] In this sense, see case T-313/02 David Meca-Medina and Igor Majcen v Commission of the European Communities, judgment of 30.9.2004, nyr, paragraphs 53 and 63 et seq. The keywords were Competition - Freedom to provide services - Anti-doping legislation adopted by the International Olympic Committee (IOC) - Purely sporting legislation. The Court of First Instance concluded that anti-doping rules are of pure sporting interest and fall outside Community law. The basis of its assessment it defined, as follows (paragraph 42): 'Conversely, legislation which, although adopted in the field of sport, is *not purely sporting* but concerns the economic activity which sport *may* represent falls within the scope of the provisions both of Articles 39 EC and 49 EC and of Articles 81 EC and 82 EC and is capable, in an appropriate case, of constituting an infringement of the liberties guaranteed by those provisions (see, in that regard, the Opinion of Advocate General Lenz in Bosman at I-4930, paragraphs 253 to 286, and particularly paragraphs 262, 277 and 278 EC […])'; my emphasis. The judgment is subject to appeal (see case C-519/04 P) - obviously in vain.

[206] See also Article I-48 of the Constitutional Treaty. The context involves also a question about political strikes, which is not explored here.

4.4 On Protection of the Right to Strike in the Context of EC Law

4.4.1 General Remarks

I first denote the right to strike as presumably a fundamental right in EC law. Such rights enjoy a special status in the legal order of the Community [207] that the Court e.g. in the recent judgment *Omega Spielhallen* expressed as follows:

> 33 […] according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect […].[208]

Hence, fundamental rights are protected as an integral part of general principles of law and in protecting them the Court draws on common constitutional tradition and relevant international treaties. It is plausible also that the Charters adopted within the Community, next to national constitutions, reflect the common constitutional tradition. On the other hand, international treaties giving (only) guidelines do not bind the Court which i.a. means that the Court with respect to strikes is not bound by the weak (and old) letter of the ECHR that recognizes only the freedom of association. The Court naturally takes into account the supervisory practice and jurisprudence of the international treaties. I will return to this below.

However, under this heading I will give only a necessary overview, with some subject-related comments concerning the ILO instruments and the EU Charter of 2000, on the international and EC law instruments governing either the freedom of association or directly the right to strike. Regarding international instruments, I would generally refer to the presentation by Tonia Novitz in her dissertation. [209] At an EC

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[207] On the development and status of fundamental rights in the legal order of the Community see e.g. Tuomas Ojanen, The European Way. The Structure of National Court Obligation under EC Law, Gummerus Kirjapaino Oy, Saarijärvi 1998, pp. 97-136 and 291-324. As to a conceptualizing overview, see e.g. Allan Rosas, The Legal Sources of EU Fundamental Rights: A Systemic Overview, in Colneric et al. (eds.), Une communauté de droit. Festschrift für Gil Carlos Rodriguez Iglesias, Berliner Wissenschafts-Verlag Berlin 2003, pp. 85-102.

[208] Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn, judgment 14.10.2004, nyr. The following case-law was this time cited in paragraph 33: Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71.

[209] Tonia Novitz, International and European Protection of the Right to Strike, Oxford University Press 2003. My presentation draws generally also on Olavi (Olli) Sulkunen, Kansainväliset ammattiyhdistysoikeudet (International Trade Union Rights), Helsinki 2000, XXXIX + 674, with an English summary. I refer also to Olavi Sulkunen, Ammattiyhdistysoikeudet Euroopan yhteisön oikeudessa (Trade Union Rights in EC Law), Työoikeudellisen yhdistyksen vuosikirja 1999-2000, pp. 55-195 (exists only in Finnish). In the latter Sulkunen does not, however, discuss trade union rights in the specific context of the

level the issue (right to strike/industrial action v. fundamental freedoms in the internal market) is naturally particularly complicated due to the diversity of strike laws in the Member States. [210] Therefore, and for space reasons, I have to confine myself to presenting only the basics, followed by shaping a likely or possible application line in EC law, especially in the field of the free provision of services.

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free provision of services. The same concerns Novitz (and Germanotta, see infra). More generally, Sulkunen has not dealt with the status of ILO provisions in EC law by virtue of Article 307 EC or general international law in doctrine while he well mentioned Article 307 in spring 2005. He died on 13 May 2005. Novitz refers to pre-existing obligations of the Member States in one sentence, p. 31; Paul Germanotta and Tonia Novitz, Globalisation and the Right to Strike: The Case for European-Level Protection of Secondary Action, IJCLLIR Vol. 18/1, 67-82, 2002, p. 79, do refer to transposition of ILO norms into the EU as consistent with EU external relations policies (see footnote 220, *infra*) but, graphically, without any reference to Article 307 EC or general international law.
As one of the certainly rare references made to the fundamental right to strike in EC law I may mention Giovanni Orlandini, The Free Movement of Goods as a Possible 'Community' Limitation on Industrial Conflict, ELJ, Vol. 6, No. 4, December 2000, pp. 341-362. His starting point (p. 341) is that Article 137(5) EC excludes the right to strike from EC competence but it doesn't prevent him – without further normative grounds - from referring to its protection under EC law as a fundamental right. This he does, however, also by presenting the 'reasonableness' of appeal to it as one of its criteria (which Novitz, p. 254-5, accepts without comments). I denote an overriding difficulty in deriving such an *overall* criterion from both the formula in Omega Spielhallen, para. 33, and the legal framework in accepting restrictions on fundamental rights, applied e.g. in case Schmiedberger (which I explore below in section 4.10.1), let alone under Article 307 EC or general international law (which I explore in sections 4.5 and 4.6). There is, of course, less space for criticism in case that this 'reasonableness' in fact means the principle of proportionality. That is relevant, indeed, regarding the specification of restrictions on fundamental rights and market freedoms as case Schmiedberger shows.
[210] It is common ground that, among the old EU Member States, in Southern and Central Europe the right to strike is primarily an individual right (with the exception of Greece); in Northern Europe it is organic, hence belonging to the organisations. An outlining description is e.g. in Brian Bercusson, Trade Union Rights in the 15 EU Member States of the European Union (by the European Parliament, EU's Publications Office 1998). As to sympathy (solidarity) strikes the picture is more varied; see e.g. Niklas Bruun and Bruno Veneziani, The Right or Freedom to Transnational Industrial Action in the European Union, in A Legal Framework for European Industrial Relations, ETUI, Brussels 1999, pp. 77-88. A broader presentation is given by Juri Aaltonen, International Secondary Action in the EU Member States, Finnish Metalworkers' Union, Espoo 1999. An international overview is also e.g. in A.T.J.M. Jacobs, The Law of Strikes and Lockouts, in Blanpain and Engels (eds.), Comparative Labour Law and Industrial Relations in Industrialized Market Economies, Kluwer Law Int. 2001, pp. 585-628. The need for a principal regulatory measure on the right to strike he identified already in 1978; he referred as an example to the Hersant Group case. This publisher transferred the printing of three newspapers to Belgium, following a strike in France; see Antoine Jacobs, Towards Community Action on Strike Law?, CMLRev. 1978 Vol. 15, pp. 133-155, especially at 142 and 155. He also presents the answer of the Commission to a parliamentary question: 'the principle of freedom of establishment neither affects nor is affected by the right to strike'; p. 142.

4.4.2 ILO Provisions

As a first step it is essential to note that the international treaties concerned include the ILO Constitution, the ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise 1948 and the ILO Convention No. 98 on the Right to Organise and Collective Bargaining 1949. The ILO Declaration on Fundamental Principles and Rights at Work, [211] adopted in 1998, is an expression of commitment by governments, employers' and workers' organizations to uphold basic human values - values that are vital to our social and economic lives. It stated the commitment of the ILO Member States to respect, to promote and to realize, in good faith and in accordance with the ILO Constitution, the principles concerning the fundamental rights, such as freedom of association and the effective recognition of the right to collective bargaining (paragraph 2(a)). The former is enshrined also in the Preamble to the ILO Constitution, the latter in the Philadelphia Declaration of 1944, annexed to the Constitution.

The letter of Article 3(1) of Convention No. 87 does not spell out the right to strike but the freedom of association, as complemented by the right of the trade union organizations 'to organize their activities' and 'to formulate their programmes'. However, derived from these formulas in the supervisory practice the right to strike has been recognized for decades. [212] As developed, this right is regarded as 'an intrinsic corollary of the right of association protected by Convention No. 87' [213] and as 'one of the essential means through which workers and their organizations may promote and defend their economic and social interests'. [214] Hence, the 'ILO right to strike' means a civil, political and socio-economic entitlement. [215] It is clearly also free from restrictions set up by the existing working relationship which would impose limits on the protection of the right concerned. It is the right of the workers' organizations [216] and, as linked also to the right to establish and join federations and

[211] The Declaration is available <http://www.ilo.org/ilolex/english/index.htm>.
[212] Further support for the right to strike is in Articles 8 (organisations have to respect the law of the land which shall not impair the guarantees provided for by the Convention) and 10 of the Convention ('organisation' means any organisation of workers or of employers for furthering and defending the interests of workers or of employers). On the evolution of the ILO practice in general, see e.g. Novitz, p. 185-206; similarly: Lee Swepston, Human rights law and freedom of association: Development through ILO supervision; ILRev. Vol. 137 (1998), No. 2, pp. 169-192, at 186-7. Also Bernard Gernigon, Alberto Odero and Horacio Guido (officials of the International Labour Office) give an overview on the application of the ILO Convention 87: ILO principles concerning the right to strike, International Labour Review, Vol. 137 (1998), No. 4, pp. 441-481.
[213] ILO Committee of Experts, General Survey 1994, paragraph 179.
[214] ILO Committee on Freedom of Association: Digest of Decisions and Principles of the Governing Body Committee on Freedom of Association (Digest), 4th edition, Geneva, ILO 1996, paragraph 475.
[215] In terms of Novitz**,** see e.g. her outlook, p. 368, in fine.
[216] See International Labour Conference 81st Session 1994, Report of Committee of Experts, General Survey, paragraph 149, p. 66. The Committee also found that protection of strikers under the Abolition of Forced Labour Convention 1957 (No. 105) extends to individuals, as does the protection under the UN Covenant on Economic, Social and Cultural Rights (presented later in this article) and the European Social Charter of 1961 (presented later in this article); loc cit., footnote 23. The Committee further noted that while the right to strike is an intrinsic corollary of the right to organize protected by Convention No. 87, it cannot be

confederations in Article 5 of the Convention No. 87, covers also sympathy actions, [217] secondary boycotts included. [218]

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considered as an absolute right. It may be 'subject to a general prohibition in exceptional circumstances' and 'governed by provisions laying down conditions for, or restrictions on, the exercise of this fundamental right;' loc.cit., paragraph 151.

[217] Ibid., paragraph 168, p. 75. The Committee noted that sympathy strikes are recognized as lawful in some countries. It further noted the need for distinction (such as an exact definition of the concept of a sympathy strike; a relationship justifying recourse to this type of strike, etc.) but concluded that 'a *general* prohibition on sympathy strikes could lead to abuse and that workers should be able to take such action, provided the initial strike they are supporting is itself lawful.' The 1996 Digest (footnote 214, *supra*), paragraph 489, confirmed that a ban on strike action not linked to a collective dispute to which the employee or union is a party is contrary to the principles of freedom of association. It further referred to 284th Report, Case No. 1575, paragraph 911. This essentially repeated the position of the 1994 General Survey (paragraph 168) but referred also to the General Survey of 1983, paragraph 217. Gernigon et al. report also a case in 1987 where a Decree did not ban sympathy strikes but merely regulated them by limiting the possibilities of recourse to this type of action. The Committee on Freedom of Association found that various procedural provisions might be justified (as well as security provisions) but e.g. geographical or sectoral restrictions placed on sympathy strikes – which therefore exclude general strikes of this nature - it found as constituting a serious obstacle to the calling of such strikes; Gernigon et al. (footnote 212), p. 447; Reports of the Committee on Freedom of Association, in Official Bulletin (Geneva), Vol. LXX, Series B, No. 1, 248th Report, Case No. 1381, paragraphs 417-8. As to more recent practice, one may refer e.g. to the complaint of the International Confederation of Free Trade Unions (ICFTU) et al. v. Australia, report No. 320, case No. 1963 (Doc. Vol. LXXXIII, 2000, Series B, No. 1) where the Committee on Freedom of Association requested 'the Government to take necessary measures, including amending the Trade Practices Act, to ensure that workers are able to take sympathy action provided the initial strike they are supporting is lawful' (conclusion (d)).

[218] The 1989 Report of the Committee of Experts on the Application of Conventions and Recommendations, p. 238, stated that '(t)he Committee has never expressed any decided view on the use of boycotts as an exercise of the right to strike. However, it appears to the Committee that where a boycott relates to the social and economic interests of the workers involved in either or both of the original dispute and the secondary action, and where the original dispute and the secondary action are not unlawful in themselves, then that boycott should be regarded as a legitimate exercise of the right to strike. This is clearly consistent with the approach the Committee has adopted in relation to 'sympathy strikes''. In its Report 2001 the Committee of Experts noted with regret that amendments in Australia's Trade Practices Act 1974 maintained its boycott prohibitions (p. 206). More recently, and concerning the same law, the 2003 Report of the Committee of Experts, p. 220, expressed again its position on secondary boycotts as a corollary to its position on sympathy action. It 'once again' recalled that workers should be able to take such action, provided the initial strike is lawful. In response to the complaint against Australia, referred to in the previous footnote, the Committee on Freedom of Association protected also an international secondary boycott, as follows: 'The Committee recalls that the right to affiliate with international organizations of workers implies the right, for the representatives of national trade unions, to maintain contact with the international trade union organizations with which they are affiliated, to participate in the activities of these organizations and to benefit from the services and advantages which their membership offers (see Digest of 1996, para. 635). The granting of advantages resulting from international affiliation must, however, not conflict with the law, it being understood that the law should not be such as to render any such affiliation meaningless (see Digest of 1996, para. 631). The Committee, therefore, requested the Government 'to take the necessary measures to ensure that in future trade unions are entitled

The ILO Convention No. 98 concerns the application of the principles of the right to organise and to bargain collectively. It complements the protection of the right to organize (Article 11 of Convention No. 87) by its Articles 1 and 2, in particular by protecting strikers. Article 4 of Convention No. 98, establishes the obligation of the Member States to 'encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements'. Hence, autonomous collective bargaining is not just something legitimised but also subject to encouragement and promotion by states. Taken together, the guarantee of freedom of association and the effective recognition of the right to collective bargaining at work is 'of particular significance in that it enables the persons concerned, to claim freely and on the basis of equality of opportunity, their fair share of the wealth which they have helped to generate, and to achieve fully their human potential.' [219]

All EU Member States are also ILO Member States and have ratified ILO Conventions Nos. 87 and 98. The Community itself promotes and rewards compliance with them in its external relations, notably in development aid and external trade. [220]

4.4.3 European Human Rights Convention

A further relevant provision is in the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1951, Article 11(1) of which declared:

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to maintain contact with international trade union organizations, to participate in their legitimate activities and to benefit from the services and advantages of such membership' (paragraph 236). In a complaint against Canada (British Columbia) in 1988 the Committee on Freedom of Association found that a law restricting clauses on secondary boycotts in collective agreements – prohibiting trade unionists from thus giving effective assistance to their fellow workers - was not in accordance with free and voluntary collective bargaining and requested the government to review the law; report 256, case no. 1430, Official Bulletin, Vol. LXXI, 1988, Series B, No. 2, paragraph 193.

[219] Applying the terms of the fifth preambular paragraph of the 1998 ILO Declaration. Principal discussion on the role of collective bargaining is e.g. in the 2004 Global Report (under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work) of the ILO Director General, Organising for Social Justice; International Labour Conference, 92nd Session 2004, Report I (B), especially in paragraphs 27-30; http://www.ilo.org/declaration.

[220] I here note only the trade aspect. Since 1995, the EU's Generalized System of (tariff) Preferences has acquired an additional development orientated dimension by providing special incentives rewarding compliance with international social (and environmental) standards. To qualify under the social policy incentive clause, countries must be able to provide proof of compliance with standards included in the ILO Declaration of 1998, hence i.a. with ILO Conventions Nos. 87 and 98. See Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004. It was extended to last until 31 December 2005 by Council Regulation (EC) No 2211/2003. Substantively, see Recitals 18-19 and Article 14(2) of Regulation 2501/2001.

> Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

Article 11(2) ECHR sets up the limits for restricting the rights and freedoms guaranteed under Article 11(1). It is disputable whether the EHRC has recognized that freedom of association and joining a trade union includes also the right to collective action. [221] However, while the letter of the ECHR does not spell out the right to strike, although the other fundamental rights instruments referred to below do, it is appropriate to remind oneself of the need to read Article 11 ECHR in the light of Article 53 ECHR. [222] It denotes, under the heading of 'Safeguard for existing human rights' how '(n)othing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party'. [223] Hence, the ECHR does not restrict the right to strike as guaranteed by national law or other international treaties.

[221] See case Schmidt and Dahlström v Sweden, 1 EHRR 632 (1979), paragraph 36. On this judgment, see Novitz p. 229-30, 320-1. Advocate General Jacobs in case C-67/96 Albany [1999] ECR I-5751 (paragraph 145 of the opinion of 28.1.1999) asserted that 'nor does Article 11 necessarily imply a right to strike, since the interests of the members can be furthered by other means'. He referred to paragraph 36 of judgment Schmidt and Dahlström v. Sweden. While it is true that paragraph 36 of Schmidt and Dahlström v. Sweden refers also to 'other means', it nevertheless presents – in paragraph 36 - the right to strike as one of the most important means of protecting occupational interests and required, based on the ECHR, that the members should have in national law the possibility of promoting their occupational interests by means of their organisations. On this basis the Presidium of European Convention of 2000 anchored its interpretation on Article 11 ECHR (as recognizing the right to strike) to judgment Schmidt and Dahlström v. Sweden, see Charte 4192/00 Convent 18, 27 March 2000, p. 7. This debate received a further nuance from judgment Unison v. UK in 2002 in which a Chamber of the EHRC asserted that 'the proposed strike must be regarded therefore as concerning the occupational interests of the applicant's members in the sense covered by Article 11 of the Convention'; application No. 53574/99, Decision of 10 Feb. 2002, unreported. On this judgment and about the (only) 'occupational' right to strike presented there, see Novitz, p. 231-2.

[222] It is to be denoted how e.g. in case Gustafsson v. Sweden the EHRC referred (in paragraph 53) as arguments to the other international treaties, including Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions nos. 87 and 98 of the International Labour Organisation. See further footnote 314, *infra*.

[223] Novitz concludes that the EHRC has not applied Article 11 consistently with Article 53 (that she still counts as Article 60; the articles of section III of the Convention were renumbered by Protocol No. 11 (ETS No. 155)) especially by leaving aside the relevant ILO Conventions 87 and 98. See Novitz, p. 239-240.

4.4.4 European Social Charter

The European Social Charter of 1961 declares in its Article 6(4), as follows:

> With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:
>
> and recognize:
>
> 4. the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into. [224]

Article H of the Charter, as revised in 1996 (Article 31 of the 1961 Charter), stipulates that 'the provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected'.

The Appendix to Article 6(4) declares that 'It is understood that each Contracting Party may, insofar as it is concerned, regulate the exercise of the right to strike by law, provided that any further restriction that this might place on the right can be justified under the terms of Article 31'. However, Article 31 (Article G in the revised Charter of 1996) qualified these possible restrictions, as follows

1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

Article 32 of the 1961 Charter (Article H of the Charter, as revised in 1996), stipulates that 'the provisions of this Charter shall not prejudice the provisions of domestic law or of any bilateral or multilateral treaties, conventions or agreements which are already in force, or may come into force, under which more favourable treatment would be accorded to the persons protected'. Noteworthy is that the ESC defines the scope of the right to strike/collective action being 'cases of conflicts of

[224] It is worth denoting that the provision refers to obligations that *might* arise out of a previous agreement. Such obligations can be excluded. That is what the Swedish lex Britannia does; see section 4.9.4, and footnote 294, *infra*. The European Social Charter is inherently subject to reservations (also by its Article G). Greece has not accepted its Articles 5 and 6 whereas Austria, Luxembourg, Poland and Turkey have not accepted Article 6(4); www.coe.int. Novitz further points out that Germany, the Netherlands and Spain have excluded the application of the ESC to certain officials in the public sector, p. 132, footnote 40. On the other hand, Sulkunen (in International Trade Union Rights) concludes that the supervisory practice of the Charter is rather uniform with that of the ILO Conventions 87 and 98; p. 651-2 in the English summary.

interest' and derives it, similarly to that in the ILO nowadays, from the 'effective exercise of the right to bargain collectively'. The ESC is the only international treaty that expressly deals with the question of restrictions arising out of previous collective agreements.

4.4.5 United Nations' Covenants

The UN's International Covenant on Civil and Political Rights 1966, Article 22, recognizes freedom of association. Furthermore, the International Covenant on Economic, Social and Cultural Rights 1966, Article 8(1)(d), recognizes 'the right to strike, provided that it is exercised in conformity with the laws of the particular country'. Article 8(3) stipulates that nothing in Article 8 shall authorize state measures prejudicing ILO Convention No. 87. The EU has incorporated these covenants into its external human rights policy, even as parts of the *acquis.* [225]

4.4.6 Community Law and Charters

Following the case-law of the ECJ since *Stauder* [226] in 1969, the Preamble of the Single European Act was the first piece of written EC law that referred to fundamental rights, recognized in national law, the ECHR and the European Social Charter.

The 1989 Community Charter of Fundamental Social Rights of Workers, as a solemn declaration of the 11 Member States, stated as follows:

> 13. The right to resort to collective action in the event of a conflict of interests shall include the right to strike, subject to the obligations arising under national regulations and collective agreements.

The last Recital of the Preamble to the 1989 Charter (naturally) declared its non-regressive nature as to national rights.

Article 6(1) TEU states that 'the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. In Article F.2 (now 6(2)) TEU the Union in 1992 committed itself to respect the fundamental rights, enshrined in the

[225] See Council Regulation (EC) No 975/1999of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms; see Recital 6 in the Preamble and Article 2(1). See further Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries; see Recital 6 and Article 3.

[226] Case 29/69 Stauder [1969] ECR 419.

ECHR and as they result from the constitutional traditions common to the Member States, as general principles of EC law. According to Article 6(3) TEU the Union shall respect the national identities of its member States. The Treaty of Amsterdam acknowledged in Article 136 EC, first paragraph, to 'have in mind' the European Social Charter of 1961 and the Community Charter on Fundamental Social Rights of Workers of 1989. Article 136 EC, second paragraph, further envisages in the social field Community measures 'which take account of the diverse forms of national practices, in particular in the field of contractual relations'. (I have discussed Article 137(5) above, in section 4.3) Social dialogue between management and labour, contractual relations included, has been recognised in EC law since the Single European Act and is now enshrined in Article 139 EC.

With respect to this 'normative catalogue', the references in Article 136 of the EC Treaty to the 1989 Community Charter and the European Social Charter merit special attention because they are in the very EC Treaty. Although the referential 'bridge' is only the expression 'having [these Charters] in mind', it still makes both of these Charters part of EC law. A bottom line interpretation is that the reference to the European Social Charter by this 'having in mind' does not and cannot nullify its nature as an international treaty that binds within the limits that I have referred to in footnote 224, *supra*. Therefore, if one takes the Treaty references seriously (in terms of Birk; see footnote 202, *supra*), it means that one must conclude that the right to strike/industrial action has in principle a binding guarantee in EC law. This conclusion obviously has also more practical consequences in the justification of the Swedish lex Britannia; see footnote 294, *infra.*

Furthermore, the Charter of Fundamental Rights of the European Union of 2000 (the EU Charter) [227] as a solemn declaration of the Council, Parliament and Commission declared in its Article 28 that

> Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.

The explanations prepared under the responsibility of the Praesidium of the Convention preparing the Charter noted that this Article was based on Article 6 of the European Social Charter and on the Community Charter of the Fundamental Social Rights of Workers (points 12 to 14). The explanations further denoted how the collective action was recognized by the European Court of Human Rights as one of the elements of trade union rights laid down by Article 11 of the ECHR. Moreover, according to the explanations, collective action, including strike action, comes under national laws and practices, including the question of whether it may be carried out in parallel in several Member States. [228] Still in the text of the Charter is the explicit

[227] On the Charter in general, see e.g. Koen Lenaerts and Eddy De Smijter, A 'Bill of Rights' for the European Union, 38 Common Market Law Review (2001), 273-300.

[228] A footnote attached to the published Charter denotes how the explanations 'have no legal value and are simply intended to clarify the provisions of the Charter.' However, Article II-112(7) of the Constitutional Treaty states that 'The explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States.' This 'provision of guidance'

reference to a fundamental right to collective action to defend their interests, including strike action, 'in accordance with Community law'.

Article 52(3), second sentence, of the Charter declares the possibility of a protection by Community law stricter than that guaranteed by the ECHR. Furthermore, according to Article 53 (Article II-113 of the Constitutional Treaty), nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised i.a. by international agreements to which all the Member States are party. The ILO Constitution and Conventions Nos. 87 and 98 are such agreements.

Several Advocate Generals have referred to the EU Charter in support of an argument [229] as well as the Court of First Instance in many cases. [230] The Court of Justice has obviously not yet been compelled to make such a reference and may, on the other hand, so far feel more comfortable in refraining from such a reference while the Charter is still to become formally binding through the entry into force of the Constitutional Treaty (in this case Article II-88). However, the EU Charter represents a kind of a resumé of the fundamental rights developments within the E(E)C and EU. Lenaerts and de Smijter conclude that it is also an emanation of the common constitutional traditions, in the substantive sense of the term 'constitutional traditions'. They therefore argue that it is a part of the *acquis communautaire*, even if it is not yet a part of the Treaties. [231]

The European Commission, upon the request of the European Parliament, has set up an EU Network of Independent Experts on Fundamental Rights. It monitors the

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and 'due regard' however cannot overthrow the unambiguous level of protection clause in Article 53 of the Charter (II-113 of the Constitutional Treaty). Besides, next to Article 53, also the Preamble to the Charter reaffirms the international obligations common to the Member States. Hence, the reference to 'the modalities and limits for the exercise of collective action' in the explanations to Article 28 of the Charter by the Praesidium of the Convention on the Future for Europe cannot be validly interpreted as meaning that the Member States would have a free hand in restricting the right to collective action via these modalities and limits for exercise.

[229] The first reference obviously was in the Opinion of Advocate General Alber (1.2.2001) in case C-340/99 TNT Traco [2001] ECR I-4019, paragraph 94.

[230] See e.g. judgment in case T-54/99 max.mobil Telecommunications [2002] ECR II-313, paragraphs 47 and 57.

[231] Lenaerts and De Smijter, footnote 227, *supra*, p. 299. As grounds they refer to the holistic interpretation given by the Court to the term 'common constitutional tradition', the composition and functioning of the Convention drafting the Charter as well as to the unanimous acceptance of the text by the three EU institutions with legislative powers. As a reflection of the holistic interpretation they refer to case 44/79 Hauer [1979] ECR 3727, paragraphs 20 to 22, and note how the Court does not undertake an exhaustive study of the constitutional provisions of *all* the Member States. They further refer to the Opinion of AG Tizzano of 8 Feb. 2001 in case C-173/99 BECTU [2001] ECR I-4881 where (paragraph 28) he asserted that 'the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right'. The Court passed the EU Charter but relied expressly (in paragraph 39) on the 1989 Charter that is referred to by the Preamble to the Working Time Directive. - The refusal by a number of Member States to insert the EU Charter into the Treaties already in 2000 is seen by Lenaerts and De Smijter as more a political than a legal issue.

situation of fundamental rights in the Member States and in the Union, on the basis of the Charter of Fundamental Rights. It issues reports on the situation of fundamental rights in the Member States and in the Union, as well as opinions on specific issues related to the protection of fundamental rights in the Union. In its 'Synthesis Report: Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and Its Member States in 2004' of 15 April 2005 it qualified the Charter, as follows: 'However, the Charter also constitutes a catalogue of common values of the Member States of the Union. In that respect, the Charter may be taken into account in the understanding of Article 6(1) EU, to which Article 7 EU refers. […] the Network considers the Charter as the most authoritative embodiment of these common values, on which its evaluation therefore may be based.' [232] This statement shows that it is appropriate to consider and assess the right to strike in the light of the very founding principles of the Union, as enshrined in Article 6(1) TEU: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. A further necessary conclusion is also that the restrictions on the right to strike must qualify under the parameters enshrined in Article 6(1) TEU, as strictly elaborated by the Court of Justice in judgment *Schmidberger*, paragraphs 79 and 80 (see section 4.10.1, *infra*).

The normative complex in EC law is completed by the so-called Monti-Regulation (2679/98/EC). [233] According to its declaratory Article 2

> 'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognized in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.'

It is natural to reason that this principle of Article 2 in the Monti-Regulation applies also within the field of the free provision of services, although in assessing restrictions on the free movement of goods and services the test patterns are not entirely parallel. [234] However, a natural connecting factor is the fact that goods move by means of transport services or stop moving following a strike in that service sector.

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[232] The report is available via <http://europa.eu.int/comm/justice_home/index_en.htm> or with reference 'CFR-CDF.Conclusions.2004.en'. The Network also took into account the fact that there are provisions of the Charter other than Article 52(3) that 'have to be read in accordance with the rights guaranteed in instruments adopted in the field of human rights in the framework of the United Nations, the International Labour Organisation or the Council of Europe'; p. 10 of the Report. This is fully in line with what I assert on the applicability of the 'ILO right to strike' also by the EU; see sections 4.5 to 4.7, *infra*.

[233] Officially it is Council Regulation (EC) No 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States.

[234] I recall how e.g. in Bosman (footnote 190, *supra*) the Court relied on case-law on the free provision of services. The difference is, of course, that in the free provision of services the Court has not accepted the Keck and Mithouard (Cases C-267 and 268/91 [1993] ECR I-6097) formula, according to which – in a nutshell – equal selling arrangements are not regarded as forbidden restrictions to the free movement of goods. In services the Court applies the Arblade-test.

4.4.7 Member States' Constitutions

As to the common constitutional tradition of the Member States regarding the right to strike, it suffices for the purposes of this reasoning to denote that among the old Member States in Greece, Italy, Portugal, Spain and Sweden the right to strike is enshrined in the constitution; in Belgium, Denmark, France and Germany it is proclaimed there as a freedom. In Austria and Finland the right derives from the constitution. In the new Member States the right to collective action is enshrined in the constitution with the exceptions of the Czech Republic and Malta. One may therefore justly conclude that the common constitutional tradition is sufficient so as to be relevant in the sense of the fundamental rights formula of *Omega Spielhallen*, paragraph 33.

4.4.8 Summing up; Comparing International Treaties

In summing up I recall that the ECHR (via its jurisprudence), the ILO Conventions Nos. 87 and 98 (via the supervisory practice and as anchored in the ILO Constitution), the UN Covenant and the three Charters (expressis verbis) – two of them besides issued within the Community - do recognize the right to strike as a fundamental right, complemented by the Monti-Regulation in secondary EC law. Hence, the national constitutional tradition together with the international treaties justifies concluding that the right to strike is a fundamental right in EC law.

Within these international instruments, the protection of the right to strike is obviously the broadest and strongest under the ILO Conventions No. 87 and 98, as anchored in the ILO Constitution. [235] It is notable that the EU Charter of 2000 comes close to them at least in the sense that it recognizes the right to strike for organizations, too, more particularly 'in cases of conflict of interests'. Even that formula anyway fully covers cases like that in *Laval*.

To illustrate the difference between the approach (and interpretation) of the ECHR and that of the ILO, I would mention the freedom of association. I would further point out that for analytical purposes it is common to make, in describing the basic trade union rights, a distinction between three facets: the right to organise (or, freedom of association), the right to collective action and the right to collective bargaining. [236] In the judicial practice under Article 11 of the ECHR this distinction has generated some discussion as to whether the right to strike can be derived from the freedom of association. [237] Obviously, that discussion still continues. In the ILO practice, hence under Convention No. 87, both the right to strike and the right to collective bargaining

[235] On this, concerning particularly the permissible objectives of a strike, see Novitz pp. 285-294 (also with more references to ILO practice on sympathy actions, pp. 290-292), and as a summary and on theoretical, structural and contextual differences, pp. 329-339.
[236] This is what e.g. AG Jacobs did in case C-67/96 Albany (footnote 221, *supra*); see paragraph 134 of the Opinion of 28 January 1999.
[237] See footnote 221, *supra*, concerning the debate as to case Dahlström v. Sweden and especially the position of AG Jacobs thereon.

have been unequivocally derived from the freedom of association. [238] [239] Furthermore, and illustratively, in the 1998 Declaration on Fundamental Principles and Rights at Work the ILO defines as core labour rights: the freedom of association and the effective recognition of the right to collective bargaining. The report, drawn up under the responsibility of the ILO Director-General, following up the 1998 Declaration, sets forth that 'the right to strike is the logical corollary of the effective realization of the right to collective bargaining. If it does not exist, then bargaining risks being inconsequential – a dead letter.' [240] This way the 1998 Declaration is the modern – and additional - source of the universal right to strike, expressly anchored in the ILO Constitution. But coming back to the question about arguably different contents of freedom of association within the ILO and the EHRC, crucial is to see that the ILO practice is by no means imprisoned by any constraints in the analytical distinction in three facets. On the other hand, there is nothing in the 1998 Declaration showing any aim to restrict or dilute the value of the earlier positions in the supervisory practice by this certain shift of emphasis, i.e. definition of the right to collective bargaining, too, as the source of the right to strike. Defending economic and social interests remains as its scope. This shift of emphasis reflects more adequately the common ground that justified strikes have a justified goal, i.e. normally an agreement with the employer side. - Finally, noteworthy is that also the EU Charter presents the right to strike as an extension (or, guarantee) of the right to collective bargaining.

However, the special status granted in the fundamental rights doctrine to the ECHR (*Omega Spielhallen*, paragraph 33) would lead one to conclude that the ECJ would find it possible to decide the lot of the right to strike in EC law, as well as the *Laval* (Vaxholm) case, by using the 'occupational' right to strike, recognized i.a. in *Unison v. UK* by the EHRC. In this sense it is to be noted that already Articles 53 of the ECHR and the EU Charter directly lead to the application of the fundamental rights doctrine in drawing even exclusive inspiration from the ILO right to strike, taking into account that the ILO Constitution and Conventions Nos. 87 and 98 bind every EC Member State. Another issue is that a strong requirement of coherence – and, in fact, a moral argument - militates for the same result: what the EU promotes and rewards in its external relations as a part of the *acquis communautaire* (i.e. application of ILO

[238] As to the right to strike, see e.g. footnote 213, *supra*. As to the right to collective bargaining, the 1996 Digest (footnote 214, *supra*), referring to the travaux préparatoires of Convention No. 87, characterized it, as follows: **'**The right to bargain freely with employers with respect to conditions of work constitutes an essential element in freedom of association, and trade unions should have the right, through collective bargaining or other lawful means, to seek to improve the living and working conditions of those whom the trade unions represent. The public authorities should refrain from any interference which would restrict this right or impede the lawful exercise thereof. Any such interference would appear to infringe the principle that workers' and employers' organizations should have the right to organize their activities and to formulate their programmes'; Digest, paragraph 782. See that e.g. AG Jacobs in Albany (footnote 221, *supra*) at this point, concerning the right to collective bargaining, refers only to (the wording in Article 4 of) Convention No. 98; he concluded that 'no right is granted'; paragraph 147 of the opinion of 28.1.1999.

[239] Sulkunen states that the right to collective bargaining has been derived from Convention No. 98 as well; Sulkunen, Kansainväliset ammattiyhdistysoikeudet (International Trade Union Rights), p. 647 (in the English summary).

[240] ILO, Your Voice at Work (2000), paragraph 101; www.ilo.org.

Conventions – i.a. - Nos. 87 and 98 in the Generalized System of Preferences), it must respect also internally.

Still, the special status of the ECHR in the fundamental rights doctrine, together with the certain margin of discretion inherent in 'drawing inspiration' from international treaties, leads to a discussion of two additional legal sources in this context: the effect of Article 307 EC and *general international law*.

4.5 Article 307 EC

Article 307 EC, first paragraph, stipulates that '(t)he rights and obligations arising from agreements concluded before 1 January 1958 or, for acceding States, before the date of their accession, between one or more Member States on the one hand, and one or more third countries on the other, shall not be affected by the provisions of this Treaty.' Article 307 EC is of general scope and applies to any international agreement, irrespective of subject-matter, which is capable of affecting the application of the Treaty. [241] Furthermore, the purpose of Article 307, first paragraph, is defined 'in accordance with the principles of international law', i.e. the 1969 Vienna Convention on the Law of Treaties. [242] [243] Furthermore, crucial in an ILO context, the

[241] Case 812/79 Attorney General v Burgoa [1980] ECR 2787, paragraph 6, and Case C-158/91 Levy [1993] ECR I-4287, paragraph 11. On Levy Macleod, Hendry and Hyett, The External Relations of the European Communities, Clarendon Press Oxford 1996, p. 230, have written laconically that the duty of the Community to respect pre-existing agreements of the Member States 'extends to permitting the Member State to fulfil its obligations, if necessary by allowing it to maintain in place legislation which would otherwise be contrary to its Community obligations'. Piet Eeckhout, External Relations of the European Union. Legal and Constitutional Foundations. Oxford University Press, 2004, p. 338-9, denotes a contrast between the outcome in Levy and the opinion of Lenz AG in joined cases 209 to 213/84 Ministère public v. Asjes [1986] ECR 1425, 1453. The latter conditioned the effect of Article 307 EC, first paragraph, by compliance with the second paragraph. Eeckhout's conclusion is that deviating from judgment Levy (or from the opinion of Tesauro AG in Levy) would mean to let the EC law impose a breach of international law.

[242] See e.g. Case C-84/98 Commission v. Portugal [2000] ECR 5215, paragraph 53. The Vienna Convention is available e.g. via http://www.un.org/law/ilc/texts/treaties.htm.

[243] The ECJ has applied the Vienna Convention, next to case Levy (see footnote 241), paragraphs 19 and 20, e.g. in its Opinion 1/91 European Economic Area [1991] ECR I-6079, paragraph 14 (interpretation of an international treaty in accordance with Article 31 of the Vienna Convention) and in cases Case C-312/91 Metalsa Srl. [1993] ECR I-3751, paragraph 12 (Article 31 of the Vienna Convention); C-432/92 Anastasiou [1994] ECR I-3116, paragraph 43 (on the rules on the interpretation of treaties; see Article 31 of the Vienna Convention); C-162/96 Racke [1998] ECR I-3655 paragraphs 18 et al., especially 58 and 59 (on *rebus sic stantibus* clause); and C-416/96 Nour Eddline El-Yassini v Secretary of State for Home Department [1999] ECR I-1209, paragraph 47 (interpretation rules on international agreements, Article 31 of the Vienna Convention; it seems that the ECJ resorted to the Vienna Convention by its own motion); the CFI did it in case T-115/94 Opel Austria [1997] ECR II-39, paragraph 90 and 91 (principle of good faith as a rule of customary international law; Article 18 of the Vienna Convention). In case C-286/90 Poulsen [1992] ECR I-6048, paragraph 9, the ECJ not only referred explicitly to rules of international law but also accepted their binding nature (on this case, see further section 4.6, *infra*, in the context of case Racke).

leitmotiv for the application of Article 307 EC is no longer limited to guaranteeing the rights of *third countries.* [244] This became clear in judgment *Levy* [245] where the full Court resorted to the obligations of the Member States as the leitmotiv. In so doing it recognised also the binding nature – in EC law - of the ILO Convention No. 89 prohibiting night work for women. France was allowed to apply penal sanctions against an employer who breached the Convention while he invoked compliance with the Directive 76/207/EEC on equal treatment. Furthermore, *Levy* extended the application of prevailing prior international agreements to the benefit of individuals. [246]

It is essential to note that under Article 307 EC the ILO Constitution qualifies with respect to every EU Member State as an earlier international agreement. This implies that the freedom of association and the effective recognition of the right to collective bargaining have also in EC law their effect as principles embodied in or, respectively, annexed to the ILO Constitution.

It is essential further to determine whether the ILO Conventions Nos. 87 and 98 also qualify as earlier international treaties. Among the six founding states of the EEC Belgium, France, Germany and the Netherlands ratified the ILO Convention No. 87 prior to the entry into force (1 January 1958) of the Treaty of Rome while Luxembourg did it on 3 March 1958 and Italy on 13 May 1958. Accordingly,

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On this case-law, e.g. see Christiaan Timmermans, The EU and Public International Law, 4 European Foreign Affairs Review (1999), pp. 185-188**;** Koen Lenaerts & Eddy De Smijter, The European Union as an Actor under International Law, 19 Yearbook of European Law (1999-2000), pp. 95-138, at 115-126. For the purposes of this reasoning it suffices to note the title of Timmermans in explaining the case-law of 1990s: 'A More Open Attitude of the Court *vis-à-vis* International Law'. Piet Eeckhout (footnote 241, *supra*, p. 343) reminds one of the simple but important source of developments. Namely, distinguishing EC law clearly from international law and restricting the latter's effects once was rather natural for a new legal order. However, 'it seemed incongruous for a legal order which owed its very birth and existence to international law to become unreceptive to the latter'. He further reminds how this receptive attitude towards international law has an important political dimension. The EU is deeply involved in international relations where it is faced also with the hegemonic approach of the United States. He finally recalls the EU Constitution that (in Article I-3) provides that the EU 'shall contribute…to strict observance and development of international law, including respect for the principles of the United Nations Charter'. - The latest example of the application of the Vienna Convention (by 3 June 2005) by the ECJ obviously is case C-347/03, ERSA, judgment of 12 May 2005, nyr.
As to other examples of the overall value of international law in interpreting the basic concepts of the EU's legal order, see joined cases C-46/93 and 48/93 Brasserie de Pêcheur and Factortame, [1996] ECR I-1029, paragraph 34; and case C-224/01 Köbler [2003] ECR I-10239, paragraph 32; both judgments concerned state liability under EC law.

[244] Like e.g. in cases 10/61 Commission v. Italy [1962] ECR 1, 812/79 Burgoa [1980] ECR 2787, paragraph 8, and 121/85 Conegate [1986] 1007, paragraph 25.

[245] Case Levy (footnote 241, *supra*), paragraph 22.

[246] This is also the conclusion of Lenarts and De Smijter, footnote 243, *supra*, p. 119. Based on judgment Levy, Krüger, Nielsen and Bruun have referred to Article 307 (ex 234) in the contradiction between Article 3(2) (eight days' installation works), 3(3) and 3(4) PWD, and Labour Clauses (Public Contracts) Convention (No. 94) 1949 of the ILO; Kai Krüger, Ruth Nielsen & Niklas Bruun, European Public Contracts in a Labour Law Perspective, DJØF Publishing, Copenhagen 1997, p. 232. However, while Sweden has not ratified this Convention and it does not deal directly with the right to strike, I do not explore it further.

Luxembourg and Italy ratified Convention No. 98 on the same dates while the Netherlands did it just on 22 December 1993. All the succeeding Member States have joined the Community after having ratified them. This concerns also the newest Member States that joined on 1 May 2004. In any case, a literal reading of Article 307 EC leads to the conclusion that ILO Conventions Nos. 87 and 98 have remained in force as earlier agreements with the abovementioned exceptions. Such a legal split would lead to undesirable or unacceptable imbalances between the Member States. However, between e.g. Latvia (home state of Laval un Partneri Ltd, the plaintiff in the *Laval* case) and Sweden there would not be any imbalance.

Hence, the finding above is the 'delayed' – in the case of Article 307 EC - ratification of ILO Convention No. 87 by Luxembourg and Italy, as well as that of ILO Convention No. 98 by Luxembourg, Italy and the Netherlands. While this, – taken literally - means with respect to these Conventions the non-applicability of Article 307 EC in trade involving these Member States, there is still one relevant legal source that presumably leads to adoption of the ILO right to strike as a coherent EC standard, namely general international law.

4.6 General International Law

The EU as a subject of international law is bound by general (customary) international law. [247] In *Racke* (see footnote 243, *supra*) the Court expressed this, as follows:

> '45. It should be noted in that respect that, as is demonstrated by the Court's judgment in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR I-6019, paragraph 9, the European Community must respect international law in the exercise of its powers. It is therefore required to comply with the rules of customary international law when adopting a regulation suspending the trade concessions granted by, or by virtue of, an agreement which it has concluded with a non-member country.'

The rules of customary international law in this case mean those codified in the Vienna Convention. On the other hand, there is no real reason why this respect for international law should not cover cases where the Community is not a formal party to an international treaty but only the Member States, as in the case of the ILO provisions. In that sense I recall the fact that the ILO Constitution and Conventions Nos. 87 and 98 bind every Member State. Furthermore, Article 26 of the Vienna Convention stipulates, under the heading *Pacta sunt servanda*, that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' [248] Therefore, it is impossible, indeed, to avoid the conclusion that the Member States

[247] As to EU and general international law, see e.g. Timmermans, footnote 243, supra, pp. 181-194 (including also a heading 'Community Law as a Factor of Strengthening International Law'); Lenaerts and De Smijter, footnote 243, supra, pp. 95-138, especially at pp. 122-126 (under the heading 'The Status of Customary International Law in the European Legal Order').

[248] In Racke (footnote 243, *supra*) the Court highlighted the value of the *pacta sunt servanda* principle and stated, as follows: '49. The rules invoked by Racke form an exception to the *pacta sunt servanda* principle, which constitutes a fundamental principle of any legal order and, in particular, the international legal order. Applied to international law, that principle

have a mutual commitment to respect also the ILO Constitution and Conventions Nos. 87 and 98 in trade between them by virtue of customary international law (as codified in the Vienna Convention).

The theoretical possibility that the Member States would have certain rules for themselves as ILO Member States and different rules for themselves within the EU surmounts the limits of any genuine legal reasoning. This is *a fortiori* the case whereas, as noted above, the EU in its external policy promotes and rewards as a part of the *acquis* compliance with these ILO Conventions. In the light of the effect of Article 307 EC and general international law one might ask why it was necessary to present the overall contents of the three Charters and the UN Covenant. It was appropriate, first, simply to describe the legal landscape, and, second, also to show that this contains more than just the position of AG Jacobs in Albany (explained below under EC case-law) and the ILO provisions as alternative legal sources. Third, it was necessary to show that the application of the ILO provisions, or the adoption of the right to strike according to them as the EU's basic standard, is finally not just an inevitable outcome but also in harmony with the other international treaties.

There is one principal aspect to be added concerning the relationship between Community law and the obligations of the Member States under international treaties. Namely, as the Court stated in its *AETR* judgment, [249] where Community rules have been promulgated for the attainment of the objectives of the Treaty, the Member States cannot, outside the framework of the Community institutions, assume obligations that might affect those rules or alter their scope. There are no substantive Community rules *sensu stricto* [250] on strike (but only Article 2 of the so-called Monti-Regulation 2679/98). Hence, concerning the right to strike, there cannot be any substantive contradiction between the Member States obligations under the ILO provisions and those under Community law. On the other hand, e.g. the Court's Opinion 2/91 concerning the ILO's Chemicals Convention 1990 shows that the ECJ takes seriously the obligations of the Member States under the ILO Conventions; see e.g. paragraphs 23 and 26 of the Opinion where the Court found that the Member

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requires that every treaty be binding upon the parties to it and be performed by them in good faith (see Article 26 of the Vienna Convention).' The Court further relied (paragraph 50 of Racke) on the qualification by the International Court of Justice, which has held that 'the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases (judgment of 25 September 1997, *Gabcíkovo-Nagymaros Project* (*Hungary* v *Slovakia*), at paragraph 104…)'. The judgment is available on the website <http://www.icj-cij.org/>.

[249] Case 22/70 Commission v Council [1971] ECR 263, paragraph 22.

[250] The European Social Charter and the 1989 Community Charter are referred to in Article 136 EC as something to be had in mind. As to a contradiction between EU and ILO norms, see also case C-203/03, Commission v Austria, judgment of 1.2.2005, nyr. It dealt with an ILO based national (basic) prohibition of female work in mines. Austria invoked Article 307 EC, linked to ILO Convention No. 45 of 1935. The ECJ (Grand Chamber) a priori, let it be that with certain conditions, accepted the defence (paragraphs 57 to 64). However, an elementary difference from case Laval (right to strike) is that in Commission v Austria the EC law applicable included clear substantive provisions in Directive 76/207 on gender equality as regards access to employment, vocational training and promotion, and working conditions.

States could not assume certain ILO obligations adversely affecting i.a. protection of workers in the field of chemicals. [251]

4.7 Intermediate Concluding Remarks

The result of this international discourse shows the necessity of considering the application – obviously for the first time - of Article 307 EC to a situation where the relevant international treaties (the ILO Constitution and the Conventions 87 and 98) are ratified by and bind every Member State. A literal reading of Article 307 EC first leads one to conclude *ipso jure* that freedom of association (as embodied in the ILO Constitution) and the effective recognition of the right to collective bargaining (as annexed to the ILO Constitution) have remained in force also in EC law. Accordingly, ILO Convention No. 87 has remained in force as an earlier agreement with the exception of Luxembourg and Italy. ILO Convention No. 98 is also an earlier agreement, with the exception of Luxembourg, Italy and the Netherlands. General international law anyway leads to the application of these Conventions ('the ILO right to strike'), including also in the case of the exceptions, and, thus, as the coherent EU standard, without the possibility of resorting to the standard drawing of inspiration (only) from international treaties. This finally also excludes any (diluting) influence of the other international treaties or charters - which is not, I would remind the reader, against the expressed purpose and spirit of each of them - as well as any difficulty in the national constitutional tradition. This outcome essentially means the recognition of the right to strike also as a right of the organisations to defend their economic and social interests, covering the right to sympathy (solidarity) action. If the wording of the EU Charter is used to define the EU right to strike, the contents must anyway fulfil the ILO criteria.

A terminological remark is that in the following I take the ILO right to strike/industrial action as applicable – by virtue of Article 307 EC and general international law - within the *fundamental rights doctrine* (*Omega Spielhallen*, paragraph 33). Discussing e.g. the convergence of that doctrine with the principles of justifying restrictions on the free provision of services then implies this connotation. This is my way of retaining the protection aspect in the fundamental rights doctrine without having to repeat it all the time.

Still, any *detailed* substantive definition of the right to strike/industrial action at a Community level (let alone at the international level) has not yet been feasible nor will it be feasible in the foreseeable future, given the existing diversity in national strike laws and practices. However, the basic recognition of the right to strike/industrial action in its ILO form is a commitment of all the Member States, and one which the Community respects. A direct consequence thereof must be that interpretations of Community law (here Articles 49 and 50 EC) cannot generally overrule or preempt the right to strike, as further elaborated in national regulations. This is my preliminary conclusion. It has legal support in Article 136 EC where the EU Member States have drawn into the sphere of the *acquis* the fundamental social

[251] Opinion 2/91 Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work [1993] ECR I-1061.

rights enshrined in the European Social Charter and in the 1989 Community Charter of the Fundamental Social Rights of Workers. Furthermore, Article 28 of the Charter of Fundamental Rights of the European Union is a politico-constitutional enshrinement of the right to strike/industrial action, which can be read together with the ILO right to strike and can be interpreted ultimately in harmony with the founding principles of the Union: liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (Article 6(1) TEU).

It is finally noteworthy that also the Commission has stated that 'with regard […] to international core labour standards, the fundamental principles and rights at work identified by the International Labour Organization of course apply in their entirety to the countries of the EU'. [252] Self-evidently, the right to strike is one of the rights meant in that statement.

4.7.1 ILO Supervision v. EU Proceedings

The above conclusion, that the ILO right to strike is also binding on the EU, naturally raises the question about the relationship between the interpretations and application of the ILO's constitution and conventions within the ILO and those to be adopted by the ECJ. A preliminary remark is that the two international organisations (the ILO and the EU) have been close for quite some time. Their cooperation dates back to 1958 and is now based on the exchange of letters between the EU Commissioner for Employment and Social Affairs, Anna Diamantopoulou, and the ILO Director-General, Juan Somavia, in 2001. [253] The cooperation is reinforced by the EU promoting and rewarding compliance of the core ILO Conventions (Conventions 87 and 98 included; see section 4.4.2, especially footnote 221, *supra*), covered by the 1998 ILO Declaration on Fundamental Principles and Rights at Work.

The ILO standards have often served as a model for E(E)C law, even such as Article 141 (ex 119) EC on equal remuneration which has its international legal roots in the ILO's Equal Remuneration Convention, 1951 (No. 100). [254] A further example is the

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[252] See the Commission Communication, Promoting Core Labour Standards and Improving Social Governance in the Context of Globalisation, COM(2001) 416 final, p. 11.

[253] The exchange of letters is available at: http://europa.eu.int/comm/employment_social/news/2001/ jun/letter1_en.html and http://europa.eu.int/comm/employment_social/news/2001/jun/letter2_en.html. In the latter Mr. Somavia stated, as follows: 'Against this background, the Commission and the ILO agree that it would be of benefit to both organisations to develop their co-operation by focussing [inter alia] on the following priority areas: The promotion of labour standards, notably with regard to the principles and rights set out in the 1998 ILO Declaration on Fundamental Principles and Rights at Work;'.

[254] Arrigo and Casale denote that Article 141 (ex 119) EC was 'clearly inspired' by this ILO Convention; see Gianni Arrigo and Giuseppe Casale, Glossary of labour law and industrial relations (with special reference to the European Union). International Labour Office, Geneva, 2005, p. 23. Idem Novitz 2005, footnote 202 *supra*, p. 221. The ECJ referred to this ILO Convention in case 43/75 Defrenne II [1976] 455, paragraph 20. Besides, e.g. in the

Posted Workers Directive that was inspired also by the Labour Clauses (Public Contracts) Convention, 1949 (No. 94). Still, a discussion about the two distinct supervisory and jurisdictional structures seems rather self-evident. However, time and space do not allow any in depth discussion of this topic here.

Thus, the supervisory machinery in the ILO, concerning Convention Nos. 87 and 98, includes the Committee of Experts (which gives a yearly report to the International Labour Conference) and the Committee on Freedom of Association that works under the Governing Body of the ILO and deals with individual complaints. At the top of the interpretation of the ILO Constitution or its single conventions is the International Court of Justice; see Articles 29, 31 to 34 and 37 of the ILO Constitution. Under the last mentioned article the ILO Governing Body may appoint also an ad hoc tribunal. Since its creation in 1951 the Committee on Freedom of Association has examined over 1800 cases. On the other hand, the ICJ practice seems to include no substantive case concerning the ILO Constitution or Conventions. Therefore, a contradiction between the ECJ and the ICJ is rather theoretical. On the other hand, the ECJ has sometimes resorted to the authority of the ICJ as e.g. judgment *Racke* shows. [255]

The question of possibly overlapping and even contradictory supervisory and court practice is still worth some further principal remarks. In so doing I will mainly set aside for the present the status of the Commission in supervising the functioning of the Internal Market.

A source of certain tension is the fact that the EU is not - and cannot be, due to Article 1(2) of the ILO Constitution - a member of the ILO. It is a member e.g., and in particular, in the World Trade Organisation (WTO) that has its own dispute settlement and court system. In the ILO the EU has an observer's status while officially it is

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Preamble to the Working Time Directive 93/104/EC, Recital (4) (Recital (6) in codifying Directive 03/88/EC), the Community legislator has referred to corresponding ILO principles. As an expression of the confidence that the ILO has enjoyed in the eyes of the Commission one may mention the draft parallel Community ship register; see Commission Communications COM(89) 266 final and COM(91) 483 final. Namely, the Commission proposed that wages, working hours and further labour conditions of seafarers, who were not nationals of a Member State, on board vessels registered in that EC register (EUROS) 'shall be in accordance with the ILO Wages, Hours of Work and Manning (Sea) Recommendation (No 109)'; see Article 8 of the first Communication and Article 14 of the second. Deviations by collective agreements were possible; see Articles 9 and 15, respectively. Thus, the Commission wanted to raise the ILO Recommendation into a position of a principal norm in the EC legal order. The Commission did not see it as being necessary to justify this legal structure (see paragraph 61 of the 1989 Communication) but found that 'legally speaking the setting up of a parallel register is not a major problem' (ibid., paragraph 65).

[255] For Racke, see footnote 248, *supra.* As to an ICJ reference by the ECJ within employment law, I refer as an example to judgment in case C-37/00 Herbert Weber v Universal Ogden Services Ltd [2002] ECR I-2013, paragraphs 34 to 36. The case concerned a contract of employment, more precisely the definition of the place where the employee habitually carried out his work. The work was performed partly at an installation positioned over the continental shelf adjacent to a Contracting State (to the Brussels Convention on jurisdiction) and partly in the territory of another Contracting State. One can imagine 'inserting' a total strike, or even a sympathy action into such a legal framework. However, the ILO right to strike would clearly streamline it. I will take the liberty to postpone any in depth discussion thereof.

represented by the EU Member States. But viewed the other way round, my crucial thesis is that the ILO right to strike/industrial action 'penetrates' the EU's legal order even *de jure* (under Article 307 EC) and ultimately by virtue of general international law.

However, there are several factors which alleviate a potential problem concerning overlapping supervision and/or jurisdiction. The first factor is that the supervisory practice of the ILO, while it deals with concrete cases, does not require any EC-modelled balance to be struck at a detailed level between work rights and the economic market freedoms. Wide and detailed case-law of the ECJ does cover these freedoms. In that sense, my further crucial thesis is that recognising the binding effect of the ILO right to strike within the EU does not deprive the ECJ of its status as a guardian of the Treaty in general, let alone its rules on the Internal Market. A further alleviating factor is that in Articles 227 and 292 EC [256] the EU Member States have committed themselves not to bring their 'internal' EC law disputes, i.e. in this context those regarding the interpretation of EC law, before the courts outside the Union, and thus elsewhere than the ECJ. Hence, the EU Member States are committed also to leave any dispute involving a balance-striking between the right to strike/industrial action and the fundamental market freedoms (i.e. any such interpretation of the EC Treaty) for the ECJ to decide; its decision meaning here a principal line drawing while the ECJ 'internally' may leave e.g. a concrete application of the proportionality principle for a national court to decide. I will comment the status of national courts in the end of this section.

Coming back to the issue of possibly conflicting judicial supervision, it is useful to remember the Opinion 1/00 [257] of the ECJ concerning judicial supervision within the then draft European Common Aviation Area (ECAA). There the ECJ first reasoned, as follows:

> 20. The Court has already recognised that an international agreement entered into by the Community with non-Member States may affect the powers of the Community institutions, without, however, being regarded as incompatible with the Treaty. As it found in its Opinions on the draft agreements relating to the creation of the EEA, such an agreement is regarded as *compatible with the Treaty provided it does not alter the essential character of the powers conferred on the Community institutions by the Treaty* (see, in particular, Opinion 1/92, paragraphs 32 and 41). (italics added)

The ECJ continued (in paragraph 23) by noting that the 'indispensable conditions for safeguarding the essential character' of its own powers were satisfied. It presented as grounds, first (in paragraph 24), the fact that the Court remained responsible for ruling

[256] Article 227 EC, first subparagraph, reads, as follows: 'A Member State which considers that another Member State has failed to fulfil an obligation under this Treaty may bring the matter before the Court of Justice.' Article 292 EC for its part stipulates that the 'Member States undertake not to submit a dispute concerning the interpretation or application of this Treaty to any method of settlement other than those provided for therein.'

[257] See Opinion pursuant to Article 300(6) EC: Proposed agreement between the European Community and non-Member States on the establishment of a European Common Aviation Area; Opinion 1/00 [2002] ECR I-3493. For this opinion, see the case annotation of Fernando Castillo de la Torre, CMLRev. 39: 1373-1393, 2002.

on all questions 'concerning the legality of decisions taken by Community institutions under this Agreement.' Consequently, the Court's powers under inter alia Articles 230 EC and 234 EC were not called in question. The ECJ's second ground highlighted (in paragraph 25) how the proposed ECAA Agreement safeguarded the binding effect of the preliminary rulings of the ECJ.

The ECAA Agreement included also a dispute settlement procedure that is indirectly relevant in the ILO context. The background was that the ECAA Agreement replicated a whole number of Community rules such as those relating to market access, freedom of establishment, equal conditions of competition, safety and environment. The agreement also established a Joint Committee to resolve disputes and to ensure the uniform implementation of the provisions concerned. This created a potential threat to the autonomy of the Community legal order, which the Court addressed separately (paragraphs 27 to 45). The solution to this threat was that the dispute resolution and interpretation mechanisms ultimately did not bind the Community and its institutions (notably the Commission) to a particular interpretation of EC law. In the ILO context it is essential to note that the ILO right to strike/industrial action does not replicate any Community rules and, therefore, a similar threat to the autonomy of the Community's legal order should normally not arise.

A comparison of the grounds expressed by the ECJ in their Opinion 1/00 suggests that the same outcome would also be reached in the context of the ILO right to strike/industrial action: while it binds within the EU, it does not alter the essential character of the powers of the ECJ. *Mutatis mutandis* this applies also to the Commission.

The status of national courts still requires some important comments. As mentioned, it is natural that what binds the EU and the ECJ, binds also the national courts when interpreting EC law. The obligation of the Member States to respect the fundamental rights – when they are implementing EU law - is enshrined also in Article 51(1) of the Charter of Fundamental Rights of the European Union. Lastly in *Booker Aquaculture Ltd* the ECJ confirmed as settled case-law '…that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules. Consequently, Member States must, as far as possible, apply those rules in accordance with those requirements'. [258] Some elementary additional remarks will suffice here to amplify the point. Thus, according to the *Simmenthal*-doctrine a national court is under a duty to set aside the national rules not only when they conflict with express Community rules but also if they are 'otherwise incompatible with the provisions of Community law'. [259] On the other hand, there is also the question to what extent the ILO right to strike/industrial action, via the EU, 'penetrates' purely national situations (and strike

[258] See joined cases Booker Aquaculture Ltd, trading as Marine Harvest McConnell (C-20/00), Hydro Seafood GSP Ltd (C-64/00) and The Scottish Ministers [2003] ECR I-7411, paragraph 88.

[259] See case 106/77 Amministrazione delle Finanze dello Stato v Simmenthal SpA [1978] ECR 629, paragraphs 18 to 24.

rules). I take the liberty to pass over this issue here. However, within the ambit of EC law, as for example in the cross-border provision of services, a consistent treatment of the fundamental rights requires that the national courts protect those rights to the same extent as the ECJ does. Also the primacy and the uniform application of EC law are strong grounds in support of this conclusion. Hence, what binds the Member States, binds also their courts. [260] The logical conclusion is that the national courts also must protect the fundamental ILO right to strike/industrial action and balance it with the market freedoms, just as the ECJ does. I discuss it further, mainly in my section 4.10.4, *infra*.

4.8 EC Case-law

It is notable that EC case-law recognizes the right to strike, although originally in staff cases. In *Union Syndicale* [261] the Court arguably recognized, first, the individual right to form and join an association and, secondly, the collective right to take action. The fundamental nature of those two rights was confirmed in *Bosman* [262] with respect to freedom of association in general and in *Maurissen* [263] more specifically with regard to trade unions.

In *Albany* [264] Advocate General Jacobs recognized, on the basis of this case-law, that 'the right to take collective action in order to protect occupational interests in so far as it is indispensable for the enjoyment of freedom of association is also protected by Community law'. [265] Hence, he did not recognize the right to strike as a fundamental right in EC law but as something to be protected. It is to be underlined that he presented his analysis in 1999 and relied only on a disputable interpretation of Article

[260] The fact that the rules regarding the EU right to strike/industrial action derive essentially from an outside source, i.e. the ILO, does not alter the criteria applicable when a national court considers a request for a preliminary ruling of the ECJ. For these criteria, see e.g. Ojanen, footnote 207 *supra*, pp. 188-203, where he gives i.a. an explanation of the *acte clair* doctrine (p. 196 et seq.) under which a national court can refrain from making a reference to the ECJ. The first condition of that doctrine requires that the national court be 'convinced that the matter is equally obvious to the courts of the other Member States and to the Court of Justice'; paragraph 16 of case 283/81 CILFIT [1982] ECR 3415. Regarding the right to strike/industrial action, especially apposite is Ojanen's general statement that '[t]hus, when the point is new and invites construction of Community legal system as a whole and the objectives thereof, the Court of Justice alone is in the position to ponder such broad and significant questions'; ibid., p. 201.

[261] Case 175/73 Union Syndicale, Massa and Kortner [1974] ECR 917, paragraph 14

[262] See paragraphs 79 and 80 of Bosman (footnote 190, *supra*).

[263] Joined Cases C-193/87 and C-194/87 Maurissen and European Public Service Union v Court of Auditors [1990] ECR I-95, paragraphs 11 to 16 and 21.

[264] Case Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie is case C-67/96 [1999] ECR I-5751. Its joined cases were Brentjens, C-115-117/97, and Drijvende Bokken, C-218/97. As to Albany in defining the demarcation line between collective agreements and competition rules, see Bruun Niklas & Hellsten Jari (eds.), Collective Agreement and Competition Law in the EU, DJØF, Copenhagen 2001. As to Albany as a more general landmark showing the relationship between the economic and social dimensions in EC law, see Hellsten 2005 (footnote 107, *supra*), pp. 67-71.

[265] Paragraph 159 of the Opinion of 28 January 1999.

11 ECHR, thus passing the European Social Charter concerning the right to strike [266] and, especially, the ILO Convention No. 87 with its supervisory practice. The Court was able to pass the right to strike while it had to take stock – in relation to competition rules [267] - only on collective bargaining and on its results, i.e. a collective labour agreement. It decided that these agreements outweighed fundamental competition rules, hence, they must themselves result from a fundamental right, namely a right to collective bargaining. Such a right without the right to strike would be anomalous, like collective begging. I will come back to this in the context of the free provision of services.

One 'internal' ground for accepting the entitlement to secondary (solidarity) action in EC law can be seen in the fact that in defining – in *Albany* - the scope of the immunity of collective agreements vis-à-vis competition rules the Court did not accept the third condition suggested by Advocate General Jacobs, namely that the relevant collective agreement should not 'directly affect [...] relations between employers and third parties, such as clients, suppliers, competing employers or consumers'. [268]

The ECJ (sitting in plenum) tackled in 1991 the right to strike also in case *Dansk Slagterier* where it indirectly deduced the right to strike (and its indirect protection) from the concepts of a prudent businessman and (an *in casu* dismissed) force majeure. [269] It was essential also that the likelihood and probable effects of a declared strike

[266] He mentions only the right to collective bargaining in the European Social Charter, paragraph 146 of the Opinion.

[267] I rhetorically recall the fundamental nature of the competition law regime (Article 81 EC) in the *acquis*; it 'constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market.' See i.a. case C-126/97 Eco Swiss [1999] ECR I-3055, paragraph 36.

[268] See paragraph 193 of the Opinion of AG Jacobs. In case C-222/98 van der Woude [2000] ECR I-7111 AG Fennelly found this proposed restriction as undermining 'the solidarity inherent in collective bargaining' (paragraph 32 of the Opinion of 11 May 2000). The Court did not endorse this but confined itself to assessing the resulting collective agreement on the basis of judgment Albany. Germanotta and Novitz have found the solidarity statement of Fennelly to be brave and 'most promising for advocates of an entitlement to take secondary action' (footnote 209, *supra*, p. 77). The context (a collective sickness insurance) in van der Woude seems, however, to refer more to solidarity between those within the scope of a collective agreement than with those outside. Anyway, Fennelly's statement was not just brave but also true.

[269] Case C-338/89 Organisationen Danske Slagterier agissant pour Jydske Andelsslagteriers Konservesfabrik AmbA (Jaka) v Landbrugsministeriet [1991] ECR I-2315; the key words were 'Force majeure' and 'Interruption of supplies owing to a strike'. In paragraph 21 the Court wrote, as follows: 'Similarly, the possibility mentioned by the national court that the strike would have no effects on the undertaking concerned, because, for example, negotiations might be resumed, the strike postponed or an exception made for the transport of animals or foodstuffs, is not decisive. As the Court ruled in its judgment in Case 4/68 Firma Schwarzwaldmilch GmbH v Einfuhr-und Vorratsstelle für Fette [1968] ECR 377, an event is abnormal when it would have been considered improbable by a prudent businessman exercising due care. Such is not the case when the elimination of the effects of a strike, which is foreseeable in itself, depends on the occurrence of other events which are beyond the control of the trader concerned and incalculable in nature, as is shown by the Danish trade union practice described in these proceedings'. The Danish system of collective agreements

threat were assessed in their real national context where the Court took into account the Danish system of collective bargaining and the negotiation and strike practice of the Danish trade unions. The reasoning justifies concluding that this principle – a strike is to be assessed in its real national context – has general significance in EC law. [270]

In conclusion, the case-law of the ECJ also recognizes the right to strike and takes it in its real context. [271]

As mentioned, the issue (the right to strike in relation to internal market freedoms) is made more complicated due to the diversity of substantive national strike laws and practices. However, that situation is, regarding fundamental rights, not unique to strikes. In *Omega Spielhallen* the Court had to assess fundamental values, i.e. human dignity, enshrined in the German Constitution (Basic Law), in relation to the free provision of services. By its question, the referring court asked i.a. whether the ability which Member States have, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide services and the free movement of goods, is subject to the condition that that restriction be based on a legal conception that is common to all Member States (paragraph 23). The answer of the Court, following the standard formula of the observance of fundamental rights both in EC and national law (cited above), was rather straightforward:

> '37 It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. '

Hence, despite the diversity, EC law may protect fundamental rights. There seems to be no grounds for concluding that this diversity aspect would receive in principle a different treatment with respect to strikes, on the contrary.

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and the way it operates in practice was accordingly referred to by AG Mischo in his Opinion of 22.1.1991, paragraph 16.

[270] See also paragraphs 18 to 21 in comparison to paragraph 24 that is no longer bound – as to its wording – to the Danish circumstances.

[271] The history of EC social law reveals some traces of a similar national context, in fact of a margin of discretion within social and economic policy. In Case 155/80 Oebel [1981] ECR 1993 the Court discussed working hours in relation to the free movement of goods. It concluded that 'national rules governing the hours of work, delivery and sale in the bread and confectionery industry constitute a legitimate part of economic and social policy, consistent with the objectives of public interest pursued by the Treaty'. A further indication was the wave of cases on Sunday trading in the late 1980s. Shop owners claimed that compulsory closing on Sundays was in breach of Article 30 (now 28) EC. In Case C-145/88 Torfaen Borough Council v B & Q plc [1989] ECR 3851 the Court, referring to Oebel as cited above, held that '(t)he same consideration must apply as regards national rules governing the opening hours of retail premises. Such rules reflect certain political and economic choices in so far as their purpose is to ensure that working and non-working hours are so arranged as to accord with national or regional socio-cultural characteristics, and that, in the present state of Community law, is a matter for the Member States' (paragraph 14).

4.9 Right to Strike in the Framework of Free Provision of Services

4.9.1 General Aspects

Before entering into a detailed reasoning on the convergence of the doctrines on the free movement of services (Arblade-test) and fundamental rights, so as to shape the justification for a strike within services, it is appropriate to comment in one section on the basis, a legal source or principle, of such justification. Are there relevant competing justifications?

As alternative hypotheses one can distinguish six such justifications, which are to claim: (i) a 'Social Policy exclusion' or 'Title XI (of the EC Treaty) exclusion' from the ambit of services (Articles 49 and 50); (ii) a 'strike exclusion' or 'industrial action exclusion', respectively; (iii) an 'Albany-immunity'; (iv) a 'fundamental rights' exclusion, respectively; (v) a public policy defence; and (vi) a justification by convergence of the doctrines on restrictions on services (Arblade-test) and fundamental rights. Each of them is both defensible and subject to more or less critical comments. I will comment on them briefly.

A 'Social Policy exclusion' or 'Title XI exclusion' (i) would mean that matters falling under EU Social Policy do not fall at all under Articles 49 and 50 EC. By definition this *prima facie* looks attractive for any labour lawyer, highlighting an independent development and status of EC labour law.

However, the 'Social Policy exclusion' faces considerable problems, both in number and contents, I am sorry to say. First, an elementary point is that the text of the EC Treaty does not include any such exclusion. Furthermore, finding Title XI and the Services Chapter of the Treaty as mutually exclusive would for the sake of consistency obviously require also one to apply the same principle to the free movement of workers. Do we e.g. want to deny e.g. the effect of the 1989 Community Charter, referred to by Article 136 EC, on the free movement of workers? A further fundamental comment is that if mutual exclusivity were to be the case, it would have been impossible to write already in *Walrave* (see section 4.2) that 'regulating in a collective manner gainful employment' falls under Article 49 EC. Namely, as is common ground, 'gainful employment' as such falls under Title XI. Next to this, against 'mutual exclusivity' speaks, or, demonstrates, also the presence of 'the functioning of the common market' in Article 136 EC, although as a (de facto quite unsuccessful) source of upwards harmonisation. [272] It is there, anyway. Furthermore, adopting the labour law directives on collective redundancies, transfer of undertakings and employer's insolvency during the 1970s under Article 94 EC shows that Title XI is not any exclusive base for EC labour law, far from that. Article 136 EC refers also to the approximation of laws etc. On the other hand, the Posted Workers Directive shows how the Services Chapter may produce also labour law (see chapter 1). Finally

[272] In case-law the negation of the mutual exclusivity is graphic e.g. in Joined cases C-72/91 and C-73/91 Sloman Neptun [1993] ECR I-887. The ECJ first repeated the programmatic nature of Article 117 (now 136) EC (paragraph 25) but added (in paragraph 26): '26 Admittedly, the fact that the social policy objectives laid down in Article 117 are in the nature of a programme does not mean that they are devoid of any legal effect. They constitute an important aid, in particular for the interpretation of other provisions of the Treaty and of secondary Community legislation in social matters […].'

(supposing a 'Social Policy exclusion'), the Arblade-test or doctrine, with 'protection of workers' as one of its elementary components, would not exist in its present form because the ECJ would have applied this 'Social Policy exclusion' instead. Judgment *Seco* would obviously have declared that the extension right of national minimum wages would flow from Title XI, instead of 'Community law' (see section 1.2.2). Not just the expressed 'face' but also the 'heart' (legal source in the Treaty), i.e. Title XI, of justifying labour law matters (not 'restrictions on a fundamental freedom' in this thinking) would differ from the established practice. The effect of labour law issues on the freedom to provide services would be assessed and justified in a completely different way from what the European legal audience has had under its own eyes for decades. These comments are not exhaustive. Summing up one may state that the economic and social factors in EC law are also legally deeply and mutually interlinked. They are not exclusive.

I have discussed the 'strike/industrial action exclusion' (ii) in section 4.3, with the conclusion that a strike in an internal market context falls under the Treaty, ultimately under Article 2 EC. On the other hand, Article 137(5) EC shows that we cannot expect any EU strike directive that, in theory, could – like reflecting 'the purpose of the fondateurs of the Community' – elaborate the Treaty by excluding strikes from the legal ambit of the fundamental freedoms. Neither has the Monti-regulation 2679/98 such an effect as judgment *Schmidberger* (see section 4.10.1) indirectly shows: there is no reference to the Regulation although the case concerned the free movement of goods. The Regulation clearly reflects a high protection of the fundamental right to strike (within the free movement goods, and, by analogy, within services), as finally guaranteed in its details by national law. As secondary legislation it, however, cannot and does not exclude the right to strike from the fundamental freedoms (in the event that the ECJ decides that a strike falls under a freedom).

In *Albany* (see further especially footnote 312 and the references in footnote 264, *supra*) the ECJ set up a conditioned immunity of (sectoral) collective agreements from competition rules. The hypothetic assertion is that by analogy a similar quasi-exclusion ('Albany-immunity' (iii)) would/should be established also with respect to strikes in relation to Article 49 EC. In *Albany* the judgment was constitutional for EC social policy and labour law, being anchored to the particular task of the Community 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection' (Article 2 EC). However, while *Albany's* final normative target was the relationship between collective agreements and competition rules, the ECJ will not literally repeat itself by assessing or justifying strikes within services. If the question were the setting up of a demarcation line between strike rules/a strike and competition rules, *Albany* (with its conditions) would be, by definition, 'directly applicable'. Still, as a landmark in striking the balance between the social and economic factors it is self-evidently of high value in any corresponding constitutional interpretation of the Treaty. Accordingly, I, too, will resort by analogy to *Albany* in considering the final justification criteria of a concrete strike (see section 4.10.4).

An overall 'fundamental rights' exclusion (iv) is with respect to strikes a natural submission in the sense that Article 136 EC requires us to 'have in mind' the European Social Charter of 1961 and the 1989 Community Charter of Fundamental Social Rights of Workers. Both expressly enshrine the right to strike. While their

interpretative value is clear, [273] they do not offer any comprehensive defence against services rules of the Treaty. The leading precedent *Schmidberger* shows that the relative ones amongst fundamental rights/human rights may be balanced against fundamental market freedoms (see section 4.10.1). While the contents of the ILO right to strike a priori exclude its restriction unless strictly profession-related (for example the army and police force) or on societal grounds (under exceptional circumstances), it is nowhere an absolute right. It therefore falls to be balanced.

A public policy (ordre public) defence or exclusion (v) is of specific value but does not a priori free strike rules or a concrete strike from the fundamental freedoms, as the ECJ confirmed e.g. in *Arblade*. I discuss this further in section 4.9.3. Another aspect is that case-law under the EC Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters shows how fundamental rights are a necessary element in assessing the contents of the public policy, and that the Member States are in principle free to define the contents of their public policy while the limits of that concept are a matter for interpretation of the Convention, finally by the ECJ (judgment *Krombach* [274]).

What is then the profile of the Arblade-test, as complemented by the fundamental rights doctrine (*Schmidberger*) (vi). Given the text in previous chapters, it is not necessary to present the Arblade-test generally, its position in case-law, etc. Within the social part of the restrictions on the free provision of services, justified by general good or interest it embodies the case-law since 1979 in judgment *van Wesemael*. [275] It is to be expected that the ECJ would follow that line when assessing the status of strikes within services. *Schmidberger* is a fresh landmark of the ECJ but there, too, no serious reason leads to the conclusion that its principal line, weighing between fundamental rights and a market freedom, would not be followed with respect to the fundamental right to strike/industrial action.

However, one additional aspect is worth particular attention within the Arblade-test before considering its application to strikes. It must be highlighted at the outset that concerning (minimum) wage-setting by law or collective agreements within the PWD, or as a modification of the Arblade-test, the ECJ as a principal position (as a 'well-established' interpretation of 'Community law', not just of 'common market') in *Seco* legitimised *state measures* (the extension right; see section 1.2.2, *supra*) against low-wage competition from other Member States. I maintain that this test must *a fortiori* allow measures (industrial action) by workers (the 'affected workforce'; *Webb*, paragraph 19) themselves, as well as by their organisations.

4.9.2 Elaborating Remarks; Relation to Earlier Case-law

I first resume in brief the normative structure to be used in assessing a national strike regarding posting workers in the framework of the free provision of services. With this I mean a situation where a national trade union resorts to industrial action in order

[273] On the 1989 Charter, see e.g. joined cases C-397/01 to C-403/01 Pfeiffer, nyr, paragraph 91. On the 1961 Charter, see e.g. case 24/86 Blaizot [1988] ECR 379, paragraph 17.
[274] See Case C-7/98 Krombach [2000] ECR I-1935, paragraphs 22.
[275] See footnote 32, *supra*.

to reach a (substitute) collective agreement implementing the Posted Workers Directive 96/71 (PWD).

As argued above, the right to strike is a fundamental right, essentially protected by the relevant international treaties (of which the ILO right to strike sets up also the EU standard) and the common constitutional tradition of the Member States. Furthermore, Article 136(2) EC (taking account of the diverse forms of national practices, in particular in the field of contractual relations) must also be observed in interpreting Articles 49 and 50 EC which have also the horizontal direct effect. I see the effect of Article 137(5) EC in the principle that whereas it reflects the reluctance of the European legislator to interfere in the right to strike, it is a legitimate expectation that the Court will find itself equally bound – although mutatis mutandis – to respect the inherent national margin of appreciation.

As to the Treaty, it would be no surprise to see that the Court would rely even on the leading Articles 2 and 3 EC, defining the objectives and tasks of the Community, and on an 'effective and consistent interpretation of the provisions of the Treaty as a whole' as the Court declared in *Albany*, paragraph 60.

The Posted Workers Directive (PWD) furthermore fills the normative 'space' concerned. While its Recital 22 states that the PWD 'is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions', the PWD is not without significance here; far from it. Recital 22 must be read as meaning that the PWD, being secondary legislation, does not weaken or dilute the status of the (national) right to strike from what it would be without the PWD. Otherwise it is highly important to note that the Directive itself means a convergence of the consolidated market freedom (i.e. fair competition) and protection of the rights of workers as its Recital 5 demonstrates. That was counted of weight also in judgment *Wolff & Müller*, in paragraphs 41 and 42, as follows: [276]

> 41 Inasmuch as one of the objectives pursued by the national legislature is to prevent unfair competition on the part of undertakings paying their workers at a rate less than the minimum rate of pay, [277] a matter which it is for the referring court to determine, such an objective may be taken into consideration as an overriding requirement capable of justifying a restriction on freedom to provide services provided that the conditions mentioned in paragraph 34 hereof are met. [278]

[276] On that decision, see section 2.2.5, *supra*.

[277] It is, however worth mentioning here, too, the early decision in 1974 where the Court, although in the field of free movement of workers, confirmed the right to protection for domestic workers against low wage competition: case Commission v France, 167/73 ECR [1974] 359, paragraph 45 (quoted in connection to footnote 12, *supra*). One may clearly conclude that this protection is recognized outside an employment relationship. By analogy this supports the submission that national trade unions are not prohibited from industrial action against a foreign service provider by virtue of the fact that they have no members in the companies concerned.

[278] The referred paragraph 34 of *Wolff & Müller* conditioned the restriction with the standard formula in the Arblade-test, as follows:
'…justified where it meets overriding requirements relating to the public interest in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject

> 42 Moreover, as the Austrian Government has rightly pointed out in its observations, there is not necessarily any contradiction between the objective of upholding fair competition [279] on the one hand and ensuring worker protection, on the other. The fifth recital in the preamble to Directive 96/71 demonstrates that those two objectives can be pursued concomitantly.

These passages present, when read together, indeed, one and the very first post-PWD application of the Arblade-test that the Court uses in the interpretation of Article 49 and 50 EC. It is essential to note the incorporated twofold proportionality assessment (appropriateness – necessity) with respect to restrictions on the free provision of services. As shown earlier in this reasoning (Chapter III), in *Commission v Germany* (paragraph 24) [280] the ECJ in April 2005 somewhat rewrote, while keeping the contents, the formula concerned in the Arblade-test regarding the definition of the minimum rates of pay. It was essential, in line with earlier case-law, to establish the protection of workers – instead of any interest of the posting employer - as the very yardstick of the proportionality assessment. There the analysis shows that finally the proportionality test remained as a safety valve against social protectionism or unnecessary restrictions on free movement. [281] However, it is more than likely that in assessing the right to strike in this context the ECJ will base itself, next to protecting the right to strike as a fundamental right and in its ILO form, on its own case-law, especially *Commission v. France* (quoted at footnote 12, *supra*), *Seco, Dansk Slagterier, Arblade*, *Wolff & Müller* and *Commission v. Germany*. I will come back to this after having discussed first the Swedish lex Britannia in the light of the Arblade-test. That is what we obviously can do even without adding the fundamental rights aspect to that test. Experience has shown that lex Britannia is no industrial action automat. In 2004 the Swedish Building Workers' Union concluded 98 substitute collective agreements with foreign employers posting workers into Sweden and in only three cases was it required to resort to industrial action (blockades, boycotts etc.). [282]

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in the Member State in which he is established and in so far as it is appropriate for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it […].'

[279] Already judgment Vander Elst, paragraph 25, in 1994 used this competition argument, by referring to the Belgian system of industrial relations that prevented workers from being exploited and competition distorted. See section 1.2.2, supra.

[280] Case C-341/02, judgment 14.4.2005, nyr. On that judgment see sections 3.3.3 and 3.4, supra.

[281] For clarity's sake it is to be underlined that this proportionality test is no novelty in posting case-law, for example Rush Portuguesa (and the 12th recital of the Preamble to the PWD) in its obiter dictum of paragraph 18 noted it (in 1990) by referring to enforcement ('guarantee of observance' in the PWD) of national pay rules by *appropriate* means. So did also judgment Vander Elst in 1994 in an obiter dictum in paragraph 23.

[282] See press release 'Kommentar med anledning av TT-uppgifter: 98 avtal med utländska företag 2004' of 29 April 2005, available via www.byggnads.se.

4.9.3 Public Policy (Ordre Public) Provisions

A further important - but now still preliminary - question in EC law is whether national strike laws are of ordre public (public policy) nature in the context of the free provision of services. I will have to pass over any deeper reasoning thereon. [283] However, the so-called lex Britannia (i.e. the set of certain provisions in the Swedish Codetermination Act) elaborates the Swedish constitution by stipulating that the Swedish trade unions may resort to industrial action so as to reach a collective agreement under Swedish law, like the abovementioned substitute agreement, even if the foreign employer posting workers into Sweden is bound by a collective agreement abroad. Hence, lex Britannia seems to belong to the Swedish ordre public (public policy) and to be a (set of) mandatory provision(s) falling under Article 7(2) of the Rome Convention on Law Applicable to Contractual Relationships. [284] Besides, being the cornerstone of the Swedish labour law and labour market system [285] in a cross-border context, the value of lex Britannia, too, was highlighted by a declaration attached to the Accession Act of Sweden. [286]

It is necessary to observe that public policy (ordre public) provisions do not escape from the sphere of the fundamental freedoms in the Treaty. The Court stated this e.g. in *Arblade* (paragraph 31) by referring simply to the need to avoid undermining the primacy and uniform application of Community law. It continued by stating how

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[283] As to the concept of ordre public provisions, the ECJ defined it in Arblade, as follows (paragraph 30): '…concerning the classification of the provisions at issue as public-order legislation under Belgian law, that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social *or* economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.' (emphasis added) In 'fundamental rights language' one may state that the Swedish right to strike/industrial action – like the Finnish one, included in case Viking; see section 4.10.5, *infra* – is an expression of the common constitutional tradition that has its special status under Article 6(2) EU.

[284] Being inherently linked to the core of the Swedish labour market model, lex Britannia seems to clearly reflect, indeed, the political, social *and* economic order of the state. Ulla Liukkunen points out in her dissertation The Role of Mandatory Rules in International Labour Law, Talentum, Helsinki 2004, p. 139, that one part of the lex Britannia (section 25a of the Swedish Co-determination Act) is 'clearly' internationally mandatory; according to that provision, a collective agreement invalid under foreign law due to its emergence from an industrial action is anyway valid in Sweden if the industrial action is valid under the Swedish Co-determination Act. She further refers to Swedish *travaux préparatoires* (SOU 1998:52, p. 69) according to which 'provisions in the Act on the freedom of association, the right to negotiate as well as provisions on the peace obligation when a collective agreement has been concluded have been regarded as internationally mandatory.' In this context lex Britannia (Sections 25a, 31a and 42, subparagraph 3, of the Co-determination Act) seems to form one entity that as a whole amounts to public policy (ordre public) provisions.

[285] I recall how the EHRC emphasized the status of collective agreements in the Swedish labour market model in case Gustafsson v. Sweden; see footnote 314, *infra*.

[286] See the Declaration No. 46 by the Kingdom of Sweden on social policy, annexed to the Accession Act of Austria, Finland, Norway and Sweden, OJ C241, 29.8.1994: 'In an exchange of letters between the Kingdom of Sweden and the Commission, the Kingdom of Sweden received assurances with regard to Swedish practice in labour market matters and notably the system of determining conditions of work in collective agreements between the social partners'.

‘(t)he considerations underlying such national legislation can be taken into account by Community law only in terms of the exceptions to Community freedoms expressly provided for by the Treaty and, where appropriate, on the ground that they constitute overriding reasons relating to the public interest.’ [287] Hence, even ordre public provisions are subordinate to the Arblade-test. [288] This brings me to discuss the justification of lex Britannia.

4.9.4 Justification of Lex Britannia

Before applying the above-mentioned principles of EC law into a concrete industrial action it is appropriate to discuss in brief the status of the Swedish lex Britannia in the light of the Arblade test. That is the reference question (B) of the Labour Court of Sweden (see section 4.1). I recall in summary its components: (i) abolition of any discrimination and even tenuous restrictions on the free provision of services; (ii) existence of justifying overriding requirements of public interest (iii) that have not been met by rules of the home state (equivalence or mutual recognition) and (iv) proportionality with an objective justification (appropriateness and necessity – ‘not going beyond’ – of the national measures concerned).

A preliminary remark is that the lack of any reference to wages in the Swedish law implementing the Posted Workers Directive is not a decisive factor in the justification of lex Britannia. This simply leads to the conclusion that the obligations deriving from the EC Treaty (i.e. the Arblade-test) apply, and the Directive is of (only) interpretative value.

By giving precedence to a subsequent collective agreement under Swedish law (Co-determination Act, Section 31(a)) the national law incorporates unequal treatment and indirect discrimination of foreign employers posting workers into Sweden. [289] A Swedish employer enjoys the legal protection granted to the previous agreement, the inherent peace clause included. That unequal treatment is, however, an inherent consequence of the basic purpose of the Act, namely to guarantee the realisation (i.e.

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[287] On similar lines the Court reasoned in Omega Spielhallen, as follows: ‘30 However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 *Van Duyn* [1974] ECR 1337, paragraph 7). In addition, the concept of ‘public policy’ in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of workers, *Van Duyn*, paragraph 18; Case 30/77 *Bouchereau* [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 *Église de Scientologie* [2000] ECR I-1335, paragraph 17)’.

[288] As to Arblade-test in general, see section 1.2.3, supra.

[289] An a priori forbidden discrimination established; criterion (i) in Arblade-test. That lex Britannia involves indirect discrimination is also the position of e.g. Jonas Malmberg, Metoder att motverka låglönekonkurrens i Sverige, in Malmberg (ed.) Låglönekonkurrens och arbetstagares integritet. Arbetslivsinstitutet, Arbetsliv i Omvandling, 2000:2, p. 19-20. Also Sigeman, footnote 202, *supra*, pp 492-3, finds that lex Britannia in practice means treating the visiting service providers different from domestic ones and foresees ’good grounds (’goda skäl’) for its justification (which he does not rule out).

implementation(!)) of the national benefits covered by the PWD by means of collective agreements. Hence, the purpose is to guarantee equal treatment (or to block low wage competition or social dumping [290]) and fair competition within that sphere of benefits. It is in fact an *obligation* established by the PWD for the Member States with erga omnes minimum wages and such an obligation is by definition more than that required by the Arblade-test, namely a *public interest* recognized by the Community**.** In this sense, the collective agreements in Sweden, the substitute agreements in particular, do have the same function as minimum wage laws or collective agreements of the formal erga omnes effect in many other Member States. In other words, collective agreements based on lex Britannia put into practice the equal treatment principle enshrined in Article 50(3) EC. This is besides in line with Article 137(3) EC which refers to the implementation of directives (like the PWD) by means of collective agreements. Furthermore, this corresponds with the second subparagraph of Article 3(1) PWD that leaves the definition of the minimum wage concerned to the national law and labour market practice. For all these reasons the formally inherent, indirect discrimination via lex Britannia must be regarded as fulfilling the requirement of overriding reasons of public interest (see judgment *Wolff & Müller*, paragraph 41, quoted above). Here I especially recall how the Court in *Seco* legitimised state measures against low-wage competition. It *a fortiori* means that measures by the affected workers themselves or by their organisations must be regarded as legitimised. [291]

Fulfilling the equivalence criterion of the Arblade-test is manifest unless the law of the home state would exceptionally oblige the employer to comply with the pay rules of Sweden as the host state. That could create a relevant debate whether it would be justified to require a collective agreement under Swedish law as a means of implementing the extension right of national minimum wages that the ECJ established in *Seco*, with a reference to enforcement with appropriate means (see section 1.2.2, *supra*). It is in fact an exception to the equivalence criterion; more money does not violate equivalence. [292]

As a whole, the Swedish system (lex Britannia), due to its status as realising a fundamental Community principle (i.e. equal treatment, as enshrined in Article 50(3) EC) must be regarded as appropriate for its purpose and proportionate as to the yardstick, protection of workers. It does not result in automatically and manifestly

[290] See in the Swedish travaux préparatoires Ds 1994:13, p. 333.
[291] Concluding: criterion (ii) in Arblade-test fulfilled.
[292] Concluding: criterion (iii) in Arblade-test fulfilled. As far as the author knows, the only national implementation law of the PWD that includes such an obligation (of the home state), clearly justified as such, be exactly the Swedish law. See also – by analogy - the philosophy in Wolff & Müller where the liability rule of the host state *added* at least one more solvent debtor (paragraph 40). A detailed analysis reveals other aspects in the Swedish system with such an added value, like the independent status (*locus standi*) of the trade union to institute judicial proceedings so as to execute a collective agreement under Swedish law. If the posted workers do not act, the union may institute proceedings so as to reinforce the union's compensation interest even against the workers' will (arg. Litigation in Labour Disputes Act - lagen (1974:371) om rättegången i arbetstvister). Further on, as a standard procedure, a substitute agreement subordinates the employer also to the wage control mechanism in the sector-wide national collective agreement in construction. The employer has to declare to the trade union each month the wages paid.

disproportionate pay benefits to workers as individual strikes or other industrial action in theory may do. [293]

In sum, in the light of settled case-law, lex Britannia as such passes the Arblade-test and is compatible with Articles 49 and 50 EC. This conclusion becomes endorsed if one adds, regarding the 'overriding reasons' and proportionality criteria of the Arblade-test, the legal consequences adhering to right to strike/industrial action as a *fundamental right* in EC law. [294]

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[293] Concluding: criterion (iv) in Arblade-test fulfilled. The opposite position would mean to regard as inappropriate and disproportionate ultimately the whole Swedish labour market model with its emphasized role of collective agreements. The fact that Sweden has not officially indicated implementing the PWD via collective agreements cannot be decisive as this is at the end of interpretation of Articles 49 and 50 (ex 59 and 60) EC.

[294] This study has reached the conclusion that the fundamental 'ILO right to strike/industrial action' also binds the EU. 'The ILO right to strike' is 'one of the essential means through which workers and their organizations may promote and defend their economic and social interests' and it is therefore 'a civil, political and socio-economic entitlement' (see section 4.4.2 at footnotes 212 and 213, *supra*). It a priori legitimises trade union action in the Internal Market, certainly against low-wage competition, within the concept of the protection of workers; see further section 4.10, *infra*.
However, regarding the particular justification of lex Britannia, it is appropriate to consider also an additional argument: the European Social Charter (ESC), referred to also by Article 136 EC.
Article 6(4) ESC refers to restrictions (obligations) 'that *might* arise out of collective agreements previously entered into' (see section 4.4.4; italics by JH). It is the only international treaty dealing expressly with the question of previous agreements. By virtue of Article 307 EC the Swedish trade unions and government may invoke it, due to the ratification of the ESC by Sweden on 17 December 1962 with no reservation with respect to Article 6(4).
As to substance in the ESC, the Digest of the Case-law of the European Committee for Social Rights (ECSR) in March 2005 describes generally the permitted objectives of collective action, as follows:
'Article 6§4 applies to conflicts of interests, i.e. generally conflicts which concern the conclusion of a collective agreement. It does not concern conflicts of rights, i.e. related to the existence, validity or interpretation of a collective agreement.
Within those limits, the right to strike should be guaranteed in the context of *any* negotiation between employers and employees in order to settle an industrial dispute.' (emphasis JH; see the Digest, p. 36; available via http://coe.int). Furthermore, the question of previous agreements is not a dead letter in the ECSR practice. Concerning a breach of a currently valid collective agreement (in Malta) the ECSR wrote "Admittedly, the Committee has always accepted the fact that collective action could not be taken with regard to *matters governed* by collective agreements if legal disputes, rather than conflict of interests, were at stake (see Conclusions I [1970], p. 38). However, this did not apply to matters subject to bargaining during the negotiations but *not covered* by the agreement, which could not be considered an obstacle to such action" (Conclusions XIII-2 [1995], p. 283; italics by JH). The case is reported by Lenia Samuel, Fundamental social rights. Case-law of the European Social Charter. Second edition, Council of Europe Publishing 2002, p. 155.
Hence, the Article 6(4) ESC clause on *possible* restrictions on industrial action by previous agreements may have an impact on contractual relations even between parties that have concluded an agreement. The right to action exists regarding matters 'negotiated but not covered' by a previous agreement. *A fortiori* Article 6(4) ESC legitimises the abolition of the peace obligation between parties that have *not* concluded any previous agreement. This is exactly the case in the Swedish lex Britannia.

4.10 Converging the Doctrines on Services and Fundamental Rights

4.10.1 Proportionality and Acceptability Aspects

In *Schmidberger* the Court ruled in the field of free movement of goods. In that sense I recall that while the restriction rules regarding the four fundamental freedoms are not entirely parallel, they too can be used by analogy unless there are obvious reasons not to. Seen from the point of view of the fundamental rights, the interpretations should be even more parallel, irrespective of against which of the four freedoms a fundamental right is to be balanced. Anyway, as to the fundamental rights of workers, there should be no essential difference, whether the question is one of the free provision of services or the free movement of goods. However, in *Schmidberger* the Court reasoned, as follows:

> 78. First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 *Rewe-Zentral* ('*Cassis de Dijon*') [1979] ECR 649.
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> 79. Second, whilst the fundamental rights at issue in the main proceedings are expressly recognized by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued […].
>
> 80. Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed […].

A linguistic remark is that, as justifying restrictions on fundamental rights, the expression 'pressing social need' (paragraph 79) self-evidently means a need seen from the whole society's point of view. Accordingly, viewing each of the freedoms concerned 'in relation to its *social* purpose' (paragraph 80, emphasis added) means the purpose for the whole society, hence not just an issue 'more or less' protecting the poor or powerless people; the French wording manifests this with the expression 'leur fonction *dans la société*'. On the other hand, the freedoms concerned were qualified as constituting 'the fundamental pillars of a democratic society' (see paragraph 79). Substantively I submit that the fundamental right to strike/industrial action amounts to the same qualification as freedom of expression and assembly: a fundamental pillar of a democratic society. However, to make this argumentation more operational, I resort,

in discussing possible interferences with the right to strike/industrial action, to the developed concept present in paragraph 80 of *Schmidberger*: outlawing interferences that *impair the very substance of the right guaranteed*. This does not mean that the other paramount 'restriction threshold' in paragraph 80, the objective of *general interest*, would not be important. It certainly is, but case *Laval* (with its Swedish context) does not require any detailed discussion on the application of such restrictions.

However, some further general comments are appropriate regarding the 'general interest' criterion. First, the right to strike/industrial action finally has its 'EU base' (hence, next to the applicability of the 'ILO right to strike') in the founding principles of the Union, enshrined in Article 6(1) TEU: liberty, democracy, respect of human rights and fundamental freedoms, and the rule of law. Consequently, also the restrictions of that right ultimately must qualify even on that level. Second, in a cross-border context it is a Community concept, but it might be of some significance that paragraph 80 of *Schmidberger* does not refer to it. [295] Still, in posting of workers a natural association anyway exists with the settled case-law that 'protection of workers' represents (overriding reasons of) general interest that may restrict the free provision of services. [296] Furthermore, because *Seco* (see section 1.2.2, *supra*) legitimised state measures against low-wage competition, measures by the workers affected and their organisations must *a fortiori* be regarded as legitimate under EC law. This (finally 'protection of workers') in fact excludes even considering restrictions on the right to strike, as far as its use remains genuine, under any 'general interest' of the Community. At the same time proportionality and acceptability of restrictions on the right to strike ('that may not impair the very substance of that right') obviously leads to concrete conclusions. I will turn my attention to them now.

The *Schmidberger* formula proportionality – acceptability ('disproportionate and unacceptable interference' in paragraph 80 of Schmidberger) finally for its part highlights also the question about the two types of restrictions present in the *Laval* case: restrictions on the free provision of services and restrictions on a fundamental right. I will discuss them together since they both qualify the one and same phenomenon, the interference that may ultimately impair the very substance of the right to strike.

Hence, the *Laval* case for the first time in the field of EC labour law [297] incorporates in the one and same case the proportionality assessment as a part of two a priori separate toolkits of reasoning in EC law: (i) justification of restrictions to the fundamental freedom to provide services (fourth part of the Arblade-test) and (ii) proportionality test in restricting a fundamental right of workers. The fundamental rights doctrine adds the acceptability assessment (of a restriction) to this already complicated structure. Both the proportionality and acceptability assessments must be first put into their context and outlined. Here I take it for granted that the Court will

[295] In Case C-62/90 Commission v. Germany [1992] ECR I-2575, paragraph 23 (whereto Schmidberger, paragraph 80, refers), this is clearly spelled out by referring to general interest pursued by the Community. That case concerned free movement of medicinal products.
[296] Judgment Arblade, paragraph 36.
[297] I see it as being justified to place the posting of workers in the framework of services (and the Posted Workers Directive) here with this qualification 'EC labour law' having in mind the other side of the context: guaranteeing fair competition between undertakings.

keep the protection of workers as its legal yardstick for proportionality, as in the relevant, and also in the recent case-law.

In distinguishing between acceptability and proportionality, it should be noted that the acceptability assessment is highly sensitive. While it has at one level a very concrete dimension (with the exploitation of the Latvian workers as the core), it is at the same time abstract and linked to social values. It comes close to, or even within, purely political decision-making in relation to which any constitutional court is extremely careful and grasps only manifest cases of excess of the limits of discretion (by the Member States in this case). [298] Another sensitive dimension simply is: who decides what an acceptable restriction is? Is it the Labour Court of Sweden or the European Court of Justice. The prerequisite is that it is the European Court of Justice that answers that question. Furthermore, the legal concepts present are either its own creatures or otherwise fall under its ultimate jurisdiction. On this basis, I think, the ECJ will deem itself competent, if not the solely competent body, to decide the acceptability of a restriction to a fundamental right. That is what it did also in *Schmidberger*, besides deciding there also the proportionality assessment (paragraphs 90-94). It is, of course, conceivable that the ECJ confines itself to establishing the parameters or otherwise guiding the acceptability assessment and leaves its final application to the Labour Court of Sweden. In any case, in applying the final formula ('interference impairing the very substance of the right[s] guaranteed', *Schmidberger*, paragraph 80), the ECJ will rely on the right to strike as it is elaborated in the Swedish context.

There remains the question about which court will make the proportionality assessment concerned. The examples of e.g. the recent posting judgments *Wolff & Müller v. Pereira* and *Commission v. Germany* would justify concluding that the ECJ would confine itself to establish the criterion (or criteria), the yardstick, but otherwise leave the application for the national court. [299] However, while there are now two types of proportionality, and one of them is inherently linked to acceptability (under the umbrella of substance-impairing interference), a reasonable guess is that the ECJ will decide, if not the whole 'package', at least anything having essential significance in Community law. One has to bear in mind that on this occasion the industrial action concerned one school site in one country. Another time the same action may concern e.g. even large parts of transport (services) in several countries and reach the desk of the ECJ. Judgments *Bostock* and *ERT v DEP* provide clear guidance by explaining

[298] I may refer to a framework applied by the Court, although it was in exploring proportionality of a Community act, in the case C-84/94 United Kingdom of Great Britain and Northern Ireland v Council of the European Union [1996] ECR I-5755; the keywords were: Council Directive 93/104/EC concerning certain aspects of the organization of working time - Action for annulment. There the Court reasoned, as follows:
'58 As to judicial review of those conditions, however, the Council must be allowed a wide discretion in an area which, as here, involves the legislature in making social policy choices and requires it to carry out complex assessments. Judicial review of the exercise of that discretion must therefore be limited to examining whether it has been vitiated by manifest error or misuse of powers, or whether the institution concerned has manifestly exceeded the limits of its discretion.' By replacing 'the Council' by 'a Member State' one might bring a viable formula also to the acceptability assessment.
[299] On this aspect, see sections 3.3.3 and 3.4, supra, in the context of judgment Commission v. Germany, case C-341/02.

how [300] the ECJ - where the national rules fall within the scope of Community law - must provide in a preliminary ruling all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights whose observance the Court ensures. This already implies the obligation of a national court to protect the fundamental rights recognised by the Community and the ECJ.

4.10.2 Lot of Danish-Swedish Model

A further relevant but case-related feature is that the relevant posting law precedents (notably *Webb,* [301] *Seco, Rush Portuguesa, Vander Elst, Arblade, Finalarte, Portugaia, Wolff & Müller* and *Commission v. Germany)* in one way or another dealt with restrictions imposed by the state (and on the broad line justified by the Court whenever subject to the very ruling on a concrete question). In *Arblade* and *Portugaia* the questions subject to preliminary ruling involved, of course, national collective agreements but such as were declared of universal applicability (erga omnes) by the state. Mutatis mutandis, in *Omega Spielhallen* the restriction (ban on 'play killing' games) concerned one type of entertainment game and e.g. in *Läärä* [302] certain types of gambling (slot) machines, both in any case rather limited as to their overall societal significance. Differently (although not in contrast), the particular feature of the *Laval* case is that it concerns restrictions caused by a national labour market system that relies on the acts of *private* legal actors, namely collective labour agreements. The final means of reaching them is the right to strike/industrial action. This way it is also the anchor of the whole labour market model of Sweden (and Denmark). Linked to this, in terms of *Schmidberger*, paragraph 80, what might be *impaired* is finally that labour market model. Therefore that model – having its legal formulation in the lex Britannia - is finally subject to judgment in the *Laval* case, with the possibility of keeping that model in a Member State of the Community. And what is elementary for a Member State (or two Member States) is deeply tied also to the essence of the Community itself. The Swedish and Danish model, in realising social justice and order (fair competition and prevention of social dumping), certainly deserves its place in the Community.

With the remarks above I want to highlight the challenge ahead in the case. It is not just combining the Arblade-test and the doctrine of accepting restrictions for a fundamental right in a way that is coherent and sustainable from the point of view of the *Community* law; it also has to serve the Member States concerned. That is also the message that stems – next to Article 3(1) and 3(8) PWD - from *Omega Spielhallen*: [303] accepting diversity in the common legal framework.

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[300] See Case C-2/92 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Dennis Clifford Bostock [1994] ECR I-955, paragraph 16, and Case C-260/89 ERT v DEP [1991] ECR I-2925, paragraph 42,

[301] I take the liberty to insist on the connection between judgments Webb, Seco and Arblade, see especially sections 1.2.2 and 1.3.6, *supra*, but also the end of footnote 318, *infra*.

[302] See Case C-124/97 Läärä [1999] ECR I-6067.

[303] And from the case-law referred to by Omega Spielhallen, paragraph 38: Case C-124/97 Läärä [1999] ECR I-6067, paragraph 36; Case C-67/98 Zenatti [1999] ECR I-7289, paragraph 34; Case C-6/01 Anomar and Others [2003] ECR I-8621, paragraph 80).

4.10.3 Convergence of the Two Doctrines in Practice

However, while we live in the European legal *Community*, I see it as being natural that the ECJ in making this convergence will take as its basis the free provision of services, one of the fundamental elements of the internal market that is a constituent element of the whole Community, and thereby the Arblade-test as an equally heavy doctrinal category resulting from a relevant number of cases since judgment *van Wesemael* in 1979 (see footnote 32, *supra*). Hence, the Court will incorporate the application and protection of the right to strike into that legal framework and not the other way round. Putting it other way round would mean taking the right to strike as the basis; the Arblade-test would then be incorporated into that framework. Hence, the basis would be the right to strike as a fully new concept of EC law (although a fundamental right; it would still be a kind of a *Deus ex machina*). It is besides nationally variable as to final material contents. Given the overall strength of the settled case-law, such a way of converging these two doctrines seems very unlikely, indeed. If the convergence line were still unclear, it would stem - in the form stated above - from an 'effective and consistent interpretation of the provisions of the Treaty as a whole' (*Albany*, paragraph 60). [304] I would emphasize that regarding the proportionality assessment the difference in approach does not necessarily lead to a different result, given that the yardstick in the Arblade-test proportionality here is the protection of workers; it covers the right to strike. Regarding the acceptability assessment in the fundamental rights doctrine, the situation at least prima facie looks different and at the same time inevitable. Hence, the historical evidence leads one to assume that the *prima facie* leading question will be to what extent the fundamental right to strike may restrict the freedom to provide services.

However, this does not free us from the remaining challenge, application of the 'protection facet' of the fundamental rights doctrine, i.e. the proportionality and acceptability test therein. I would emphasize that when the ECJ takes – understandably as such - the fundamental freedom (with its inherent Arblade-test) as the basis for the necessary convergence with the fundamental right, it does not free the Court from answering the question to what extent that *freedom* may restrict the fundamental *right* to strike without it impairing its very substance. [305] In that sense I dare to present a model below. Obviously the old adage that a freedom is weaker than a right is not sufficient for a sustainable answer in the Community context.

Still, the convergence of the Arblade-test and the fundamental rights doctrine is complicated. Such a convergence, or balance-making, is in any case necessary in order to answer the concrete question on the lot of the *Laval* industrial action and boycott under Articles 49 and 50 EC. It remains to be seen to what extent all this can

[304] This is what paragraph 60 of Albany means. The interpretation is (or, must be) effective and consistent, and not as the English version of Albany suggests. This is clear on the basis of the French (the authoritative version) and other linguistic versions of Albany. – This aspect in a way also reveals one additional reason why the Court in Laval will not build up the essential of its argumentation on the basis of Article 137(5) EC but will interpret – effectively and consistently – the Treaty as a whole, taking Article 137(5) EC as one element within this holistic approach.

[305] I am well aware that this question implies recognition by the ECJ of the right to strike as a fundamental right.

be condensed to a more straightforward balancing of the interests involved, having regard to all the circumstances of the case (as in *Schmidberger*, paragraph 81 et seq.).

4.10.4 Applying the Line of Argumentation

I first recall that I have considered only one aspect of the *Laval* case, namely the question of proper wages (with holiday pay as a natural corollary). Other collective agreement based restrictions on the free provision of services in Sweden, such as certain insurances or payments to a training fund, deserve a separate in casu assessment. Such an exercise is better suited to native (or correspondent) scholars and is finally an obligation of the courts concerned. However, regarding proper wages, I would make the further preliminary remark that the industrial actions in *Laval* seem to fulfil the ILO criteria: the trade unions defended the economic and social interests of their members. On the other hand, the actions also strived to increase considerably the wages of the Latvian workers concerned, thus affecting their economic and social interests. Both angles achieve the same result of fair competition between employers. However, falling under the economic and social interests does not in itself make any strike legitimate. The question of legitimacy is subject to a combined application of the protection of the fundamental right to strike and the criteria in the Arblade-test.

Thus, what needs to be considered next is the proportionality and acceptability assessment – as resulting from the convergence of the Arblade-test and the fundamental rights doctrine - of industrial action based on a fundamental right; with the protection of workers and impairment of the *substance* of the right to strike as the relevant yardsticks. I recall that here, too, the proportionality and acceptability assessments are concepts of EC law. [306] However, an essential and inherent factor is that, due to the lack of detailed substantive strike law in international treaties and EC law, and in line with the lessons of case-law, especially from *Dansk Slagterier* and *Omega Spielhallen*, the proportionality and acceptability assessment takes place in a real, i.e. in a national context.

Hence, the predictable broad line of interpretation of Articles 49 and 50 EC on the one hand, and the right to strike on the other, would be as follows: in so far as an industrial action of the host state workers or trade unions strives, assessed objectively [307] and as to its nature and expressed purpose, to protect the posted workers by improving their working conditions, it passes successfully the proportionality test. [308] It is even the more so if the protection is intended to guarantee the posted workers the same level of benefits as that applicable – for example by virtue of a national collective agreement – to domestic workers. The situation is just easier to assess this way in cases of social dumping (Schmutzkonkurrenz).

In case Laval the Swedish trade unions have demanded that the wages Laval pays its Latvian posted workers should be at the standard Swedish level. According to the

[306] I recall the difference between German and EC law proportionality; see footnote 131, *supra*.
[307] The opinions of the often exploited and misled posted workers are not relevant.
[308] I recall how in *Commission v. Germany* something assessed as 'normal' within the field of wages passed the proportionality test finally without being separately and expressly tested with the formula 'does not go beyond what is necessary'. See section 3.3.3, supra.

judgment of the Labour Court of Sweden, this first meant an hourly wage at a market level for the Great Stockholm region (some 2530 €/month). Before the Labour Court of Sweden the union announced that it required the signing of a standard substitute collective agreement which, according to the pay and negotiation rules of the national CBA, would result in an hourly wage – standard for the Great Stockholm region - of 14.70 €/h (some 2430 €/month, if applied for that period of time). However, the company, Laval, was only ready to agree to 1430 €/month. [309] Coming back to the level of principles, as a theoretical possibility the unions could demand a wholly unrealistic level (such as double the normal level in the host state). In this situation, the pay provisions that are claimed, ostensibly for the protection of the posted workers (raising their wages etc.), might be viewed – ultimately in the eyes of the ECJ - as de facto a means of discrimination against the foreign employer and his workers. Again, the broad line of interpretation clearly is that as long as a foreign employer is treated equally with domestic employers, the industrial action serves – next to protecting workers - fair competition in the sense of the PWD and cannot be prohibited discrimination. [310]

It is notable that the first reference question does not pose the question of claiming a so-called market wage in the circumstances concerned. By market wage I mean a wage that, depending on historical, sociological and political factors, availability of manpower, economic trends, geographic circumstances etc., is higher than that in the law or national collective agreement concerned. In Sweden this may include also a substitute agreement with the non-organized foreign or domestic employer. However, in this study I confine myself to some initial remarks – with a commitment to discuss

[309] The Building Workers' Union has contested this amount as paid in reality; during the hearing before the Labour Court of Sweden the Union asserted that, according to the Latvian collective agreement concerned, the wages were 2.10 to 3.68 €/hour, i.e. some 336 to 590 €/month; see e.g. the krönika (column) 5/2005 of the Union's Chairman, Hans Tilly; http://www.byggnads.se/byggnads/38871,38869.cs.

[310] Sigeman (footnote 184, p. 486-7) denotes that that the Labour Court of Sweden considered the question of market wages and expressed some doubt as to the compatibility with the Treaty of the claim concerned. However, Sigeman himself refers primarily to the protection of the host state workers: Finalarte (footnote 13, *supra*), Mazzoleni (footnote 114, *supra*), Portugaia (footnote 20, *supra*), Wolff&Müller, paragraph 40 (footnote 7, *supra*) and Commission v. Germany, paragraph 24 (footnote 149, *supra*). This protection falls within the overriding reasons justifying restrictions of the free provision of services. This aspect he reiterates on p. 490 but this time developed in the form of a question whether the protection of the host state workers justifies restrictions (like the wage claims in Laval) on the free provision of services even in a case where the wages of the posted workers are not so low that they as such would require restrictive measures in the general interest. He finds that Articles 12 and 49 EC allow this and denotes that the wage claims concerned were not discriminating but merely equalled those claimed against Swedish employers. Indirect discrimination he found possible in transaction costs (like interpretation and translation), possibly balanced by lower costs in the home state's social security costs (the last aspect being in Sigeman's footnote 45). Sigeman's position regarding the posting case-law corresponds to that of the author. He does not present an argumentation regarding the right to strike/industrial action as a protected fundamental right in the EU, but essentially a reference (p. 489) to the growing role of the social partners since the 1989 Community Charter of the Fundamental Social Rights of Workers. Accordingly, he does not discuss the combined application of the Arblade-test and the doctrine in allowing restrictions on the fundamental rights à la Schmidberger.

the issue profoundly in the synthesis book of this research project. Thus, in any case, the basically minimum nature of the PWD, which is here a relevant interpretative factor, does not outlaw such a claim (i.e. a claim for a market wage). Furthermore, the EC Treaty provisions other than those on discrimination (Article 12 EC), i.e. at least Articles 2 (including 'a harmonious, *balanced* and sustainable development of economic activities' and 'the raising of the standard of living'; italics added), 3 ('a policy in the social sphere'; this is the obvious key in this particular reasoning), 4 (the principle of open *market* economy; italics added), 50(3) (principle of same conditions imposed on domestic and foreign service providers, thus employers) and 136 EC ('…improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained…', as resulting also from the functioning of the common market…') heavily suggest, I maintain, the conclusion that the EC Treaty does not outlaw a claim based on market wage. Besides, the issue – being also a question of restricting a fundamental right - is finally tied to the founding principles of the Union, enshrined in Article 6.1 TEU.

The nature of the action requires an assessment whether the action is peaceful and is the normal behaviour of trade unions. In this case the assessment can be kept short. According to the judgment of the Labour Court of Sweden, some incidents of peaceful picketing have taken place around the site but nothing so serious as e.g. during the tumults in case *Commission v. France* [311].

It is no secret that this interpretation line on the effect of the proportionality and acceptability assessment (taken now as abstract legal categories) is – mutatis mutandis - pretty much the same as the approach of the ECJ in *Albany*. [312] There the ECJ protected collective agreements from EC competition rules in so far as they serve by their nature [313] and purpose the social objectives of the Treaty or at least in so far as they contribute directly to improving one of the working conditions, namely remuneration; paragraph 63 of *Albany*. Anyway, the 'purpose' and 'nature' of the collective agreement served as a safety valve against misuse of collective agreements. My final argument on this line is hypothetic in a formal sense but worth presenting in

[311] See Case C-265/95 Commission v France [1997] ECR I-6959.

[312] An intermediate conclusion, applying mutatis mutandis the structure in paragraph 59 of Albany, would be: 'It is beyond question that restrictions of the free movement of services are inherent in collective actions taken by workers and their organisations. However, the social policy objectives pursued by such action would be seriously undermined if workers and their organisations were subject to Articles 49 and 50 of the Treaty when seeking to improve conditions of work and employment.' A further corresponding exercise with paragraph 60 of Albany would result in stating that 'It therefore follows from an effective and consistent interpretation of the provisions of the Treaty as a whole and the fundamental right to take collective action in accordance with the ILO Constitution and Conventions Nos. 87 and 98 that the action in pursuit of such objectives must, by virtue of its nature and purpose, be regarded as falling outside the scope of Articles 49 and 50 of the Treaty.' This kind of reasoning includes no real proportionality test as in the Arblade-test and Schmidberger doctrine. The purpose test may, however, serve a similar function. Hence, a genuine purpose of improving working conditions would equate to regarding something as a proportionate means.

[313] 'Nature' of the agreement in Albany meant that it was made in the form of a collective agreement and was the outcome of collective negotiations between representative organisations of employers and workers (according to the French version; the English one used 'representing' instead of 'representative'); see paragraph 62 of Albany.

any case. Namely, had the case *Albany* also involved a strike, then just as in the case of an allegation of a collective agreement being incompatible with EC law due to its emergence from an illegal or disproportionate strike, that strike would probably have received the same treatment as the collective agreement resulting from such a strike.

This interpretation line would obviously be in harmony also with the outcome in case *Gustafsson v. Sweden* of the European Court of Human Rights [314] in the sense of respecting the national margin of appreciation regarding the right to collective action. The difference is, by definition, that there is no fundamental freedom to provide services in the ECHR, with the necessary balancing between the fundamental freedom and right. The interpretation line above would be in harmony also with the overall line of developments in the history of the Community: the emergence of a real social dimension, particularly in the context of fundamental or human rights. In gender equality the Court in *Deutsche Post* and in *Deutsche Telekom* in 2000 found it inevitable to conclude that 'the economic aim pursued by Article 119 [now 141] of the Treaty, namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental human right.' [315] According to Judge Rosas, '[t]his quotation from the Court's case law shows that the social dimension of the EU has come to be considered as a value in itself, not necessarily subordinate to the economic freedoms inherent in the EC Treaty.' [316] Also

[314] See Case Gustafsson v. Sweden (1996) 22 EHRR 409. In assessing the boycott and related activities of the national trade union, striving to a substitute agreement, the EHRC reasoned (in paragraph 53), as follows: 'Bearing in mind the special role and importance of collective agreements in the regulation of labour relations in Sweden, the Court sees no reason to doubt that the union action pursued legitimate interests consistent with Article 11 (art. 11) of the Convention (see, for instance, the above-mentioned Swedish Engine Drivers' Union judgment, pp. 15-16, para. 40; and the Schmidt and Dahlström v. Sweden judgment of 6 February 1976, Series A no. 21, p. 16, para. 36). It should also be recalled in this context that the legitimate character of collective bargaining is recognised by a number of international instruments, in particular Article 6 of the European Social Charter, Article 8 of the 1966 International Covenant on Economic, Social and Cultural Rights and Conventions nos. 87 and 98 of the International Labour Organisation (the first concerning freedom of association and the right to organise and the second the application of the principles of the right to organise and to bargain collectively).' In paragraph 54 the Court, based on the margin of appreciation accorded to the States, drew its conclusion that Sweden did not fail to secure the applicant's rights under Article 11 (art. 11) of the Convention.

[315] Joined cases C-270/97 and C-271/97 Deutsche Post [2000] ECR I-929, paragraph 57. The ECJ first (in paragraph 55) referred to Case 43/75 *Defrenne* v *Sabena* [1976] ECR 455 ('*Defrenne* II'), where the fundamental right aspect was not yet present; shoving the change in the approach it then (in paragraph 56) referred to cases 149/77 *Defrenne III* [1978] ECR 1365, paragraphs 26 and 27; joined cases 75/82 and 117/82 *Razzouk and Beydoun* v *Commission* [1984] ECR 1509, paragraph 16; and case C-13/94 *P.* v *S. and Cornwall County Council* [1996] ECR I-2143, paragraph 19, where the Court had found that the right not to be discriminated against on grounds of sex is one of the fundamental human rights whose observance the Court has a duty to ensure. The precedence of the social aim was stated 'in view of that case law'. Case C-50/96 Deutsche Telekom [2000] ECR I-743 includes the passages identical to those in Deutsche Post.

[316] See Allan Rosas, The Role of the European Court of Justice in the Application and Interpretation of Social Values and Rights, in Palola Elina and Savio Annikki (eds.), Refining the Social Dimension in an Enlarged EU, Stakes, Helsinki 2005, p. 199.

the right to strike/industrial action is, as to its core, a fundamental human right, deserving equal treatment.

What would finally be the effect of the proportionality and acceptability assessment, as shaped above, under Articles 49 and 50 EC? It is – nothing more, nothing less than - a safety valve, as indicated also in judgment *Commission v. Germany* (explored in section 3.3, *supra*). I am, of course, well aware that this interpretation line is in discordance with the old trade union slogan that the ECJ may assess and judge the results of a strike, notably a collective agreement, but not the strike itself. The counterargument is that an advanced trade union doctrine should orientate itself by taking into account probable developments (based on history) and not solely according to its own dogma. Similarly, a complete 'hands off' solution by the ECJ would doubtless require the right to strike to be an absolute fundamental right, but it is proportional or subject to possible restrictions in all the international treaties.

To sum up: in assessing the industrial action in the *Laval* (Vaxholm) case the ECJ will judge (in more or less detail), in this era of globalisation, the first direct case in EC strike law. This is connected – not just by the case itself questioning the Danish-Swedish labour market model but also by the ILO context (ultimately with its coherence argument) within the fundamental rights doctrine - to the Social Self of the Community. A legitimate and reasonable expectation is that the forthcoming judgment will strongly resemble *Albany*. This background note may be further turned to a sustainable outcome by resorting to one of the fundamental principles in EC law: non-discrimination. Such a decision line would guarantee the protection of the fundamental right to strike in EC law but make it possible to grasp any abuse of that right.

4.10.5 Reach of Case *Laval*; Case *Viking* v. *ITF and FSU*

In *Laval* the ECJ *prima facie* will have to lay down the essential principles concerning the right to strike in EC law. The situation resembles that in *Albany* in the sense of filling a decades' gap in case-law, as a heavy spill-over phenomenon. The internal market sometimes produces after a long delay, but anyway it eventually produces, new legal clashes between the economic market freedoms and (fundamental) social rights. The decision in *Laval* will be of constitutional value, shaping the overall balance between economic and social factors in the EU in its very core, i.e. the Internal Market.

Besides, a first successor case to *Laval* in the form of another reference for a preliminary ruling is already before the Court of Justice. Namely, on 16 June 2005 the High Court (of London), Queen's Bench Division, Commercial Court in case *Viking Line Abp v. The International Transport Workers' Federation* (ITF) *and the Finnish Seamen's Union* (FSU) granted an injunction against any industrial action, even against these defendants causing such an action by other trade unions, related to wages applicable to seamen after the re-flagging of MS Rosella in Estonia (at present it flies the Finnish flag). [317] The aim was to replace the existing, predominantly Finnish crew by an Estonian one, however, retaining some Finnish (key) workers

[317] Decision [2005] EWHC 1222 (Comm) of the High Court.

onboard. With respect to the actions of the FSU, the court naturally applied the Finnish law on industrial action (on the assumption that it would allow such an injunction; see infra). The court de facto ignored the application of the maritime services rules in EC law [318] and its judgment was based on Article 43 EC and equipped with a penal notice against possible contempt of Court. It was further strengthened by a threatened sequestration of the defendants' assets. The judgment became subject to appeal, not just in the United Kingdom, but also in Finland where it was to be enforced against the FSU. [319]

The appeal in the United Kingdom led on 3 November 2005 to the judgement of the Court of Appeal (Civil Division). [320] In this instance Viking's Estonian subsidiary, Viking Line Eesti OÜ, joined the proceedings and claimed to reconfirm the injunction by invoking its freedom to engage in liner traffic (provision of maritime transport services) between Estonia and Finland under Regulation 4055/86/EEC. [321] In its judgement the Court of Appeal lifted the permanent injunction issued by the High Court and (also refusing any interim injunction) referred to the ECJ ten questions

[318] Judgment (of the Court in plenum) in case C-18/93 Corsica Ferries Italia [1994] ECR I-1783, paras. 20 to 31, shows the overall status of service rules of the EC Treaty in the field of maritime transport. They apply. On that line in case C-381/93 Commission v. France [1994] ECR I-5145, paragraph 13, the ECJ then declared that Maritime Transport Services Regulation No 4055/86/EEC (the English version as a lapsus refers to 'Paragraph 13' of Regulation 4055/86; there are 12 Articles in the Regulation) thus renders applicable to the sphere of maritime transport between Member States the 'totality of the Treaty rules governing the freedom to provide services.' This a priori means that the Arblade-test (see section 1.2.3) applies there while it is not for this reasoning to discuss its possible minor modifications or specifications due to specific circumstances in maritime transport. To denote in brief, vulnerable seamen need special protection like construction workers (see Arblade, paragraph 36, in fine; section 1.2.3, *supra*). Furthermore, much of my reasoning above, especially in Chapter IV, is *mutatis mutandis* valid also in case Viking v ITF and FSU. Furthermore, also my examples on the application of the proportionality principle in sections 2.2.5 and 3.3.3, in fine, are relevant in the context of the case Viking v ITF and FSU. Finally, as to case C-18/93 Corsica Ferries Italia, the Advocate General, who reasoned fully on the line of the Court, relied (paragraph 23 of the opinion of 9 February 1994) also (although via case 18/83, European Parliament v Council [1985] ECR 1513, paragraph 62) on the first 'great' labour law judgment within the free provision of services, namely Case 279/80 Webb [1981] ECR 3305 that started also the case-law cited in the present cornerstone of social or labour law restrictions on the free provision of services: Arblade, paragraph 36.

[319] According to Article 34 in the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the Member States may refuse to recognise a foreign judgment if such recognition is manifestly contrary to public policy (*ordre public*) in the Member State in which recognition is sought. In its appeal of 30 August 2005 against the recognition by a district court the FSU invoked *ordre public*, based in particular on the constitutional protection of the right to strike (and i.a. that of industrial peace and dispute settlement system, and of freedom of association and freedom of expression) in national law, but it referred also to Finland's obligations in the ILO and, consequently, to Article 307 EC.

[320] The judgment is available on the internet: http://www.bailii.org/ew/cases/EWCA/Civ/2005/1299.html.

[321] The original lawsuit was based – exactly in this order – on the envisaged industrial action violating EC rules on 1. free provision of services, 2. free movement of workers and 3. freedom of establishment. During the proceedings in the High Court services and establishment exchanged their 'benches'.

(with some of them elaborated by further alternatives). The first one asks whether the industrial action falls 'outside the scope of Article 43 of the EC Treaty and/or Regulation 4055/86 by virtue of the EC's social policy including, inter alia, Title XI of the EC Treaty and, in particular, by analogy with the Court's reasoning in […] *Albany*, paras 52-64?' This is what I have discussed in sections 4.9.1 and 4.10.4, *supra*. – In the ECJ the case has the following coordinates: C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union*.

The other questions deal with the horizontal direct effect of establishment and services rules in EC law, existence of restrictions on free movement, relationship of establishment and services rules [322] and justification of restrictions. The last mentioned facet includes i.a. the assertion that 'the taking of collective action (including strike action) is a fundamental right protected by Community law' and the concept of the protection of workers as a justification ground; question No. 7. A separate question (No. 8) deals with the justification of the flag of convenience policy of the International Transport Workers' Federation. Thus, via the link to the ILO right to strike/industrial action even the possibility of striving after global social justice will be indirectly addressed in this case. Regarding the justification of the FSU's action, the Court of Appeal finally asks whether the collective action that has been taken strikes 'a fair balance between the fundamental social right to take collective action and the freedom to establish and provide services and is it objectively justified, appropriate, proportionate and in conformity with the principle of mutual recognition'; question 9. This is what I have discussed under the Arblade-test *passim* in this study when considering strikes/industrial action, in particular in section 4.10.

Time and space do not allow any in depth reasoning on the legal and economic details in *Viking*. [323] As *Laval*, it deals with the fundamental and constitutional balance

[322] Case-law shows a sufficiently settled line of reasoning by the ECJ in assessing rivalling or overlapping internal market freedoms in a particular case. In Omega Spielhallen (footnote 208**,** *supra)* the ECJ stated this, as follows (paragraph 26): '…where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it...' The Court referred i.a. to the lottery case C-275/92 Schlindler [1994] ECR I-1039 where the full Court found that cross-border sending of advertisements and application forms, and possible ticket selling, thus importation and distribution of such objects, were, in the context of lottery activities, not ends in themselves. The case was decided only by applying the rules on free movement of services; paragraphs 22 to 25. On the line of this 'dominating freedom principle' in the particular circumstances of the case Viking the re-flagging in a certain Member State is not an end in itself. The core is the pay conditions (and the way to establish them – with or without the right to strike - before or after re-flagging) which falls under the free provision of services; see further footnote 318, *supra*. It is essential to note that under the Maritime Services Regulation 4055/86/EEC the right to liner traffic is not bound to flagging in one of the two states; flagging within the Community suffices; see Articles 1(1) and 1(2). Besides, also 'triangle traffic' (e.g. Tallinn-Stockholm-Helsinki) might emerge.

[323] However, some aspects concerning free movement in judgments under EC Regulation 44/2001 are noteworthy already here. The background is that in Viking the courts in United Kingdom applied Finnish law to the action of the FSU. On the other hand, the High Court (like the Court of Appeal in United Kingdom, naturally) was undoubtedly a competent court under Article 6(1) of the Regulation because the other defendant, ITF, has its base in London.

between the economic and social factors within the now enlarged Internal Market. Therefore, the issue is of great political importance for the development of the European *Union*. It encourages also new thinking on ways and means of trying to accelerate, if possible, the necessary bridging of the (in general terms) drastic gap in wages, costs and overall standard of living between the 'old' and 'new' Member States. I will leave aside this macro-level consideration in this study and only pick up two legal aspects that it is worth reminding the European legal audience of (even in brief). The first concerns the contents of the Finnish strike/industrial action law regarding its relationship to the fundamental market freedoms. The second is the link that the Posted Workers Directive forms between the cases *Laval* and *Viking.*

In its public policy (ordre public) appeal (see footnote 319**,** *supra*) in Finland the FSU, although in a footnote, referred as a ground also to case C-38/98 Renault v. Maxicar and Formento [2000] ECR I-2973.

Case Renault concerned intellectual property rights granted in France. The defendants opposed in Italy the recognition of the judgment of the French Cour de Cassation (Court of Cassation) which then led to this preliminary ruling of the ECJ. The defendants attacked the French intellectual property rights (which were not recognised in Italian law) and wished the ECJ to define the concept of public policy in economic matters (ordre public économique); paragraph 24 of the judgment. Thus, the defendants invoked free movement of goods and spiced their attack with the allegation that the French courts would have committed an error in applying free movement rules. The clue in the ECJ's reasoning then came in paragraph 32, second sentence, where it wrote, as follows: 'The fact that the alleged error concerns rules of Community law does not alter the conditions for being able to rely on the clause on public policy. It is for the national court to ensure with equal diligence the protection of rights established in national law and rights conferred by Community law.' The second sentence was in line (but broader) with what the Advocate General had stated (paragraph 67 of the opinion); i.e. that 'Nevertheless, it cannot be completely ruled out that because of such an erroneous interpretation the enforcement of the judgment could breach fundamental principles, including those of Community law. This is however, in the situation described, only conceivable in the most exceptional of cases. There would have to be a clear violation of fundamental principles.'

A further essential aspect is that the judgment (according to a combined reading of especially its paragraphs 24, 30, 32 and 34) de facto includes a recognition of the French intellectual property rights as capable of restricting the free movement of goods (in this case vehicle body parts). Thus, the ECJ rejected the idea of a European public policy (ordre public) based on unlimited free movement of goods (and fully free competition). In addition to the author, at least Hélène Gaudemet-Tallon has explained the judgment on this line in her case annotation: Revue critique de droit international privé, No 3, juillet-septembre 2000 p. 504-513. She refers to violation of primacy of EC law as an example of a situation where EC law would undoubtedly form the contents of the public policy under regulation 44/2001 (p. 512). It is difficult to describe this with terms other than European public policy (within the limits and general conditions of the Regulation 44/2001, of course).

Following the judgment of the British Court of Appeal in Viking the appeal of the FSU in Finland became superfluous. I therefore pass over here any further reasoning on judgment Renault.

In the application of Regulation 44/2001 there is – due to Article 68(1) EC - the anomaly that only a national last (or single) instance can refer questions for a preliminary ruling of the ECJ. See the orders in cases C-24/02 Marseille Fret, paragraphs 14 and 15, and C-555/03 Warbecq, paragraphs 13 to 15.

Thus, first, in *Viking* it is important, also in the context of EC law, that the Court of Appeal first confirmed the envisaged industrial action of the FSU as lawful under national law, 'by virtue of the right to freedom of association protected by Article 13 of the Finnish constitution'; paragraph 26 i) of the judgement. [324] Moving on then, the relationship between national and EC law reveals a serious misunderstanding (wherever its final roots are) regarding this relationship as seen from the viewpoint of the Finnish Supreme Court (KKO). Namely, a crucial point in the whole reasoning of the judge of the High Court was the assertion that the constitutionally protected right to strike in Finland could not be invoked 'where the strike is *in breach* of EC law directly applicable between the parties' (paragraph 67 of the judgment; emphasis added here). The Court of Appeal reiterated the same position in its paragraph 26 iv) c) but did not follow thereafter the line of reasoning of the High Court. The High Court's assertion was based on the judgement of the KKO in the *Rakvere* case [325] where it dealt with – and rejected - an in principle similar injunction claimed against the FSU. The union had claimed to raise (up to a viable Baltic Sea level) the wages of the Estonian crew onboard the Estonian vessel. In its judgment the KKO in reality confirmed, leaving aside now an action exceptionally being *contra bonos mores* [326] in the sense of its relevant case-law, that

> "it would be possible to forbid the industrial action measures taken by the Seamen's Union primarily in a case where the use of such measures has been *specifically* restricted through national legislation or in European Community law in such a way as to allow reference to it when dealing with relations between private parties." (italics added) [327]

To prove the difference between an interpretation-based 'being in breach' and an *express* norm empowering a judge to restrict the use of a constitutionally protected right does not require any lengthy reasoning. By analogy one may state that exceeding

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[324] The courts in the United Kingdom were able to avail themselves of the Expert Opinion of Professor Niklas Bruun of 24 November 2004, including also a discussion of the constitutional protection of the right to strike in Finland (paragraphs 32 to 47) and the relevant references to the Supreme Court's case-law. The Opinion answered the questions posed by the High Court. The Opinion was complemented (Exhibit 1) by Niklas Bruun's annotation and analysis of the judgment in the Case Estonian Shipping Company v. Finnish Seamen's Union and Finnish Transport Workers' Union, Korkein oikeus (the Supreme Court of Finland) 2000:94 concerning MV Rakvere; see Finland, in International Labour Law Reports, Vol. 20, Kluwer Law International 2001, pp. 325-336. - The highest official authority in interpreting the Finnish Constitution, the Constitutional Law Committee of the Parliament, stated in its Opinion (mietintö) 12/2003 that the right to industrial action derives from the freedom of association, enshrined in Section 13(2) of the Constitution. Limitations of that right must reflect the overall limitation grounds of the fundamental rights.

[325] The judgment referred to in the previous footnote.

[326] For the actions *contra bonos mores* (fair practices), see Bruun's Expert Opinion, footnote 324**,** supra, paragraphs 60 to 74. The opinion shows that *contra bonos mores* is not relevant in Viking; there is, besides, no such allegation while the company Viking recognises that the envisaged action of the FSU would be lawful under national law.

[327] This formula is quoted from the High Court's judgment, paragraph 66. The translation substantively corresponds in full to that e.g. in Bruun's article in the Fordham reports, footnote 324**,** *supra*, p. 331; a purely semantic difference is that the latter uses the expression 'use of such action has been *expressly* restricted' (italics added) instead of 'use of such measures has been *specifically* restricted'.

in a car a speed limit (of let's say 40 kilometres/h) by a (more or less reliably) measured one kilometre per hour means 'being in breach' of that limit. However, every layman knows that in each Member State there are other statutes so as to empower a provisional withdrawal (like an interim injunction) or even cancellation (like a permanent injunction) of the driving licence. It is crucial here, of course, that there is no such restricting statute regarding any industrial action, neither in national nor in EC law, neither *express/specific* nor reachable via any meaningful/fair interpretation of law.

Secondly, the link between *Viking* and *Laval* brings us back, first, to the contents of the Posted Workers Directive, in particular to its Article 1(2) according to which

> 'This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.'

Textually this clause is clear. The PWD does not apply to merchant navy undertakings as regards seagoing personnel. Contextually this clause may lead to diametrically opposite conclusions as to the protection granted to seagoing personnel by EC law. Namely, at least in the Court of Appeal the company Viking maintained that this clause would be the very clause where

> '…the Community legislature expressly recognised that the principles set down in [the relevant posting] case-law were not appropriate for seafarers,…'. [328]

Concerning the principal position of seagoing personnel, it is elementary, as to relevant case-law, first, to see that it includes also the 'early' judgments *van Waesemael*, *Webb* and, in particular, *Seco* where the Court confirmed that the Member States are not required to tolerate low-wage or dumping competition within the field of the free provision of services. Furthermore, in addition to *Rush Portuguesa* and *Vander Elst*, *Arblade* is especially relevant here, too. [329] Second, the relevant case-law interprets the EC Treaty. Nothing in the Treaty even hints that it would allow lower protection standards for seagoing personnel (i.e. finally the right to industrial action/strike in this particular case) than those for other professions. [330] Third, as I have shown in my Chapter I, the PWD, as a political confirmation by the

[328] Skeleton Argument of the Respondent of 26 August 2005, paragraph 76(b); it referred to para. 138(iv) of the High Court that, always assessing the case under the freedom of establishment, mentioned judgments Guiot, Rush Portuguesa and C-288/89Gouda [1991] ECR I-6836 concerning the principle of mutual recognition. I recall that its real context in this case is a claim for more money within the free provision of services; see footnote 322, *supra.* A pecuniary claim viz-à-viz mutual recognition is quite straightforward to shape: claiming higher wages (i.e. *more* money) does not violate the principle of mutual recognition.

[329] For Seco, see section 1.2.2, and for Arblade section 1.2.3, *supra.*

[330] See that judgment in joined cases C-72/91 and C-73/91 Sloman Neptun [1993] ECR Page I-887 did not mean any such recognition. The judgment concerned the application of state aid rules and Article 117 EEC (now Articles 136 and 137 EC). It recognised that the Member States were (are) free (from the viewpoint of the Community) to set up in their *national* law a secondary (or 'international') shipping register that includes wages varying based on nationality (paragraph 28). The Community does not have a second/double shipping register.

European legislature of the interpretation of Community law (established in *Seco*), applies, as does any secondary EC legislation, in the framework of the EC Treaty. Secondary legislation cannot overrule the leading principles of the EC Treaty. Hence, the PWD could not have validly excluded the seagoing personnel from the protection granted by the EC Treaty, as interpreted by the Court. Another issue is that the wide use of secondary ship registers made it politically impossible to cover seagoing personnel by the PWD because that would have been in contradiction with the specific obligation established by the PWD: if there are binding national minimum wages, they must apply to posted foreign workers, as well.

The conclusion is that the PWD was not intended to cancel and cannot cancel the protection of seafarers under the EC Treaty. The relevant case-law since *Seco* must apply to them, too. Logically, indeed, in assessing the justification of seafarers' or their organisations' industrial action and of the flag of convenience policy of the ITF, the relevant conclusion is that the fundamental rights doctrine (*Schmidberger*, paragraphs 78 to 81 et seq.) and the protection of workers doctrine (*Arblade*, paragraph 36) form the basic legal framework for such action and policy. Finally, not even the company Viking Line has maintained that seafarers are not covered by the ILO right to strike/industrial action. Leaving aside the army and police force (like judges and high officers in the administration, representing the public employer or the so-called essential services *sensu stricto*), it is a universal right, indeed.

Finally, a relevant procedural remark is that, because *Viking* is an injunction case, the ECJ will entertain a request that the case be given priority (pursuant to Article 55 of the Rules of Procedure of the ECJ). Thus, judgment in *Viking* may come first or judgments in *Viking* and *Laval* may come on the same day. An educated guess is that the Court will not join the cases although they both fall under the free provision of services. Namely, also some different items exist, such as lex Britannia only in *Laval* and the ITF's FOG-policy in *Viking*.

The current position is that the company Viking Line and the FSU have reached – after the interim decision of the Court of Appeal in United Kingdom – a manning agreement until 2008, the vessel as a consequence continuing to fly the Finnish flag but with slightly reduced wage supplements for new crew members. The principal legal dispute remained untouched in that agreement.

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