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**Employment Rights, Free Movement**

**Under the EC Treaty and the**

**Services Directive**

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## Employment Rights, Free Movement under the EC Treaty and the Services Directive

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*The market access test adopted by the Court of Justice in the field of free movement of persons has long threatened to undermine national employment law. The decisions in Viking and Laval brought these fears into sharp focus. When the Services Directive was being negotiated, the trade unions made submissions to the European Parliament on the ways of ring-fencing national labour law from the tentacles of the Services Directive. In many ways they were successful. However, their victory may well be pyrrhic: the EC Treaty continues to apply and, as Viking and Laval show, it may well be difficult in practice to justify national employment laws in the strict terms required by the ECJ.*

### 1. Introduction

The protection of the European social model from the challenges posed by the creation of a single market has been a long-running issue facing the EU. Jacques Delors, the Commission President at the time of the launch of the 1992 programme, struck a bargain with the ETUC where he assured trade unions that the internal market would be accompanied by ‘a raft of workplace regulations combined with a social dialogue, an ambitious programme to achieve equality between men and women, a social policy programme, the strengthening of basic social rights and the creation of a clearly defined social dimension’.<sup>1</sup> With Delors’ departure, this commitment has come under ever greater strain due to the fact that traders, migrant workers and service providers have increasingly used the Treaty provisions on the four freedoms to challenge national employment laws. Where these challenges have proved successful, and *national* employment laws have been found incompatible with EC Law, this has not been matched by re-regulation at Community level. This is due in part to the Member States’ increasing reluctance to agree to Community legislation in the social field, despite the ever expanding competence that the EC now enjoys in the social field.

The Services Directive 2006/123 brought these debates into sharp – and highly political – focus. Many in the union movement argued that, by facilitating free movement, the Directive gave a green light to ‘social dumping’, with further erosion of the content and enforcement of national employment laws. This, they argued undermined the (ill-defined) European social model. The aim of this paper is to consider the challenges to national protection of employment rights posed by the EC Treaty rules on free movement, challenges given significant prominence due to the decisions in *Viking*<sup>2</sup>

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<sup>1</sup> W. Kowalsky, ‘The Services Directive: the Legislative process clears the first hurdle’ (2006) 12 *Transfer* 231, 247.

<sup>2</sup> Case C-438/05 *International Transport Workers’ Federation v Viking Line ABP* [2007] ECR I-000.

and *Laval*<sup>3</sup>. It is against this background that I will consider the background to and the effect of the Services Directive as it relates to employment law matters.

## 2. The Interaction between the EC Treaty and National Employment Laws

### A. Introduction

The drafters of the original Treaty of Rome focused their attention primarily on the achievement of the four freedoms – of goods, persons, services and capital. Highly influenced by the German ordo-liberal school of thought,<sup>4</sup> they believed that a successful economic model, delivered through an economic constitution governed by the rule of law, would bring higher levels of social benefits in its wake. Improved working conditions would be the *consequence of* market integration, not a prerequisite to it. This idea was caught in the original Article 117 EEC which said that an improvement in working conditions would ‘*ensue* not only from the functioning of the Common Market ... but also ... from the approximation of provisions laid down by law, regulation or administrative action’.<sup>5</sup> Viewed from this perspective, there was little need for the EEC to have a social dimension; social policy was left to the Member States. As Scharpf puts it, the Treaty of Rome decoupled the social sphere from the economic sphere.<sup>6</sup>

This very much coincided with the states’ own vision. Social policy, including employment laws, gradually expanded in the post-war period. Social policy and the evolving national welfare states became key symbols of national sovereignty; they helped to legitimise the state in the eyes of its (national) citizens. Social policy was certainly not the domain for the nascent European Economic Community. This helps to explain why the original Title on Social Policy in the Treaty of Rome was so underwhelming: its few provisions were largely exhortatory, conferring little by way of direct rights on citizens,<sup>7</sup> nor did its provisions give the Community any express competence to regulate in this domain. Thus, in the early days of the EU, the worlds of (national) social policy and the (E(E)C) Common/Single Market appeared to follow parallel, but never converging, tracks.

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<sup>3</sup> Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-000.

<sup>4</sup> C.Joerges, ‘Democracy and European Integration: A Legacy of Tensions, a Reconceptualisation and Recent True Conflicts’, *EUI Working Papers* 2007/25, 6-7.

<sup>5</sup> Emphasis added.

<sup>6</sup> ‘The European Social Model: Coping with the Challenges of Diversity’ (2002) 40 *JCMS* 645.

<sup>7</sup> Hallstein, *Europe in the Making* (1972), 119, cited in P.Watson, ‘The Community Social Charter’ (1991) 28 *CMLRev.* 37, 39.

### B. *The territoriality of national labour law*

Traditionally, employment law applies to all those who work in the territory of the Member State, regardless of their nationality (*lex loci laboris*).<sup>8</sup> This principle was enshrined in the Rome Convention 1980<sup>9</sup> on rules concerning the law applicable to contractual obligations, which came into force on 1 April 1991. The basic rule, laid down in Article 3 of the Convention, is that a contract is governed by the law chosen by the parties. However, Article 6(2) provides that:

... a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

- (a) by the law of the country in which the employee habitually carries out his work<sup>10</sup> in performance of the contract, even if he is temporarily employed in another country; or
  - (b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;
- unless it appears from the circumstances as a whole that the contract is more closely connected with another country in which case the contract shall be governed by the law of that country.

According to Article 6(1) of the Convention, the choice of law made by the parties must not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under Article 6(2) in the absence of choice. Article 7(1) provides that, under certain conditions, effect may be given concurrently with the law declared applicable, to the mandatory rules of the law of another country, in particular those of a Member State within whose territory the worker is temporarily posted. These mandatory rules are not defined by the Convention. However, the Posted Workers Directive 96/71<sup>11</sup> designates at Community level a ‘nucleus of mandatory rules’<sup>12</sup> within the meaning of Article 7(1) of the Rome Convention in transnational posting situations. The Directive does not seek to amend the law applicable to the employment contract but it lays down certain mandatory rules to be complied with during the period of posting to another Member States, ‘whatever the law applicable to the employment relationship’.<sup>13</sup>

### C. *Discrimination vs. market access approaches*

#### (i) The discrimination model

Both the Rome Convention and, to a certain extent, the Posted Workers Directive reinforce the idea that the laws of the territory where the worker works will apply. The idea behind these rules is not only to protect the state’s rights to regulate employment laws on its own territory but also to ensure equal

<sup>8</sup> For further discussion see Malmberg & Jonsson, ‘National Industrial Relations vs Private International Law – a Swedish Perspective’ in M.Rönmar, *National Industrial Relations vs EU Industrial Relations*, (Kluwer, 2008, forthcoming).

<sup>9</sup> OJ 1980 L266/1. See also the Report by Giuliano and Lagarde (OJ [1980] C282/1).

<sup>10</sup> See Clarkson and Hill, *The Conflict of Laws*, (Oxford, OUP, 2006), 3<sup>rd</sup> ed., 205-6.

<sup>11</sup> OJ 1997 L18/1.

<sup>12</sup> 13<sup>th</sup> Recital. See also *Laval*, para. 60.

<sup>13</sup> COM (2003) 458, 6.

treatment between national and migrant workers. This operates to the benefit of both nationals and migrants: migrants enjoy the same, often superior, terms and conditions enjoyed by nationals; nationals do not risk having their employment standards undercut by, often cheaper, labour provided by migrants. This point was noted by the ECJ in *Commission v France* where it said that Article 39 EC:

not only [allowed] in each state equal access to employment to the nationals of other Member States, but also ... [guaranteed] to the state's own nationals that they shall not suffer the unfavourable consequences which could result in 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.<sup>14</sup>

Thus, in its early case law, the Court of Justice applied the non-discrimination model when interpreting the provisions on free movement, especially those concerning workers and establishment. This meant that if national employment laws applied equally to nationals and migrants alike, they would not contravene Articles 39 or 43 since they did not discriminate on the grounds of nationality.<sup>15</sup> If, on the other hand, the Court found the national employment laws to be discriminatory – either directly<sup>16</sup> or indirectly<sup>17</sup> – the discriminatory element of the rule would have to be removed but the substance of the law itself remained in tact.<sup>18</sup> To give an example, states may well choose to legislate for a minimum wage. If this wage is applied to equally to national and migrant workers alike it would be compatible with EC Law since it is non-discriminatory. If, on the other hand, nationals enjoy a higher minimum level than migrants, this would contravene EC law and equal treatment would have to be applied. Apart from this, EC law would have nothing to say about the means of setting and applying the minimum wage: under the non-discrimination model the freedom of the national regulator to prescribe the substance of the national minimum wage remains in tact.

(ii) The market access model

The real challenge to national regulatory autonomy came with the gradual adoption by the Court of the so-called ‘market access’ test. This change in approach was signalled by *Säger*, a services case, where the Court said that Article 49 EC required:

*not only* the elimination of all discrimination against a person providing services on the ground of his nationality *but also* the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when *it is liable to prohibit or otherwise impede* the activities of a provider of services established in another Member State where he lawfully provides similar services.<sup>19</sup>

The Court continued that any such restriction could be justified only by imperative reasons relating to the public interest, provided that the steps taken were proportionate.<sup>20</sup> In subsequent cases, the Court

<sup>14</sup> Case 167/73 [1974] ECR 359, paras 44-45.

<sup>15</sup> See, by analogy, Case 221/85 *Commission v Belgium* [1987] ECR 719; Case 52/79 *Debauve* [1981] ECR 833.

<sup>16</sup> Case C-415/93 *Union Royale Belge de Société de Football Association v Bosman* [1995] ECR I-4921.

<sup>17</sup> Case C-419/92 *Scholz v Opera Universitaria di Cagliari and Cinzia Porcedda* [1994] ECR I-505.

<sup>18</sup> See also Art. 7(1) of Reg. 1612/68.

<sup>19</sup> Case C-76/90 [1991] ECR I-4221, para. 12, emphasis added.

<sup>20</sup> Para. 15.

has simplified the language down to the question of whether the national measure ‘restricts’ or creates an obstacle to free movement.<sup>21</sup>

The advantage of the ‘market access’ or ‘restrictions’/‘obstacles’ approach is that it was an effective tool to cut through swathes of national rules which impeded the creation of a single market. The disadvantage is that, with its focus on the effect of the rule on the out-of-state provider, it takes no account of the effect of the rule on the national provider. It is thus more damaging to regulatory autonomy, as can be seen from the minimum wage example. While the minimum wage would be lawful under the non-discrimination approach, it could be challenged under the market access approach as a restriction on free movement unless justified.

In the context of services, many argue that the *Säger* market access approach works particularly well. As the Court noted in *Säger* itself, a ‘Member State may not make the provision of services in its territory subject to compliance with all the conditions required for establishment and thereby deprive of all practical effectiveness the provisions of the Treaty whose object is, precisely, to guarantee the freedom to provide services’.<sup>22</sup> Therefore, as a general rule, it is inappropriate to apply the full gamut of national rules to an out-of-state service provider since the principal regulator of the service provider is the home state (the country of origin principle).

This contrasts with the situation of migrants seeking to establish themselves or work on a permanent basis in the host state. The principal regulator is the *host* state and it would seem legitimate for that state to treat migrants, especially workers, in the same way as nationals under the *lex loci laboris* or country of destination principle. It should, however, be noted that few employment laws will apply to the self-employed since most national employment laws apply to dependent workers (employees) than to independent workers (self-employed).

Given the different regulatory regimes, this would tend to suggest that the non-discrimination model should apply to free movement of workers and freedom of establishment but a restrictions model to services.<sup>23</sup> It could even be argued that the principles of non-discrimination should also apply to staff posted by service providers to perform a service contract in another Member State. The posted staff, particularly if posted for longer periods of time, are in an analogous position to workers under Article 39 and, under the *lex loci laboris* should enjoy the same terms and conditions. As we have seen, the Posted Workers Directive tried to deliver this in respect of certain mandatory rules (e.g. maximum work periods, minimum paid annual holidays, minimum rates of pay but not dismissal law) for those falling in the scope of the Directive.

<sup>21</sup> E.g. Case C-255/04 *Commission v. France (performing artists)* [2006] ECR I-000, para. 38.

<sup>22</sup> Case C-76/90 [1991] ECR I-4221, para. 13.

<sup>23</sup> L.Daniele, ‘Non-discriminatory Restrictions to the Free Movement of Persons’ (1997) 22 *ELRev* 191.

Table 1 sets out in tabular form the different ways in which individuals and companies might exercise their Community law rights of free movement and how in turn they might interact with national employment law.

Situation	Applicable Law
<b>As a worker (Art. 39)</b> 1.1 Employees	Host state laws apply.
<b>Establishment of service provider (Art. 43)</b> 2.1 Self employed  2.2 Self employed person employing staff  2.3 Company setting up branch or agency in host state and employing staff there  2.4 Company reestablishing in another Member State	Host state employment laws, if any.  Host state employment laws apply to staff.  Host state employment laws apply to staff.  Host state employment laws apply to staff.
<b>Provision of Services (Art. 49)</b> 3.1 Self employed  3.2 Self employed person or company employing staff in host state  3.3 Company posting workers	Home state employment laws apply, if any.  Host state employment laws apply to staff.  Generally host state laws will apply under the Posted Workers Directive. For employment laws not covered by the Directive, the law of the state in which the employee habitually carries out his work in performance of the contract (usually home state) will apply.

**Table 1: How national employment laws might be engaged in cross border situations**

Although the theoretical position might suggest that market access should apply to certain services but non-discrimination should apply to workers and establishment, increasingly the Court applied the *Säger* market access approach more widely, making it clear that it was no longer confined to the services cases. For example, in *Commission v Denmark (company vehicles)*, the Court said ‘[i]t is settled case law that Article 39 EC prohibits not only all discrimination, direct or indirect, based on nationality, but also national rules which are applicable irrespective of the nationality of the workers concerned but impede their *freedom of movement*.’<sup>24 25</sup>

The effect of this shift towards a market access approach is for closer scrutiny of national laws by the European Court of Justice. However, this scrutiny comes at a price: the Court has had to expand

<sup>24</sup> Case C-464/02 *Commission v Denmark (company vehicles)* [2005] ECR I-7929, para. 45.

<sup>25</sup> Emphasis added.

significantly on the relatively short group of justifications which it listed in *Gouda*.<sup>26</sup> For our purposes the most important are:

- protection of workers;<sup>27</sup>
- prevention of social dumping<sup>28</sup> or unfair competition;<sup>29</sup>
- avoiding disturbances on the labour market.<sup>30</sup>

The problem presented by the market access approach in the employment sphere is that it would be possible for a self-employed person or a business wishing to set up a branch or agency in another Member State (situations 2.1 and 2.2 above) to argue that the fact that they are obliged to comply with the host state's employment laws when employing staff in that state (especially if the host state provides high levels of employment protection) is liable to restrict their willingness to establish themselves under Article 43. A similar argument could also be run by services providers (situations 3.2 or 3.3) under Article 49. The fact that national service providers are subject to the same rules in respect of the staff they employ is irrelevant under the market access model: such rules will breach the Treaty unless they can be justified.

For a number of years, similar arguments were successfully run in the field of taxation: differences in tax rates or the basis of taxation was liable to discourage freedom of establishment. For example, in *Bosal*<sup>31</sup> the Court said that as a result of the national tax rules 'a parent company *might be dissuaded* from carrying on its activities through the intermediary of a subsidiary established in another Member State'<sup>32</sup> and so the rule breached Article 43. This caused consternation among the Member States, who also found the justifications they put forward were being rejected by the Court, with the result that the whole balance in their taxation system was being called into question. Eventually the Court reverted to a non-discrimination model in the field of taxation.<sup>33</sup> The Court has not proceeded down this route in the employment sphere. Instead, it has used a range of techniques to deal with the potential conflict between the provisions on free movement and national social policy.

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<sup>26</sup> Case C-288/89 *Stichting Collectieve Antennevoorziening Gouda v Commissariaat voor de Media* [1991] ECR I-4007.

<sup>27</sup> Case 279/80 *Webb* [1981] ECR 3305, para. 19.

<sup>28</sup> Case C-244/04 *Commission v Germany* [2006] ECR I-000, para. 61.

<sup>29</sup> Case C-60/03 *Wolff & Müller v Pereira Félix* [2004] ECR I-9553, para. 41.

<sup>30</sup> Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, para. 38.

<sup>31</sup> Case C-168/01 *Bosal Holding BV v Staatssecretaris van Financiën* [2003] ECR I-9409.

<sup>32</sup> Para. 27, emphasis added.

<sup>33</sup> Joined Cases C-544/03 and C-545/03 *Mobistar SA v Commune de Fleron* [2005] ECR I-7723. See Kingston, 'The Boundaries of Sovereignty: The ECJ's Controversial Role Applying Internal Market Law to Direct Taxation Measures' (2006-7) 9 *CYELS* 287; and 'A Light in the Darkness: Recent developments in the ECJ's direct tax jurisprudence' (2007) 44 *CMLRev.* 1321.

### 3. Tools to deal with the Conflict between EC Law and National Employment Law

#### A. Outside the scope

In some cases the Court found that the social policy issues took the matter outside the scope of EC law altogether. *Albany* is perhaps the best example of this.<sup>34</sup> *Albany* concerned a collective agreement negotiated by representative organizations of employers and workers setting up a supplementary pension scheme, managed by a pension fund, to which affiliation was compulsory. The Dutch Minister of Employment had, on request of the Social Partners, made affiliation to the scheme compulsory for all workers in the sector. The Court found that certain restrictions of competition were inherent in collective agreements between organisations representing employers and workers. Nevertheless, the Court held that the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 81(1) EC prohibiting agreements which restricted or distorted competition when seeking jointly to adopt measures to improve conditions of work and employment.<sup>35</sup> It therefore inferred from this that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article 81(1) of the Treaty.

In other cases the Court has used the solidarity principle to protect certain social welfare schemes from the impact of EC competition law.<sup>36</sup> The Court says that where the activity is based on national solidarity, it is not an economic activity and therefore the body concerned cannot be classed as an undertaking to which Articles 81 and 82 apply. This principle, when applied, indicates a certain supremacy for social protection over the Single Market.

The principle was first recognized in *Poucet and Pistre*<sup>37</sup> where the Court held that certain French bodies administering the sickness and maternity insurance scheme for self-employed persons engaged in non-agricultural occupations and the basic pension scheme for skilled trades, were not to be classified as undertakings for the purpose of competition law. The schemes provided a basic pension.<sup>38</sup> Affiliation was compulsory. The pension scheme was non-funded: it operated on a redistributive basis with active members' contributions being directly used to finance the pensions of retired members. The principle of solidarity was embodied in the *redistributive* nature of the scheme: contributions paid by active workers served to finance the pensions of retired workers. It was also reflected by the grant of pension rights where no contributions had been made and of pension rights that were not proportional

<sup>34</sup> Case C-67/96 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

<sup>35</sup> Para. 49.

<sup>36</sup> For a fuller consideration of these developments, see C.Barnard, 'Solidarity and New Governance in the Field of Social Policy?' in G.De Búrca and J.Scott (eds), *New Governance and Constitutionalism in Europe and the US* (Hart, Oxford, 2006).

<sup>37</sup> Joined Cases C-159/91 and C-160/91 *Poucet and Pistre v AGF and Cancava* [1993] ECR I-637.

<sup>38</sup> These are helpfully summarized by Advocate General Jacobs in *Albany*, para. 317 of his Opinion.

to the contributions paid. Finally, there was solidarity between the various social security schemes, with those in surplus contributing to the financing of those with structural difficulties. The Court said that because the activity was based on the principle of national solidarity, it was not an economic activity and so Community law did not apply.

*B. Remoteness/ no substantial hindrance of market access*

In other cases the Court (instinctively?) felt that the *Säger* restrictions model was going too far in the context of certain employment related matters and so found no breach of the Treaty. So in *Burbaud*<sup>39</sup> the Court said that the requirement of passing an exam in order to take up a post in the public service could not 'in itself be regarded as an obstacle' to free movement.<sup>40</sup> A similar approach can be seen in *Delière*<sup>41</sup> where the Court said that although selection rules for an international judo competition inevitably had the effect of limiting the number of participants in a tournament, such a limitation was inherent in the conduct of an international high-level sports event and so did not constitute a restriction on the freedom to provide services prohibited by Article 49.<sup>42</sup>

Perhaps, most significantly, the Court recognised in *Graf*<sup>43</sup> that a *de minimis* threshold applied to the market access approach. Graf, a German national, worked for his Austrian employer for four years when he terminated his contract in order to take up employment in Germany. Under Austrian law, a worker employed by the same employer for more than three years was entitled to severance compensation provided that his contract was terminated and he did not just resign. Graf argued that this rule contravened Article 39 because the effect of the rule was that, by resigning and moving to another State, he lost the chance of having his contract terminated in Austria and so was unable to claim compensation.

The Court disagreed: the Austrian law was genuinely non-discriminatory and did not preclude or deter a worker from ending his contract of employment in order to take a job with another employer.<sup>44</sup> It said that entitlement to severance pay was dependent on an event (termination of employment) which is *too uncertain and indirect* a possibility for legislation to be capable of being regarded as liable to hinder free movement for workers'. Putting it another way, non-discriminatory measures which do not substantially hinder access to the (labour) market,<sup>45</sup> or whose effect on free movement is too remote, fall outside Article 39.

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39 Case C-285/01 *Isabel Burbaud v Ministère de l'Emploi et de la Solidarité* [2003] ECR I-000.

40 Para. 96.

41 Joined Cases C-51/96 & C-191/97 *Delière v Ligue Francophone de Judo et Disciplines Associées* [2000] ECR I-2549, para. 64.

42 Para. 64.

43 Case C-190/98 *Graf v Filzmozer Maschinenbau GmbH* [2000] ECR I-493.

44 Para. 23.

45 Para. 23.

*C. Finding a breach but looking at justifications and proportionality*

Although the Court has the tools outlined above at its disposal, increasingly it is striking a balance between the economic four freedoms and national employment law, by applying the *Säger* market access approach, with the Court using the justifications and the proportionality principle as a means of balancing the competing interests. This is best illustrated by the cases on posting of workers and now by the decisions in *Viking* and *Laval*.

(i) Posted workers case law

Although in its earliest – and most famous – case, *Rush Portuguesa*,<sup>46</sup> the Court recognised that host states could extend and enforce ‘their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established’, the legal basis for reaching that conclusion was not clearly stated. However, subsequent cases adopt the *Säger* market access approach. This can be seen in *Mazzoleni*.<sup>47</sup> ISA, a French company, provided security guards who worked on a part-time basis for brief periods at a shopping mall in Belgium. In the course of an inspection by the Belgian labour inspectorate, it was found that the monthly wage of ISA workers was less than the minimum wage in Belgium, albeit that their remuneration package as a whole, including tax and social security contributions) was similar to, if not more favourable than, remuneration under Belgian law. The Court said that while Belgian law in principle breached Article 49, because by subjecting service providers to all conditions required for establishment, it deprived the provisions on services of practical effectiveness, the requirement to pay the host state’s minimum wage could be justified on the grounds of worker protection. However, the Court suggested the application of the Belgian rules might be disproportionate.<sup>48</sup> It said that the Belgian objective of worker protection would be attained if all the workers concerned enjoyed an equivalent position overall in relation to remuneration, taxation and social security contributions in the host Member State and in the Member State of establishment.<sup>49</sup>

Thus, *Mazzoleni* suggests that the host state is justified in requiring that, in appropriate circumstances, the service provider pay its workforce minimum wages laid down by the host state’s law or, as in *Arblade*,<sup>50</sup> collective agreement, provided that the provisions of the collective agreement are sufficiently precise and accessible and they do not render it impossible or excessively difficult in

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<sup>46</sup> Case C-113/89 *Rush Portuguesa v Office national d’immigration* [1990] ECR I-1417.

<sup>47</sup> Case C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189.

<sup>48</sup> Para. 34.

<sup>49</sup> Para. 35.

<sup>50</sup> Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453.

practice for the employer to determine his obligations. The significance of this point can be seen in *Laval* (see below).

In addition, the Court has said in *Commission v Germany*<sup>51</sup> that it is compatible with the Treaty provisions on services for the host state to insist that the service provider furnishes a ‘simple prior declaration certifying that the situation of the workers concerned is lawful’, particularly in the light of the requirements of residence, work visas and social security cover in the Member States where the provider employs them. In *Commission v Luxembourg*<sup>52</sup> the Court also said that the host state could require the service provider to report beforehand to the local authorities on the presence of one or more posted workers, the anticipated duration of their presence and the provision or provisions of services justifying the deployment.<sup>53</sup> In *Arblade*<sup>54</sup> the Court said that the host Member State could insist that the service provider keep social and labour documents available on site or in an accessible and clearly-identified place in the host State, where such a measure was necessary to enable it effectively to monitor compliance with the host State’s legislation.

On the other hand, the Court has said that host state laws requiring the posted worker to have been employed by the service provider for at least 6 months in the case of Luxembourg<sup>55</sup> (a year in the case of Germany<sup>56</sup>) was not lawful. A requirement for the posted workers to have individual work permits which were only granted where the labour market situation so allowed was also not compatible with the EC law.<sup>57</sup> In addition, the Court has said that a requirement for the service provider to provide, for the purposes of obtaining a work permit, a bank guarantee to cover costs in the event of repatriation of the worker at the end of his deployment was not permitted,<sup>58</sup> nor was a requirement that the work be licensed.<sup>59</sup>

#### (ii) Viking and Laval

In the now (in)famous cases of *Viking* and *Laval* the Court also adopted *Säger* market access approach, expressly and swiftly rejecting arguments that, following *Albany*, national employment laws should fall outside the scope of Community free movement law.<sup>60</sup> It will be recalled that *Viking* concerned a Finnish company that wanted to reflag its vessel, the *Rosella* which traded the loss-making route between Helsinki and Tallinn in Estonia, under the Estonian flag so that it could man the ship with an

<sup>51</sup> Case C-244/04 *Commission v Germany* [2006] ECR I-000.

<sup>52</sup> Case C-445/03 [2004] ECR I-10191.

<sup>53</sup> Para. 31.

<sup>54</sup> Joined Cases C-369/96 and C-376/96 [1999] ECR I-8453.

<sup>55</sup> Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, paras. 32-3.

<sup>56</sup> Case C-244/04 *Commission v Germany* [2006] ECR I-000.

<sup>57</sup> Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191, paras. 42-3. See also the earlier case of Case C-43/93 *Vander Elst* [1994] ECR I-3803 considered above.

<sup>58</sup> *Ibid*, para. 47.

<sup>59</sup> *Ibid*, para. 30.

<sup>60</sup> The Court curtly and without explanation stated that the reasoning in *Albany* could not be ‘applied in the context of the fundamental freedoms set out in Title III of the Treaty’ (para. 51).

Estonian crew to be paid considerably less than the existing Finnish crew. The International Transport Workers' Federation (ITF) had been running a Flag of Convenience (FOC) campaign trying to stop ship owners from taking just such action. It therefore told its affiliates to boycott the *Rosella* and to take other solidarity industrial action against both the *Rosella* and other Viking vessels. The Finnish Seaman's Union (FSU) threatened strike action. Viking therefore sought an injunction in the English High Court,<sup>61</sup> restraining the ITF and the FSU from breaching, *inter alia*, Articles 43 and 49 EC.

*Laval* was a Latvian company which, through its wholly owned Swedish subsidiary (Baltic Bygg), won a contract to refurbish and extend a school in the Stockholm suburb of Vaxholm. Laval was not a signatory to the Swedish Construction Federation collective agreements with Byggnads, the major Swedish construction trade union. Laval used its own Latvian workers to fulfil the contract.<sup>62</sup> These workers earned about 40 per cent less per hour than comparable Swedish workers. Byggnads wanted Laval to apply the Swedish national agreement but Laval refused, objecting, in particular, to the lack of clarity as to how much it would have to pay its workers. Laval's refusal led to a union picket at the school site and a blockade by construction workers. Further, sympathy industrial action was taken by the electricians unions, and others, who boycotted all of Laval's sites.<sup>63</sup> Laval brought proceedings in the Swedish labour court, claiming that the industrial action and blockade were contrary to Article 49, as was the sympathy strike.

In both cases the Court recognised that collective action fell within the scope of the Treaty and that Articles 43 and 49 could be invoked against trade unions. It then applied the *Säger* market access approach. For example, in *Laval* the Court said:<sup>64</sup>

... the right of trade unions of a Member State to take collective action by which undertakings established in other Member States may be forced to sign the collective agreement for the building sector ... is liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.

Likewise, in *Viking* the Court found a breach of Article 43 both by FSU and ITF.

Having established a breach, the next question was whether the collective action could be justified and proportionate. In both *Viking* and *Laval* the Court began by recognizing the need to reconcile the competing objectives of the Community: on the one hand the completion of the internal market and on the other 'a policy in the social sphere'.<sup>65</sup> The Court then noted in *Viking* that 'the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies

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<sup>61</sup> ITF had its base in London and so jurisdiction was established pursuant to the Brussels Regulation 44/2001 OJ [2001] L12/1.

<sup>62</sup> Para. 27.

<sup>63</sup> Para. 37-8. See Malmberg & Jonsson above n.8 for further descriptions of the boycotts and collective actions in Swedish law.

<sup>64</sup> Para. 99.

<sup>65</sup> Para. 78 (*Laval*, para. 104).

a restriction of one of the fundamental freedoms guaranteed by the Treaty ... and that the protection of workers is one of the overriding reasons of public interest recognised by the Court'.<sup>66</sup> The Court then considered whether the objectives pursued by FSU and ITF by means of the collective action did actually concern the protection of workers.<sup>67</sup> Although it said that this assessment was the task of the national court,<sup>68</sup> it gave the national court a very strong steer as to which way it should go. In respect of the collective action taken by the *FSU*, it said:

even if that action – aimed at protecting the *jobs and conditions of employment* of the members of that union *liable to be adversely affected* by the reflagging of the *Rosella* – could reasonably be considered to fall, at first sight, within the objective of protecting workers, such a view would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat.<sup>69</sup>

This is the crux of the judgment: collective action can be taken but only to protect both jobs and conditions of employment which are liable to be adversely affected. If that was the case the national court would have to apply the proportionality test.

On the question of suitability, the first limb of the proportionality test,<sup>70</sup> the Court said that 'it should be borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members'.<sup>71</sup> However, on the question of necessity, the Court said 'it is for the national court to examine, in particular, on the one hand, whether, under the national rules and collective agreement law applicable to that action, FSU did not have other means at its disposal which were less restrictive of freedom of establishment in order to bring to a successful conclusion the collective negotiations entered into with Viking, and, on the other, whether that trade union had exhausted those means before initiating such action'.<sup>72</sup> Thus, the Court of Justice appears to suggest that industrial action should be the last resort; and the British courts will have to verify whether the FSU has exhausted all other avenues under Finnish law before the industrial action is found proportionate.

Finally, the Court turned to ITF's situation. The Court was adamant: where the FOC policy resulted in (Finnish) shipowners being prevented from registering their vessels in a State other than that of which the beneficial owners of those vessels are nationals (Estonia), the restrictions on freedom of establishment resulting from such action cannot be objectively justified'.<sup>73</sup>

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<sup>66</sup> Para. 77.

<sup>67</sup> Para. 80.

<sup>68</sup> Para. 80.

<sup>69</sup> Para. 81.

<sup>70</sup> Para. 86.

<sup>71</sup> *Syndicat national de la police belge v Belgium*, of 27 October 1975, Series A, No 19, and *Wilson, National Union of Journalists and Others v United Kingdom* of 2 July 2002, 2002-V, § 44.

<sup>72</sup> Para. 87.

<sup>73</sup> Para. 88.

Turning to *Laval*, the Court's reasoning is more truncated and opaque. It recognised that 'the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty'.<sup>74</sup> It then adds that 'blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers'.<sup>75</sup> The next three paragraphs of the judgment are less clear but suggest that using collective action to secure Laval's signature on the collective agreement could not be justified<sup>76</sup> nor could it be justified for a national system to be so unclear as to what is required of the foreign service provider in terms of pay.<sup>77</sup>

The *Viking* and *Laval* decisions are striking in the way that they insist that the balancing between the economic and social be conducted through the justifications and proportionality. It could be argued that this is, in fact, balance in name, not substance. The very fact that the collective action is found to be a 'restriction' under *Säger*, and thus in principle a breach of Community law automatically puts the 'social' on the back-foot. The social interests have to defend themselves from the economic. And the Court has made it difficult to defend the social interests. Despite the recognition of the right to strike as a fundamental right in the early part of the *Viking* judgment, this recognition has little more than rhetorical value. The justifications put forward by the trade union movement were subject to close scrutiny. Further, the Court applied the strictest form of the proportionality test, unmitigated in anyway by references to 'margin of appreciation'. The precedence of the economic over the social is pretty clear. And it is these ongoing concerns which form the backcloth to the considerable trade union hostility to the initial Bolkestein draft of the Services Directive.

#### 4. The Services Directive 2006/123 and Employment Law

##### *A. Introduction*

There have been two main drafts of this Directive. The original 'Bolkestein' draft of 2004<sup>78</sup> was strongly deregulatory of national rules which interfered with the free movement of services. This deregulation was not matched by much re-regulation in the Directive, not least because it would have proved very

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<sup>74</sup> Para. 103.

<sup>75</sup> Para. 107.

<sup>76</sup> Para. 108.

<sup>77</sup> Para. 110.

<sup>78</sup> COM (2004) 2 final/3. For a full discussion, see C.Barnard, 'Unravelling the Services Directive' (2008) *CMLRev.* forthcoming.

difficult to re-regulate in a horizontal directive covering over 80 different sectors. The strong market access orientation of the proposed Directive raised many concerns in the trade union movement which feared that the Directive – as well as the Treaty – now risked further undermining national employment laws. So what did the Bolkestein draft actually do?

### *B. The Bolkestein draft*

#### (i) The proposal

The Bolkestein draft provided a legal framework that laid down detailed rules on mutual assistance between Member States as well as requiring Member States to establish a Point of Single Contact (PSC). It also aimed to eliminate obstacles to the freedom of establishment for service providers as well as removing barriers to temporary service provision between the Member States. For our purposes, the 2004 draft made two controversial proposals in respect of temporary service provision. Firstly, it laid down the country of origin principle (CoOP), according to which service providers would be subject only to the law of the country in which they were established; Member States would not be able to restrict services from providers established in another Member State. This CoOP principle was to be accompanied by derogations which were either general, or temporary or which could be applied on a case-by-case basis.

Secondly, in the case of posting of workers (ie where a company ‘posts’ some of its staff to work in another country) Bolkestein provided that the Posted Workers Directive 96/71<sup>79</sup> should apply instead of the Services Directive. As a result, Article 17 of the original draft Services Directive contained a derogation from the country of origin principle in respect of posted workers. Specific provision was also made for the posting of third country nationals (TCNs).<sup>80</sup> However, in order to facilitate the free movement of services and the application of Directive 96/71 the Bolkestein draft clarified the allocation of tasks between the country of origin and the Member State of posting. In particular, Article 24 of the proposed Directive would have removed certain administrative obligations concerning the posting of workers (e.g. notification and registration requirements with the host state authorities), while at the same time increasing the measures to reinforce administrative co-operation between states.

#### (ii) Criticisms of the Bolkestein proposal

The ETUC was opposed to many aspects of the Directive,<sup>81</sup> particularly the country of origin principle (CoOP). It argued that while the CoOP might work where the service itself moved (eg television broadcasting), it did not and should not apply where the service *provider* moved (eg the Polish plumber

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<sup>79</sup> OJ 1997 L18/1.

<sup>80</sup> Art. 25.

<sup>81</sup> <http://www.etuc.org/a/384>, 9 June 2004.

moving to France to provide a service). The ETUC argued that when workers moved under Article 39, the ‘country of *destination*’ principle applied i.e. workers are treated in the same way as nationals (see situation 1.1 in table 1). This, it regarded as the appropriate response. By contrast, the country of *origin* principle is premised on unequal treatment of workers on the grounds of nationality (domestic workers subject to the laws of State A, service providers subject to the laws of their home state).<sup>82</sup> The ETUC argued that this could not be justified in the name of worker protection.

The ETUC was also concerned that the Commission thought that exclusion of ‘matters covered by the Posted Workers Directive’ in Article 17 was sufficient to protect workers. It pointed out that Article 17 did not mention the Rome I Convention, nor did the exclusion take the other Community *acquis* into account such as Directive 91/383 on health and safety and Directive 80/987 on employer insolvency. The ETUC also suggested that the Commission thought that the Posted Workers Directive exhaustively harmonized which requirements a host state could impose on a foreign service provider<sup>83</sup> and so worked as an efficient protection for cross-border workers.<sup>84</sup> However, the ETUC pointed out that the Commission had failed to consider what would happen, in circumstances of a country like Sweden, where the Posted Workers’ Directive did not apply to the particular circumstance of Sweden where there is no law on the minimum wage nor is there a systems for declaring collective agreements universally applicable.

More generally, the ETUC believed that the Bolkestein proposal places too many restrictions on the right of Member States to act against abuses of labour law and to protect migrant workers on their own soil’. It doubted that authorities in the country of origin would be able to carry out effective monitoring and control across borders.<sup>85</sup> As Claes-Mikael Jonsson, legal adviser to the ETUC, put it, ‘[t]he problem with Article 24 (and certain parts of Article 16) was that many of the forbidden obligations mentioned are essential for enforcement and supervision of labour standards’.<sup>86</sup> He argued that it was not possible to separate the monitoring and enforcement mechanisms used to implement the directive from their content.

The ETUC therefore called for:

- Stronger and unambiguous language in the Directive, ensuring that it will not in any way interfere with labour law, collective bargaining and industrial relations in Member States, and explicitly referring to the respect for fundamental rights in this regard, such as the right to take industrial action.

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<sup>82</sup> Speech given by Claes-Mikael Jonsson, legal adviser to the ETUC, ‘Would the proposed Services Directive help or hurt cross-border workers?’, European Institute of Public Administration, 9-10 Mar 2006. On file with the author.

<sup>83</sup> Art. 3(7). Cf. *Laval*, para. 80.

<sup>84</sup> *Ibid.*

<sup>85</sup> <http://www.etuc.org/a/436>, 24 May 2004.

<sup>86</sup> Speech given by Claes-Mikael Jonsson ‘Would the proposed Services Directive help or hurt cross-border workers?’, European Institute of Public Administration, 9-10 Mar 2006. On file with the author.

- All cross-border services to be regulated by the law of the country where they are provided or carried out. The country of origin principle (CoOP) cannot be applied before upward harmonisation has been achieved.
- The host country to be entitled to impose supervisory measures on all services - in all sectors - provided on its territory.
- Certain sensitive sectors such as temporary work agencies and private security services to be excluded from the directive and dealt with under separate measures.
- All services of general interest (SGIs), economic or non-economic, to be excluded from the scope of the directive (especially water and social services).<sup>87</sup>

Subsequently, in its submission to the European Parliament prior to the key EP Plenary vote on 14 February 2006, it also called for:

- A text which recognises Member States opportunity to justify national regulation (overriding reasons of public interest) in accordance with ECJ case law;
- A full deletion of prohibited requirements that are necessary for enforcement, supervision and surveillance of the labour market and working conditions;
- Deletion of the country of origin principle, leaving Member States proper space to monitor and enforce national rules that guard the public interest.

(iii) Bolkestein and social dumping

At its most basic level, the ETUC and many others were concerned about social dumping: that companies would establish themselves in states with the 'lowest' standards and, taking advantage of the country of origin principle, supply services to other EU states.<sup>88</sup> This creates the risk that other states would in turn to lower their standards in order to compete, and a race to the bottom would ensue.<sup>89</sup> This would be contrary to the expressed aims of the Treaty which include, in Article 2 EC a 'raising of the standard of living and quality of life'.

This all added to the fear if the Northern European states that the European social model was under threat.<sup>90</sup> This concern was, of course, exacerbated by the 2004 enlargement to the East where

<sup>87</sup> <http://www.etuc.org/a/1822>, 6.12.05

<sup>88</sup> See F.Hendrickx, 'The Services Directive and Social Dumping: National Labour Law under Strain' in U.Neergaard, R.Nielsen and L.Roseberry (eds), *The Services Directive – Consequences for the Welfare State and the European Social Model* (DJØF Publishing, Copenhagen, 2008).

<sup>89</sup> See, e.g. the views expressed by Amicus, one of the largest British trade unions: <http://www.amicustheunion.org/Default.aspx?page=3452>, accessed 17 November 2007. See also <http://www.etuc.org/a/499>.

<sup>90</sup> See the remarks made by Evelyne Gebhardt, Socialist MEP, the EP's rapporteur on the Services Directive, the Bolkestein proposal 'constitutes a threat to consumer protection, the European social model and public services' (*EUPolitix.com*, 4 October 2004, 1). For full discussion, see Schiek, 'The European Social Model and the Services Directive' in Neergaard, Nielsen and Roseberry (eds), *The Services Directive – Consequences for the Welfare State and the European Social Model* (DJØF Publishing, Copenhagen, 2008).

labour costs were significantly lower than those in the EU-15.<sup>91</sup> The issues were particularly sensitive in France, where the ‘Polish plumber’ had for many French people assumed ‘bogeyman status as low cost, low standard, Eastern European Labour’.<sup>92</sup> These concerns led to fierce lobbying and number of trade union-led demonstrations in Brussels<sup>93</sup> as well as protests outside the European Parliament building in Strasbourg. Less heard were the views of the Accession states which had surrendered at least part of their recently acquired sovereignty in order to gain access to the markets of the EU-15, taking advantage of their cheaper labour costs.

#### (iv) The response

The European Parliament listened sympathetically to its most vocal critics and delivered a number of the ETUC’s demands at first reading,<sup>94</sup> most famously the removal of the country of origin principle. The Commission then drafted a revised proposal.<sup>95</sup> This ‘McCreevy’ draft was narrower in scope than its Bolkestein predecessor and shorn of the country of origin principle, the social provisions,<sup>96</sup> provisions on services of non-economic general interest<sup>97</sup> (but not services of general economic interest, as the ETUC had advocated<sup>98</sup>) and temporary worker agencies.<sup>99</sup> At the same time, the Commission issued a Communication on the Posted Workers’ Directive<sup>100</sup> aimed at strengthening the position of service providers wishing to use their own workforce to fulfil contracts in other Member States. In his speech to the European Parliament,<sup>101</sup> McCreevy said that the decision to remove all interaction between the Services Proposal and labour law was one of the most important elements in creating a more positive atmosphere around this new draft. He continued that ‘[t]his has allowed us to move on from allegations of lowering of social standards and threats to the European social model’, adding that ‘While this perception was wrong it did not go away and poisoned the debate’.

<sup>91</sup> See e.g. ETUC comment on ‘Draft Directive on Services in the Internal Market’, [www.etuc.org/a/499](http://www.etuc.org/a/499).

<sup>92</sup> Waterfield, ‘Polish workers protest against French bosses’ *EUPolitix.com*, 4 October 2005, 1. France was not alone. The Swedish trade minister, Thomas Ostros, was reported as saying ‘There cannot be a service directive, unless there is also a protection against social dumping’: Küchler, ‘McCreevy locks horns with Swedish unions’ *euobserver.com*, 10 October 2005.

<sup>93</sup> W. Kowalsky, ‘The Services Directive: the legislative process clears the first hurdle’ (2006) 12 *Transfer* 231, 246.

<sup>94</sup> A6-0409/2005 FINAL.

<sup>95</sup> COM (2006) 160. There were signs, in the drafts before the final one published that the Commission tried to row back on some of the gains that the ETUC thought it had made in the EP. For example, the Commission removed references to the right to negotiate and conclude collective agreements. The ETUC objected strongly to this and the published version more closely reflected the EP’s agreement at first reading.

<sup>96</sup> Arts. 24 and 25 of the original proposal were removed.

<sup>97</sup> Art.2(1)(e).

<sup>98</sup> ETUC, 20 Jan 2006.

<sup>99</sup> The ETUC argued that service provided by a temporary employment agency should be excluded from the scope of the Directive because of the lack of specific minimum harmonized requirements in respect of these service providers at Community level. It argued that issues such as authorisation and requirements with regard to temporary employment agencies need to be addressed in specific community instruments in which the level of licensing could be defined explicitly.

<sup>100</sup> ‘Guidance on the posting of workers in the framework of the provision of services’: COM (2006) 159. This is accompanied by a report SEC(2006) 439. It also issued a Communication, *Social services of general interest in the European Union* COM (2006) 177.

<sup>101</sup> SPEECH/06/220, 4 April 2006.

The Council adopted a common position on the Services Directive in May 2006.<sup>102</sup> After making some further amendments to the comitology procedures, the EP voted to adopt the common position in November 2006. The Directive came into force on 28 December 2006.<sup>103</sup>

### *C. The Services Directive and labour law*

In truth, the ETUC never thought that it would succeed in persuading the EP to drop the country of origin principle. Its strategy was therefore to fill the Directive with as much protection for national labour law as possible. When the country of origin principle was in fact removed, the protection for national employment law which had been successfully negotiated nevertheless remained in the Directive. The result is a certain amount of confusion in the Directive.

We shall now examine the relationship between the Services Directive and Labour Law.

#### (i) Recognition of the European Social Model

The Preamble to the Directive seeks to assuage the fears about social dumping. The first Recital reasserts the content of Article 2 EC. It says that in eliminating barriers to the development of service activities between the Member States, ‘it is essential to ensure that the development of service activities contributes to the fulfilment of the task laid down in Article 2 of the Treaty of promoting ... the raising of the standard of living and quality of life and economic and social cohesion and solidarity among the Member States’.<sup>104</sup> The fourth Recital adds that the removal of legal barriers to the establishment of a genuine internal market, ‘while ensuring an advanced European social model, is thus a basic condition for overcoming the difficulties encountered in implementing the Lisbon strategy and for reviving the European economy, particularly in terms of employment and investment’.<sup>105</sup> It continues that ‘[i]t is therefore important to achieve an internal market for services, with the right balance between market opening and preserving public services and social and consumer rights’.<sup>106</sup> Of course, the Directive does not give a definition of what is meant by the ‘European Social Model’.<sup>107</sup> But the use of the term sends out the necessary political message.

There are also a number of other references in the Preamble to labour law, indicating that labour law enjoys particular protection in a way that other interests are not. For example, bolted on to

<sup>102</sup> <http://register.consilium.europa.eu/pdf/en/06/st10/st10003.en06.pdf>.

<sup>103</sup> Art. 45.

<sup>104</sup> Amendment 1, Recital 1 of the EP First Reading Report A6-0409/2005. See also 71<sup>st</sup> Recital ‘The mutual evaluation process should not affect the freedom of the Member States to set in their legislation a high level of the protection of the public interest, in particular in relation to social policy objectives’.

<sup>105</sup> Amendment 3 of the EP First Reading Report A6-0409/2005.

<sup>106</sup> *Ibid.*

<sup>107</sup> Various definitions have been offered elsewhere: see e.g. Nice European Council 2000 (para. 12) ‘The European social model has developed over the last forty years through a substantial Community *acquis* ... It now includes essential texts in numerous areas: free movement of workers, gender equality at work, health and safety of workers, working and employment conditions and, more recently, the fight against all forms of discrimination’.

the end of the 8<sup>th</sup> Recital – a provision which primarily concerns the regulatory techniques to achieve an internal market in services – is the sentence that ‘[t]his Directive also takes into account other general interest objectives, including the protection of the environment, public security and public health, as well as the need to comply with labour law.’ The 13<sup>th</sup> Recital adds that ‘[i]t is equally important that this Directive fully respect Community initiatives based on Article 137 of the Treaty with a view to achieving the objectives of Article 136 thereof concerning the promotion of employment and improved living and working conditions’.<sup>108</sup>

(ii) Exclusion from scope: Articles 1(6) and 1(7)

The ETUC’s greatest victory was the adoption of Articles 1(6) and 1(7) aimed at excluding labour law and fundamental rights from the scope of the Services Directive. As we shall see, the ETUC’s footprint on these provisions is very clear.

*(a) The provisions and their origins*

Article 1(6) provides:

This Directive does not affect labour law, that is any legal or contractual provision concerning employment conditions, working conditions, including health and safety at work and the relationship between employers and workers, which Member States apply in accordance with national law which respects Community law. Equally, this Directive does not affect the social security legislation of the Member States.<sup>109</sup>

The final version follows almost exactly the revised wording put forward by the ETUC to the Parliament.<sup>110</sup> The 14<sup>th</sup> Recital clarifies what is meant by employment conditions and working conditions:

This Directive does not affect terms and conditions of employment, including maximum work periods and minimum rest periods, minimum paid annual holidays, minimum rates of pay as well as health, safety and hygiene at work, which Member States apply in compliance with Community law, nor does it affect relations between social partners, including the right to negotiate and conclude collective agreements, the right to strike and to take industrial action in accordance with national law and practices which respect Community law, nor does it apply to services provided by temporary work agencies. This Directive does not affect Member States’ social security legislation.<sup>111</sup>

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<sup>108</sup> Amendment 8, of the EP First Reading Report A6-0409/2005. This originally formed part of what became the 14<sup>th</sup> Recital. See also Article 16(4) provides: ‘By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.’

<sup>109</sup> Emphasis added. In the absence of a Community definition of labour law, the Directive tries to provide some guidance. The protection of discrimination law is mentioned only in the Preamble: 11<sup>th</sup> Recital. Further detail as to what constitutes terms and conditions of employment can be found in the 13<sup>th</sup> and, more specifically, the 14<sup>th</sup> Recital. The 14<sup>th</sup> Recital explicitly identifies ‘the right to strike and to take industrial action in accordance with national law and practices which respect Community law’.

<sup>110</sup> Revisions to Art. 1(4), ETUC 20 Jan. 2006. The second sentence of this draft formed the basis for what is now Art. 1(7).

<sup>111</sup> The 11<sup>th</sup> Recital adds that ‘The Directive does not affect Member State laws prohibiting discrimination on the grounds of nationality or on grounds such as those set out in Article 13 of the Treaty’.

This recital closely reflects the ETUC's proposed revised draft of what was originally Article 1(4) of the Directive, now Article 1(6).<sup>112</sup>

Article 1(7) deals specifically with fundamental rights. It says that 'this Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.'<sup>113</sup>

The second sentence of Article 1(7) again reflects the ETUC's proposals to the European Parliament, although reference to extending collective agreements has been dropped. However, the fact that the Directive expressly makes clear that the Directive does not affect 'the right to negotiate, conclude and enforce collective agreements' helps to address trade union concerns about the observation made by the Commission in its 2002 review of barriers to the internal market in services<sup>114</sup> that collective agreements constituted one such barrier to service provision.

This point is further addressed by Article 4(7) which defines the meaning of 'requirements'. If the rule is a 'requirement' it is subject to challenge under the Directive. The word 'requirement' is broadly construed to include, for example, any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States. However, the Article concludes with the statement that 'rules laid down in collective agreements negotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive'.<sup>115</sup> For good measure, Article 14(6) also excludes 'consultation of organisations, such as ... social partners, on matters other than individual applications for authorisations' from the list of prohibited requirements in Article 14.

The ETUC's version of Article 1(7) was modelled on the fundamental rights clause in so-called Monti Regulation 2679/98.<sup>116</sup> However, the final version of Article 1(7) is actually narrower in scope than its Monti forbear. In particular, it omits reference to the 'right' to strike, referring only to industrial action, although it does suggest that this might be a right. However, reference to the '*right to strike*'<sup>117</sup> appears in the 14<sup>th</sup> Recital: '[t]he Directive does not affect ... the *right to strike and to take industrial action* in accordance with national law and practices which respect Community law.' The 15<sup>th</sup> Recital adds:

The Directive respects the exercise of fundamental rights applicable to the Member States and as recognised in the Charter of fundamental rights of the European Union and the

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<sup>112</sup> ETUC 20 Jan 2006.

<sup>113</sup> See also the 15<sup>th</sup> Recital which expressly refers to the Charter and the accompanying explanations.

<sup>114</sup> COM (2002) 441, 50.

<sup>115</sup> Following Amendment 90 of the EP First Reading Report A6-0409/2005.

<sup>116</sup> OJ 1998 L337/8. Art. 2 provided 'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights, *as recognised 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.

<sup>117</sup> See also *Viking*, para. 44 'the right to take collective action, including the *right to strike*, must therefore be regarded as a fundamental right which forms an integral part of the general principles of Community law'.

accompanying explanations, reconciling them with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty. Those fundamental rights include the *right to take industrial action* in accordance with national law and practices which respect Community law.

The reference to the need to reconcile the exercise of fundamental rights ‘with the fundamental freedoms laid down in Articles 43 and 49 of the Treaty’ became prophetic in the light of the decisions in *Viking* and *Laval*. For this reason, the ETUC had objected to the use of such language since ‘the text seems to suggest that fundamental rights and market freedoms are of equal value and should be balanced with each other’.<sup>118</sup> The ETUC lost on this point and, as we have seen, the union movement largely lost the point again before the ECJ in *Viking* and *Laval*.

There is a further point to note too. Under Article 1(7) a right to take industrial action is only a legitimate exception to the freedom to provide services insofar as this is consistent with Community law.<sup>119</sup> This opens up the possibility that industrial action which the Court deems inconsistent with Community law - such as the situation identified in *Viking* where strike action is taken even though no jobs are ‘jeopardised or under serious threat’<sup>120</sup> - will be covered by the Services Directive (and Article 49<sup>121</sup>).

*(b) The legal effect of Articles 1(6) and 1(7)*

The legal effect of the language ‘does not affect’ used in both Articles 1(6) and 1(7) is not clear. Do they operate as total exclusions, like the sectors excluded in Article 2 (in which case why are they in a separate Article?), or do these provisions have less legal force than the exclusions in Article 2, due to the weaker language (‘does not affect’), with the result that they are merely declaratory and aspirational? The French language version obfuscates still further because it uses yet further terminology. Article 1(6) says ‘La présente directive *ne s’applique pas* au droit du travail’ and Article 1(7) ‘La présente directive *n’affecte pas* l’exercice des droits fondamentaux’. I would argue these provisions operate, in practice, as total exclusions and thus have the same weight as the Article 2 exclusions. This may be for political rather than legal reasons. Various politicians have argued that the deliberately wide drafting of Article 1(6) was intended to make sure that the Directive is ‘labour law neutral’,<sup>122</sup> a point confirmed by Commissioner McCreevy before the European Parliament:<sup>123</sup>

The Commission wants to state unambiguously that the Services Directive does indeed not affect labour law laid down in national legislation and established practices in the Member States and that it does not affect collective rights which the social partners enjoy according to national legislation and practices.

<sup>118</sup> ETUC’s amendments submitted to the Commission when the Commission was putting forward its revised proposal.

<sup>119</sup> See also the similar drafting in Art. 28 of the Charter of Fundamental Rights 2000.

<sup>120</sup> Para. 84.

<sup>121</sup> See also *Viking*, para. 44 the right to strike may be ‘subject to certain restrictions. As is reaffirmed by Article 28 of the Charter ... those rights are to be protected in accordance with Community law and national law.’

<sup>122</sup> Evidence given by Rt Hon Ian McCartney to the House of Lords EU Select Committee on 17 May 2006, annexed to the House of Lords EU Select Committee 38<sup>th</sup> Report 2005-6, p.23.

<sup>123</sup> SPEEC/06/687, European Parliament Plenary Session, Strasbourg, 15 Nov. 2006.

Thus, even if the exclusions in Article 1(6)-(7) were originally intended to have a ‘softer’, descriptive form than those in Article 2, they may well assume a harder edge through interpretation, given the sensitivities surrounding the sectors and activities, of which the drafters (and ultimately the Court) are well aware.

So, what then is the effect of Articles 1(6) and 1(7)? They would seem to rule out direct challenges under the Services Directive to national labour law based on a broad market access reading of barriers or requirements. So, for example, they would rule out challenges by a service provider employing local staff (situations 2.2-2.4 and 3.2-3.3 in table 1 above) from arguing that having to comply with the employment laws of the host state in respect of those staff interferes with the service provider’s market access. In addition, Article 1(6) may rule out any challenges by a service providing company that host state employment laws are being applied to its posted staff above the minima laid down by the Posted Workers’ Directive (situation 3.4 in table 1 above).

Article 1(6) and (7) also appear to rule out challenges to the existence of collective agreements which might govern the terms and conditions of such staff on the grounds that the collective agreements interfere with the provision of services. Likewise, the fact that strike action interferes with a service provider’s provision of services will also not be challengeable under the Services Directive so long as those strikes are compatible with national law and practice and Community law. However, as the *Viking* and *Laval* cases make clear, barriers created by national employment laws – even if exempted from the Directive - may nevertheless be caught by Articles 43 and 49 of the EC Treaty unless those rules can be justified and the steps taken are proportionate.

However, Article 1(6) of the Directive will have little impact on the truly self-employed wishing to establish themselves or to provide services (situations 2.1 and 3.1 in table 1 above). This is due to the fact that, as self-employed, national employment laws are unlikely to apply anyway.<sup>124</sup> Yet, much depends on the definition of self-employed. Some states take a tough line on determining who is, in reality, a dependent worker irrespective of how they describe themselves. Even the Court of Justice has, on occasion, been prepared to look at the reality of the situation.<sup>125</sup> The ETUC hoped that a definition of worker might be included in the definition section in Article 4. They were unsuccessful but a provision was inserted in the Preamble that it is for the *host* Member States ‘to determine the existence of an employment relationship and the distinction between self-employed persons and employed persons, including ‘false self-employed persons’.<sup>126</sup> Somewhat oddly, given that the Directive says that the definition is a matter for *national* law, the Recital then repeats the classic *Community* definition of a

<sup>124</sup> Cf Reg 1408/71 (OJ 1971 L149/2).

<sup>125</sup> Case C-256/01 *Allonby v Accrington & Rosendale College* [2004] ECR I-8349.

<sup>126</sup> 87<sup>th</sup> Recital. See also the Commission’s Green Paper ‘Modernising Labour Law to meet the challenges of the 21<sup>st</sup> century’: COM (2006) 708 which considers further the question of false self-employment. National courts have been doing this for some time: see eg in the UK context *Lane v Shire Roofing* [1995] IRLR 493.

worker.<sup>127</sup> Is this a hint that Member States should coalesce in their own systems around the Community definition of worker? That said, given that it is anticipated that the Services Directive will be of particular help to small service providers, the fact that the majority of service providers are self-employed will dilute the impact of Article 1(6).

*(c) Justifications*

As we have seen, Articles 1(6) and 1(7) aimed at protecting national employment laws from being challenged as incompatible with the Services Directive. We turn now to national rules which would not necessarily fall in the Article 1(6) or 1(7) exclusion, since they do not directly concern labour law as defined in Recital 14, but nevertheless serve a justifiable social purpose. In other words, we are now examining national rules with an indirect effect on social policy or employment law.

In order to cover this situation, ‘social policy objectives’ were included as a justification in Article 4(8). These justifications, which can be invoked by Member States to justify restrictions on freedom of establishment, are described in the Directive as ‘overriding reasons relating to the public interest’ (ORRPI) and mirror the public interest justifications developed by the Court in the context of its case law on the Treaty (discussed in section B above). They are expanded upon in the 40<sup>th</sup> Recital of the Preamble which lists ‘the protection of workers, including the social protection of workers’.<sup>128</sup>

The significance of this justification can be seen in the following example. State A lays down a requirement that all companies providing a particular service need to be authorised. One of the conditions for authorisation is that the firm must employ a certain percentage of disabled people. While the Directive allows states to lay down authorisation criteria, these criteria must be justified, proportionate and subject to good governance criteria.<sup>129</sup> State A may be able to justify imposing such a condition based on the social policy ORRPI.<sup>130</sup>

A problem comes with Chapter IV on the freedom to provide services. Although the ETUC managed to persuade the European Parliament to drop the country of origin principle, it did not manage to convince the EP to include social policy as one of the narrow grounds of justification available under Articles 16(1), 3<sup>rd</sup> paragraph and Article 16(3).<sup>131</sup> Article 16(1), third paragraph and Article 16(3) provide that Member States shall not, ‘make access to or exercise of a service activity in

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<sup>127</sup> ‘In that respect the essential characteristic of an employment relationship within the meaning of Article 39 of the Treaty should be the fact that for a certain period of time a person provides services for and under the direction of another person in return for which he receives remuneration. Any activity which a person performs outside a relationship of subordination must be classified as an activity pursued in a self-employed capacity for the purposes of Articles 43 and 49 of the Treaty.’ This follows Amendment 51 of the EP First Reading Report A6-0409/2005.

<sup>128</sup> See also the 7<sup>th</sup> and 47<sup>th</sup> Recitals. For good measure, Article 12 provides that when the number of authorisations is limited, Member States can apply selection criteria to candidates. In establishing rules for the selection criteria, Member States can take into account a range of factors including ‘social policy objectives, the health and safety of employees or self-employed persons’ (Art. 12(3)).

<sup>129</sup> Art. 9(1).

<sup>130</sup> 66<sup>th</sup> recital and also 69<sup>th</sup> Recital in respect of the modernisation of the national rules.

<sup>131</sup> ETUC, 20 Jan 2006. Amendment 155, Recital 1 of the EP First Reading Report A6-0409/2005.

their territory subject to compliance with any requirements' which do not respect the principles of: (a) non-discrimination; (b) necessity and (c) proportionality. 'Necessity' refers to an exhaustive list of only four justifications: public policy, public security, public health and the protection of the environment. It seems that the ORRPI available in Chapter III on establishment do not apply to 'any requirements' covered by Chapter IV. Therefore, it is unlikely that any requirements imposed by service providers by the host state can be justified on the grounds of social policy.<sup>132</sup>

This poses a potential problem. Article 16(2)(d) lists 'the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed' as one of the 'particularly suspect' requirements. These particularly suspect requirements will be very hard to for a state to justify. Article 16(2)(d) might cover a situation like that at issue in *Commission v France (performing artists)*<sup>133</sup> where French law presumed artists had 'salaried status' (i.e. they were employees not self-employed), resulting in them being subject to the social security scheme for employed workers in France. The absence of social policy objectives in Article 16 may therefore be problematic. On the other hand, Article 16(3) adds that 'Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements.'<sup>134</sup> This residual rule, which survived the demise of the country of origin principle, may well in fact serve a valuable function.

#### *D. The Services Directive and posted workers*

##### (i) The Services Directive

As we have seen, the Posted Workers' Directive was expressly referred to in the Bolkestein draft. The final version of the Directive contained a general derogation from the Directive in respect of the Posted Workers' Directive 96/71 in Article 3(1)(a) and a (probably superfluous) reference to the Posted Workers' Directive in Article 17(2) as a derogation to the freedom to provide services provision in Article 16(1)). The 86<sup>th</sup> Recital unusually contains a full listing of the content of the provisions of this Directive.<sup>135</sup> The listing appears exhaustive, thus raising trade union concerns that the Directive is increasingly seen as an exhaustive harmonisation measure and not, as Article 3(7) of Directive 96/71 provides, a minimum harmonisation measure.

<sup>132</sup> See, by analogy, Case 113/80 *Commission v. Ireland* [1981] ECR 1625 ("Irish souvenirs").

<sup>133</sup> Case C-255/04 *Commission v. France (performing artists)* [2006] ECR I-000, para. 38.

<sup>134</sup> See also the 82<sup>nd</sup> Recital: 'The provisions of this Directive should not preclude the application by a Member State of rules on employment conditions. Rules laid down by law, regulation or administrative provisions should, in accordance with the Treaty, be justified for reasons relating to the protection of workers and be non-discriminatory, necessary and proportionate, as interpreted by the Court of Justice, and comply with other relevant Community law.'

<sup>135</sup> Based on Amendment 50, of the EP First Reading Report A6-0409/2005.

The Directive also makes clear that it ‘does not concern the rules of private international law, in particular the rules governing the law applicable to contractual and non-contractual obligations’.<sup>136</sup> This is again repeated, probably unnecessarily, in Article 17(15). The 90<sup>th</sup> Recital adds:

Contractual relations between the provider and the client as well as between an employer and employee should not be subject to this Directive. The applicable law regarding the contractual or non contractual obligations of the provider should be determined by the rules of private international law.

Finally, the Services Directive also addressed indirectly some of the ETUC’s concerns about the need to carry out checks in the host state. Article 31(3) provides that ‘At the request of the Member State of establishment, the competent authorities of the Member State where the service is provided shall carry out any checks, inspections and investigations necessary for ensuring the effective supervision by the Member State of establishment.’ It continues that ‘[i]n so doing, the competent authorities shall act to the extent permitted by the powers vested in them in their Member State.’ The ETUC had pressed for express reference to be made to the possibility of the social partners themselves carrying out checks and inspections. This is an integral part of the Nordic model. However, this did not appear in the final version of the Directive, although reference to ‘powers vested in them’ might allow the social partners in the Nordic countries to continue to perform these functions.

While Article 31(3) concerns checks carried out by the host state authorities at the request of the home state, Article 31(4) allows the host states to carry out checks, inspections and investigations ‘on their own initiative’, provided that those checks, inspections or investigations are not discriminatory, are not motivated by the fact that the provider is established in another Member State and are proportionate.

#### (ii) The Communication

In addition to the provisions in the Services Directive, the Commission drafted a Communication on Posted Workers.<sup>137</sup> This was a part of the political compromise on the Services Directive where it was agreed that no “hard law” elements on the Posting of Workers Directive, or aspects thereof, would appear in the Services Directive. The Communication was the Commission’s attempt to demonstrate it was alert to the interests of the Accession States who wanted access to the markets of the EU-15. The Communication draws on the provisions of the Bolkestein Directive and the case law of the Court outlined above (although the Commission’s interpretation of the Court’s case law is controversial).<sup>138</sup>

Essentially, the Communication rules out three types of requirements and permits another two. Those requirements which are prohibited are firstly, the obligation for a service provider to have a permanent representative on the territory of the host Member State: the appointment of a person from

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<sup>136</sup> Art. 3(2).

<sup>137</sup> COM (2006) 159.

<sup>138</sup> This debate has continued in particular in the EP, which adopted a critical report: <http://www.europarl.europa.eu/oeil/file.jsp?id=5312992> )

among the posted workers, such as the site foreman, to act as a link between the foreign company and the labour inspectorate is sufficient. This reflects the text adopted by IMCO that an obligation on the provider to have an address or representative on the territory of the host state was a black list prohibition. The ETUC argued that the obligation to appoint a representative was ‘of crucial importance for surveillance and supervision of the labour markets in the Member States’ and was crucial in the Nordic states where the employer’s representative is the person with whom the trade unions in Sweden and Denmark engage. This requirement was actually dropped from the ‘particularly suspect’ list now found in Article 16(2) but a more proportionate version is now in the Commission’s communication.

Secondly, the Communication said that no prior authorization can be required as a general rule by the host country for the posting of workers.<sup>139</sup> However, service companies may have to obtain a specific authorisation in certain sectors (e.g. temporary employment agents) when rendering services in another Member State provided this requirement is justified, proportionate and account is taken of the controls already carried out in the home state. IMCO’s original black list requirement in Article 16(3)(b) prohibited host states from imposing on providers an obligation to ‘make a declaration or notification to, or to obtain an authorisation from’ the competent authorities in the host state. The ETUC argued that ‘Prior declarations by service providers are a basic mechanism for any effective control of employment standards’. The Court of Justice has also recognised the role of declarations (as opposed to authorisations).<sup>140</sup> The Directive has now been modified and references to the need to obtain authorisations have been dropped.<sup>141</sup> The Communication also refers only to authorisations now; declarations, as we shall see below, are permitted.

Thirdly, the Communication says that the host state cannot impose administrative formalities or additional conditions on posted workers from third countries when they are lawfully employed by a service provider established in another Member State, without prejudice to the right of the host state to check that these conditions are complied with in the state where the service provider is established.<sup>142</sup>

Those requirements which are permitted are firstly, the possibility for host states to ask for a *declaration* (which is less restrictive than a prior authorization – see above) from the service provider by the time the work starts which contains information on the workers who have been posted, the type of service they will provide, where and how long the work will take is compatible with Community law.<sup>143</sup> In respect of TCNs, the declaration can specify that they are in a ‘lawful situation’ in the home state (i.e.

<sup>139</sup> Relying on Case C-43/93 *Vander Elst* [1994] ECR I-3803.

<sup>140</sup> See also Case C-244/04 *Commission v Germany* [2006] ECR I-000.

<sup>141</sup> Art. 16(2)(b). See also Amendment 157 of EP’s Report A6-0409/2005.

<sup>142</sup> See the discussion of Case C-244/04 *Commission v Germany* [2006] ECR I-000 and Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191 above.

<sup>143</sup> See the discussion of Case C-244/04 *Commission v Germany* [2006] ECR I-000 and Case C-445/03 *Commission v Luxembourg* [2004] ECR I-10191 above.

the state in which the service provider is established), including in respect of visa requirements, and that they are legally employed in the home states.<sup>144</sup>

Secondly, the host state can require service providers to keep social documents such as time-sheets or documents related to health and safety conditions at the place of work.<sup>145</sup> However, the host state cannot require a second set of documents if the documents required under the legislation of the Member States of establishment, taken as a whole, already provide sufficient information to allow the host state to carry out the checks required.

In addition, the Communication makes clear that the national authorities of the countries of origin have to cooperate loyally with the authorities in the host Member States and to provide them all the required information, in order to enable these to perform their controlling duties and fight illegal practices. Liaison offices and the monitoring authorities have to be sufficiently equipped and resourced in order to be able to reply correctly and swiftly to any kind of demand. Appropriate measures must be in place to sanction foreign service providers when the correct terms and conditions of employment as set out in the Directive are not complied with. However, there are grounds for pessimism. For example, in its report on the Posted Workers Directive,<sup>146</sup> the Commission notes that ‘the very small number of contacts made through liaison offices ... indicates that Member States either ignore this form of cooperation or have sought other forms’. It concludes that the ‘virtual absence’ of a proper functioning system of administrative cooperation may explain why host states revert to control measures which appear unnecessary and/or disproportionate in the light of the Court’s interpretation. The absence of effective cooperation is therefore disastrous to the successful operation of the Directive.

## 5. Conclusions

The renaissance of the Treaty provisions on services in the last 15 or so years has helped to open up the market in services. When terms and conditions of employment did not differ so substantially between the original Member States, the free market did not pose a significant threat to the integrity of national social orders. But as the EU began to expand, first to the south (Portugal, Spain and Greece) and, more importantly to the east, the tensions between the free market and the preservation of national social models began to resurface. The *Laval* and *Viking* cases have brought these tensions into sharp focus and, indirectly, they influenced public perception of the proposed services Directive. The Court, inevitably, has become caught up in this debate. The Services Directive, which does its best to

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<sup>144</sup> See the discussion of Case C-43/93 *Vander Elst* [1994] ECR I-3803 above.

<sup>145</sup> See Joined Cases C-369 & 376/96 *Arblade* [1999] ECR I-8453.

<sup>146</sup> Commission Communication ‘Posting of workers in the framework of the provision of services: maximising it benefits and potential while guaranteeing the protection of workers’ COM (2007) 304.

ensure that national labour law is not covered by the Directive, appears to support the view that social rights take precedence over free movement. But, in the absence of the Services Directive applying, the Treaty will continue to apply and the Court's interpretation of Article 43 and 49 EC in *Viking* and *Laval* suggests that, despite the rhetoric in favour of fundamental rights, especially the right to strike, in fact there is very little room for legitimate industrial action to interfere with the exercise of the four freedoms. As John Monks, General Secretary of the ETUC, said to the European Parliament in a discussion about the effects of *Viking* and *Laval* on 27 February 2008:

So we are told that the right to strike is a fundamental right but not so fundamental as the EU's free movement provisions. This is a licence for social dumping and for unions being prevented from taking action to improve matters. Any company in a transnational dispute has the opportunity to use this judgement against union actions, alleging disproportionality.

The internal market appears to have gained the upper hand, despite the careful compromise in the Services Directive and, further down the line, the potential elevation of social policy matters by the Lisbon Treaty.