THE REFORM OF THE EU DIRECTIVE ON POSTING OF WORKERS

Fortune smiles on the Juncker presidency?

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1. Introduction

After having been left aside as an unattainable goal during the years of the Barroso II Commission, the reform of the Posting of Workers Directive (PWD) was brought back to the centre stage by the political guidelines outlined by president Juncker in his speech in front of the European Parliament of 15 July 2014. Mr. Juncker committed to a targeted review of the PWD to ensure that “[i]n our Union, the same work at the same place should be remunerated in the same manner”. The EU Commission followed suit by presenting its proposal for a revision of the PWD on 8 March 2016, which goes in the general direction of a better alignment of the working conditions of posted workers with those of local workers performing similar activities. In its State of the Union speech of 13 September 2017, Mr. Juncker further highlighted the need for workers in the EU to earn “the same pay for the same work in the same place”.

An agreement on the revision was achieved by the Commission, the Parliament and the Council on 1 March 2018, and the COREPER approved the compromise text on 11 April 2018. The new Directive should be voted by the EU Parliament next June. This comes right on the time to celebrate the tenth anniversary of the well-known Laval decision, which, in the words of the Monti Report had revived “the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level”.

The debate around “social dumping” was reignited by this decision, as well as by those which followed in 2008. These cases also saw a clear-cut divide between “old” and “new” Member States in the submissions to the Court, the former group broadly favouring the possibility of applying national standards to posted workers, the latter pleading for a stronger reading of the freedom to provide services (BERCUSSON, 2007). Whatever the actual meaning of “social dumping” for the different actors and in the different context (BERNACIACK, 2015a; ARNHOLTZ and ELDRING, 2015), posting of workers was perceived as allowing posting undertakings to evade formal and informal national labour regulations, because of the combined impact of EU regulations and the objective difficulty of controlling and enforcing the application of national regulations. As described by BERNTSEN and LILLIE (2015), different undertakings deployed different

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2 In the context of this paper I will refer to the text agreed by the COREPER (hereinafter, “the Agreement”). When necessary, I will also refer to the original proposal tabled by the EU Commission (hereinafter, “the Proposal”) as well as to the draft report of the Committee on Employment and Social Affairs of the European Parliament (hereinafter, “the Committee Report”).

3 CJEU, Case C-341/05, Laval un Partneri Ltd. v. Svenska Byggnadsarbetarförbundet, 18 December 2007 (hereinafter, “Laval”).

strategies to take advantage of such a situation, by completely evading the application formal and informal rules (regulatory evasion); by carving out zones of exceptions to national rules on the basis of the specific regulations of posting of workers (regulatory arbitrage); or by manipulating regulatory frameworks to obtain cost advantages while formally respecting these rules (regulatory conformance).

In light of this, the re-regulation of posting of workers at EU level proved to be a particularly contentious issue, due to the conflicting interests of sending and receiving countries. This was perfectly epitomised by the difficulties of adopting a rather limited instrument such as the Enforcement Directive\(^5\) (BERNACIAK, 2015:234), as well as by the reasoned opinions (“yellow cards”) issued by 11 national parliaments (or chambers of parliament) against the reform of the PWD in the context of the procedure regulated by Protocol nº 2 on the application of the principles of subsidiarity and proportionality.

After having briefly considered the issues arising from the 2007-2008 case law of the Court of Justice (Section 2), as well as the ensuing clash with the standards set by the European Social Charter, this paper looks at the present state of the reform of the PWD (Section 3). Section 4 is devoted to conclusions, analysing whether the legislative intervention is up to the task of providing an answer to these issues. Due to space constraints, this paper does not aim to provide a comprehensive assessment of the whole reform of the PWD. Also, in light of abundant existing literature and the well-known character of the cases, the paper will not provide a summary of the decisions of the Court of justice.

### 2. Brave (old) new world

In the trio of decision concerning posting of workers delivered between 2007 and 2008, the Court of Justice of the European Union (hereinafter “CJEU” or “the Court”) famously interpreted the PWD not as a “floor” of rights but as a “ceiling” (EKLUND, 2008:566). The Court denied the possibility for Member States to apply to posted workers’ wages and working conditions going above the minima provided by the PWD or beyond the list of subjects included in the same instrument. It restricted the ability of Member States of unilaterally defining working conditions as covered by “public policy”, and hence to apply them to posted workers. Furthermore, the Court strictly limited the collective agreements applicable to posted workers to those being universally or generally applicable, ruling out the possibility of company-based negotiations in the Host State, also in the name of a requirement of ex ante transparency for the posting undertaking. Trade unions also saw their ability to have recourse to collective action importantly curtailed, as this would only be possible to demand the application of minimum working conditions allowed by the PWD. Importantly, the CJEU considered that the legitimate objective of fighting against social dumping could be satisfied by applying the said minimum conditions\(^7\) (MAEMBERG and SIGEMAN, 2008: 1136–1137 and 1144), so that any attempt to apply more favourable ones in the Host State would constitute a disproportionate restriction to the freedom to provide services protected by the Treaties. I will now briefly consider these points of tension.

#### a. Can you show me where it hurts?

The interpretation of the PWD as a “maximum” directive was probably the most staggering outcome of the **Laval trio**. This development was particularly shocking from the point of view of those interpretations that welcomed the PWD as essentially protecting the ability of the host Member State to extend their wages and

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\(^6\) Beyond *Laval*, see CJEU, Case C-346/06, *Dirk Rüffert v Land Niedersachsen*, 3 April 2008 (hereinafter “Rüffert”); CJEU, Case C-319/06, *Commission of the European Communities v Grand Duchy of Luxembourg*, 19 June 2008 (hereinafter “Commission v Luxembourg”).

\(^7\) *Laval*, §§ 75, 103 and 108.
working conditions to posted workers (DAVIES, 1997:575-576; BIAGI, 1996:179). The Court interpreted the items on the list of Article 3(1) as establishing the maximum protection which can be awarded to posted workers. Also, the list is considered as exhaustive, with the only exception being Article 3(10), dealing with public policy provisions, narrowly interpreted and not covering trade union actions. The Court made it clear that Host states are not allowed to impose a level of protection going beyond the ones pointed out in Article 3(1).

Furthermore, in *Commission v Luxembourg*, the Court concluded, with respect of the automatic indexation of wages, that such indexation as legitimate only as long as it concerned the minimum wage. On the contrary, the indexation of wages higher than the minimum could not be imposed to posting employers, since it fell outside the scope of Article 3(1). This raised doubts as to the general possibility for Member States to apply any wage level higher than the lowest one—for instance, different wage levels related to specific categories of workers or specific allowances.

Turning to the issue of collective agreements, the text of the PWD allows setting the standards applicable to post workers by three types of agreements. First, collective agreements which have been declared “universally applicable”; second, “generally applicable” collective agreements; third, collective agreements “concluded by the most representative employers’ and labour organizations at national level and which are applied throughout national territory”. The 2003 Communication of the Commission on the implementation of the PWD had specified that the choice among these methods must be made explicitly by the given Member State. In *Rüffert*, the Court maintained that a Member State having system for declaring collective agreements “universally applicable” cannot rely on the other options (VAN PEIJPE, 2009:98-99).

In *Laval*, the CJEU found that Sweden, in the absence of a system to declare collective agreements universally binding, had not explicitly opted for one of the other possibilities offered by Article 3(8). Though the Court stated that Member States are in principle free to choose “a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States”, it criticised the “case-by-case negotiations” entailed by the Swedish one. In this sense, the Court ruled out all those systems which are based on negotiations at company level. By making it impossible for the service provider to know in advance the working conditions applicable to posted workers, these systems are considered as restricting the freedom to provide services (DAVIES, 2008:129). Also, such a system does not guarantee the equal treatment of national and foreign undertakings (MALMBERG and SIGEMAN, 2008:1141).

Whatever the procedural method chosen to apply working conditions to posted workers, these wages and working conditions cannot go beyond the list of Article 3(1). In the Host state, better conditions can be applied to posted workers in a single specific situation: a collective agreement signed in the host state by the posting undertaking “of its own accord”. The distinction drawn by the Court on the point thus implies a

8 *Laval*, § 79-81; *Rüffert*, § 32-34.
10 *Laval*, § 84.
11 *Laval*, § 81; *Rüffert*, § 34.
13 “Collective agreements […] which are generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned”.
15 *Rüffert*, § 27.
16 *Laval*, §§ 66-68, 70-71 and 100.
17 *Laval*, § 66.
18 *Laval*, § 80-81; *Rüffert*, § 34.
distinction between collective agreements which are freely signed by the posting employer and those which are “forced” upon him (DORSEMMONT, 2009:78). Thus, the issue moves to the territory of collective action.

In the aftermath of Laval, Malmberg and Sigeman considered that “the Laval judgement does not generally prohibit collective actions against foreign service providers, but rather restricts the demands that the host State trade union may put forward” (MALMBERG and SIGEMAN, 2008:1142). In this sense, these demands should be limited to the list of “minimum protection” of Article 3(1). Still, this “minimum” must fulfil a series of conditions. First, it should be formulated so that the employer is able to know ex ante the conditions applicable to posted workers19. Second, eventual negotiations should be limited in time20. Third, the minimum must cover a whole sector of activity in its geographical area of application21. From this perspective, the scope for a system not falling into the three options provided by the PWD in Article 3(8) to validly apply (minimum) rates of pay and/or working conditions to posted workers seems indeed narrow. Consequently, all collective actions undertaken to support the signature of a collective agreement going beyond the minimum thus defined face a high risk to be considered as breaching the PWD, and hence to constitute a disproportionate restriction to the freedom to provide services protected by Article 56 TFEU.

b. The Clash

In 2012 the European Committee of Social Rights (ECSR) delivered a decision directly concerning the compatibility of the EU legal framework for posting of workers, as interpreted by the CJEU, with the European Social Charter (ESC). Indeed, the reclamation presented by Swedish trade unions to the European Committee of Social Rights22 involved precisely the effects of the Laval decision in the Swedish legal system. The intervention of European and international workers’ and employers’ associations revealed the importance of this complaint.

The ECSR concluded that the limitation to minimum working condition as regards collective agreements and the legitimate demands of collective action, stemming from the CJEU case law, constitutes a “substantial limitation” to the rights at stake23, and as such not in conformity with the obligation to promote collective bargaining between social actors. The reasoning, as well as the conclusion, is similar for the right to take collective action. Therefore, the Committee concluded that restrictions to the right to take collective action in the name of the exercise of economic freedoms should be proportionate, as these freedoms “cannot be treated, from the point of view of the system of values, principles and fundamental rights embodied in the Charter, as having a greater a priori value than core labour rights”24.

The ECSR also analysed the issue under the point of view of the protection of migrant workers under Article 19(4) ESC, which requires the signatory parties to assure equal treatment to “workers lawfully within their territories” in matters such as remuneration, working conditions and the enjoyment of the benefits of collective bargaining. Thus, based on the understanding of “migrant worker” as a worker “coming from another State and lawfully within the territory of the host State”, the ECSR reached the conclusion that posted workers are indeed migrant workers and have thus the right “to receive treatment not less favourable than that of the national workers of the host State in respect of remuneration, other employment and working conditions, and enjoyment of the benefits of collective bargaining”. Also, the comparator for the equal treatment should be the actual Swedish worker with “comparable occupational experience and

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19 Laval, § 110.
20 Ibid., § 100.
21 Raffert, § 29, where the Court rules out the application of collective agreements limited to public contracts. However, no further clarification is provided as to what would constitute a valid “sector”.
22 Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v. Sweden Complaint No. 85/2012, 12 July 2012. See ROCCA (2013).
23 LO and TCO v. Sweden, § 112.
24 Ibid., §§ 116 and 121-122.
skills”\textsuperscript{25}, while applying only minimum wages and working conditions might not take into account these elements. Hence, according only minimum protection to posted workers, as well as economic and social rights which are more limited than the ones guaranteed to national workers, constitutes a discriminatory treatment, which cannot be justified by the objectives of facilitating cross-border movement of services\textsuperscript{26}.

The importance of the conflict between the two legal orders was later confirmed by the Report of the Secretary General of the Council of Europe on the State of Democracy Human Rights and the Rule of Law in Europe\textsuperscript{27}, which explicitly mentioned the decision of the ECSR and stressed the necessity of finding “pragmatic solutions to settle conflicts between the two sets of standards [EU and ESC]”.

### 3. The Reform

The reform of the PWD should be seen as the second limb of the intervention initiated with the Enforcement Directive. The latter was meant to curb regulatory evasion by companies, by lowering the obstacles for the cross-border application of sanctions and by attacking practices such as the use of bogus posting. The present reform of the PWD aims at addressing the risks posed by regulatory arbitrage and conformance. Or, following a different taxonomy, the risk posed by legal social dumping (BERNACIAK, 2015: 230).

After it was first presented by the Commission the proposal received 11 (negative) reasoned opinions from national parliamentary chambers, through the procedure aimed at ensuring the respect of the subsidiarity principle by EU legislation. Notably, several national parliaments criticised the reform on the basis of the loss of competitive advantage for posting undertakings, the excessive administrative burden and the impact on SME’s (RO, LV, LT, HU, EE, CZ, CR, BG). The Commission responded with a Communication\textsuperscript{28}, in which it maintained the proposal. Dealing with the question of the loss of competitive advantage, the Commission stated that “the proposal does not have the objective of aligning wages across Member States. The proposal merely ensures that mandatory rules on remuneration in the host Member State are applicable also to workers posted to that Member State”.

In analysing the intervention envisaged by the reform, I will focus on the specific topics highlighted in the previous Section.

#### a. Minimum conditions

The main deviation from the minimum character of the PWD concerns the issue of wages. The reference to “minimum rates of pay” of Article 3(1)(c) of the PWD\textsuperscript{29}, is replaced by “remuneration” in the Agreement. In fact, a study financed by the Commission and published in 2016 had in fact highlighted the confusion engendered by the very use of the concept “minimum rates of pay”, considering that the different concept of “minimum wage” had a more widespread diffusion at national level (LHERNOUD et al., 2016).

The Agreement also includes a definition of remuneration, which encompasses “all the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable”, while also stating (as the

\textsuperscript{25} Ibid., §§ 134-136.

\textsuperscript{26} Ibid., §§ 140-141.


\textsuperscript{29} “Member States shall ensure that […] undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters: […] (c) the minimum rates of pay, including overtime rates”.

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The reform of the EU Directive on Posting of Workers (PWD) that “the concept of remuneration shall be determined by the national law and/or practice of the Member State to whose territory the worker is posted”. The Agreement clarifies, although in a Recital (n° 17), that in the comparison between the remuneration applicable in the Home State and the one in the Host state the gross amount of remuneration should be taken into account, thus opting for a global comparison including allowances specific to the posting. The new Article 3(7) also specifies that reimbursements paid by the employer on account of expenditures actually incurred by the worker shall not be deducted by the remuneration.

The Agreement also makes it compulsory for Member States to publish in the single official national website (created following the Enforcement Directive) the remuneration items applicable to posted workers. Importantly, following the new Article 3(1), the lack of such transparency should be taken into account in evaluating eventual infringements by posting undertaking. The transparency requirement is also directly inspired by the case law of the Court of Justice, which, in Laval, criticised the Swedish system because it made “excessively difficult in practice” for the posting undertaking “to determine the obligations with which it is required to comply as regards minimum pay”.

b. Collective agreements

The issue of the application of collective agreements to posted workers was also a particularly contentious one, following notably the Laval and Rüffert cases. The reform seems to be less innovative in this aspect.

The most important change lies in the extension of the applicability of collective agreements to all sectors of the economy, whereas Article 3(10) of the PWD only mandated said application for the construction sector, leaving Member States free to extend this to other sectors. On the other hand, the Agreement does not change the kind of collective agreements which can be applied to posted workers. The Committee Report (Amendment 33) proposed adding a further category, indicating that Member States can “base themselves” also on “collective agreements which are […] representative in the geographical area, the profession or industry concerned and offer the most favourable terms and conditions of employment to the worker”. This however is not present in the Agreement. Although the type of agreements applicable to posted workers remains unchanged in the Agreement, the text introduces a change in Article 3(8) allowing the application of generally applicable collective agreements and collective agreements concluded by the most representative organisations “in addition to” universally applicable ones.

In a seemingly unrelated change, the Agreement also introduces a temporal limitation, 12 months with a possible extension of 6 more, after which Member States should “guarantee workers posted to their territory […] all the applicable terms and conditions of employment”, essentially ensuring the equal treatment after the said period. From the perspective of collective agreements however, the same paragraph, added in Article 3(1)(a), still only identifies universally applicable collective agreements, as well as those listed by Article 3(8), as the source of these terms and conditions of employment. Thus, as posting of workers would still be covered under the freedom to provide services even after the said 12+6 months period has elapsed, company-based negotiations and the application of agreements not generally applicable to posted workers seem still to be ruled out.

c. Collective action

Finally, the Agreement includes a so-called “Monti clause” in the new Article 1(5). This clause, first appeared in the Regulation on the functioning of the internal market in relation to the free movement of goods among Member States31, should ensure that a specific piece of EU legislation does not affect the right to take

30 Laval, §110. The CJEU had in fact raised a similar point already in Joined Cases C-369/96 and C-376/96, Arblade and Lehoop, 23 November 1999, §43.

31 Council Regulation of 7 December 1998, OJ L337/8, 12 December 1998. The nickname “Monti clause” comes from the name of the, at the time, Commissioner for Internal Market, Mario Monti.
collective action as well as the right to negotiate, conclude and enforce collective agreements. However, the actual impact of such a clause should be carefully considered. I will come back to this in the Conclusions.

Taking the said clause at face value, this should take the PWD out of the equation when it comes to applying the proportionality test to a collective action such as the one at stake in Laval. As the PWD was in fact the yardstick upon which the Court considered both the necessity and proportionality of the collective action, this would in turn lead to a “purer” situation of conflict between a fundamental (social) right and the freedom to provide services. One can only wonder whether this would lead back to an approach such as the one deployed in similar “pure” conflicts in Schmidberger32 and Omega33, or if the Court would distinguish the two situations, notably on the basis of the difference between the parties -public authority in these precedents, trade unions in the case of a collective action (DASHWOOD, 2008:532; MORK, 2013:130).

4. Conclusions

Considered upon the background of the issues arising from the Laval trio, as well as from the ECSR critiques, the revision envisaged in the Agreement seems to provide only a partial solution.

The codification of the more recent case law of the CJEU34, in the form of the broadening of the concept of “remuneration” does indeed dispel the fears, arising from Commission v Luxemburg, that the concept of “minimum rates of pay” might imply that only the lowest mandatory minimum wage in a given system could have been applied to posted workers. Turning to collective agreements, inclusion, in the new Article 3(8) of the possibility of applying generally applicable agreements or agreements concluded by the most representative organisations “in addition” to universally applicable ones should solve a Rüffert-like situation. That is, a situation in which a Member State characterised by a system for declaring collective agreements as universally applicable, is forbidden to applying generally applicable agreements to posted workers, even when these might provide better wages and working conditions.

On the other hand, the Agreement confirms that decentralised systems of collective bargaining based on the autonomous extension of collective agreements through the threat of collective action will not be able to include posted workers in the future. This remains problematic, since in the past several years the EU institutions, and the Commission in particular, have been fostering reforms going in the direction of the decentralization of collective bargaining through the instruments of the EU economic governance (SCHULTEN and MULLER, 2013; ROCCA, 2015:312-326). Therefore, these systems remain exposed to posting strategies based on the formal respect of mandatory rules and the actual avoidance of industrial relations practices, being de facto forced to introduce systems for extension of collective agreement which would otherwise be alien to their industrial relations system (ARNHOLZ and ELDRING, 2015).

As for collective action, the inclusion of a Monti clause in the new Directive seems insufficient to ensure a different treatment of fundamental social rights. The restrictions to the exercise of these rights brought about by the case law of the Court of Justice, in cases such as Viking, Laval and Commission v Germany35, stem in fact from the interpretation of primary EU law, that is, the Treaties and the fundamental freedoms of the internal market, notably the freedom to provide services and the freedom of establishment. As such, it is doubtful whether an intervention at the level of secondary legislation might do much to change this situation (BRUUN, BÜCKER, and DORSEMONT, 2012:284-285; ROCCA, 2012:28-29).

All in all, although the revision represents a step in the direction of more equal treatment between posted workers and local ones, these critical points arguably mark a distance with the decision delivered by the

32 CJEU, Case C-112/00, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, 12 June 2003.
33 CJEU, Case C-36/02, Omega Spielhallen - and Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundestadt Bonn, 14 October 2004.
34 CJEU, Case C-396/13, Sääksäläinen ammattiiliitto ry v Elektrobudowa Spółka Akcyjna, 12 February 2015.
ECSR which I referred to in Section 2.b. In fact, as long as posting of workers remains firmly anchored in the freedom to provide services, it seems virtually impossible to reconcile the regulatory framework provided by EU law with the firm commitment to equal treatment expressed in the ECSR decision. The issue of the legal basis will in fact emerge again in a moment.

Still, these findings do not in themselves detract to the fact that, given the socio-economic and political context, a revision of the PWD going in the direction of more equal treatment between posted workers and “local” ones should be saluted as an important achievement by those looking for some embers of “Social Europe” still burning under the ashes of the crisis. To confirm this, one can compare the changes envisaged in the Agreement with the eight proposals for a revision of the PWD put forward by the ETUC expert group on posting in 201137. Without going into too many details, roughly a half of the proposals have been fully or partially implemented. This also means that some important elements have been left out. Here I will focus on one of these, notably the refusal to change the legal basis of the PWD to include social policy (Article 153 TFEU) alongside the freedom to provide services.

The choice of the Agreement to stick with just the latter is indeed a major risk for the future interpretation of the instrument. The internal market legal basis has, in fact, played a role in shaping the case law of the CJEU on the matter (DAVIES, 2008:294), and it still appears as a striking ambivalence when read side by side with the new Article 1(1)(a), which clearly defines the PWD as an instrument aimed at the protection of posted workers. As the European legislator does not seem to be able to muster the courage of driving a metaphorical wooden stake through its heart, such an ambivalence will then be allowed to survive, lying in slumber, not dead though not quite as alive as before, and potentially ready to rise again.

To refer just to one example of such a risk, one can look at one of the most important changes introduced by the Agreement, notably the broadening of the concept of “remuneration” applicable to posted workers. Here, the interpretation of the new PWD in light of its legal basis could lead back to curtailing Member States’ competences, as the Court has stated, in Isbir38, that the ability of Member States to define the constituent elements of minimum rates of pay under the PWD should not “have the effect of impeding the free movement of services between Member States”. As proof of this risk, one just has to look back at the original proposal tabled by the Commission, which stated, in Recital 12, that the application of national rules on remuneration “should not disproportionately restrict the cross-border provision of services”.

Only time will tell if this fear is justified. In the meantime, the broadening of the concept of remuneration applicable to posted workers goes in the direction of limiting the competitive advantage of posted workers vis-à-vis local workers. Notably, it will reduce the possibility of regulatory conformance by posting undertaking, consisting in paying a given posted worker the lowest minimum wage applicable in the given Member State and/or sector, instead of the full remuneration to which he or she would normally be entitled in the Host State (ÅRHOLDT and ELDRING, 2015:84).

References


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37 CJEU, Case C-522/12, Tsjik Isbir, 7 November 2013, §37.
J-P. Lhernould et al. (2016), Study on wage setting systems and minimum rates of pay applicable to posted workers in accordance with Directive 96/71/EC in a selected number of Member States and sectors, Contract No VC/2015/0334 Final report.