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Free movement, labour market regulation and
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– a Nordic and comparative perspective

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The Posting of Workers Directive – German reactions and perceptions

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A. Introduction - aims and approach

The aim of this paper is to display the development of the rules and regulations on posting of workers on European and national level. It's focus will be a detailed explanation of the development in Germany, as in law and in fact.

In the **first part** the problems originating from posting of workers between different Member States will be displayed. The reasons and consequences of trans-national provision of services for the German economy will be highlighted. Further we discuss the discordance among Member States concerning the topic of posting of workers and the consequential obstacle for a regulation on European level; the influence of the judgments handed down by the European Court of Justice are also illustrated.

Part two is going to pinpoint the difficult development of a German domestic regulation. The focus lies on the process of legislation and the diverging opinions among politicians and economists about the existence and the necessary content of an eventual law concerning the posting of workers. Thereupon the long and winding way from a national draft bill to its effective enforcement will be disclosed regarding also the implementation of the Directive 96/71 EC concerning posting of workers.

The **third part** will focus on the recent development on national level following ECJ's judgments in the Laval Quartet. Even though intensely debated among legal scholars, these decisions were of rather limited implications for legislative developments. As nevertheless the existing act was completely overhauled, the highly controversial purpose for reformulating the national law on posting of workers in 2009 will be discussed shortly.

B. Part 1: The factual basis for a regulation for cross border provision of services

I. Development on the European level

1. Enlargement of the Single Market

The formation of the European Single Market initially was supposed to lead to a harmonised economy within Europe as a whole, but could not implement equalised market conditions in all Member States, as hoped for. Tensions increased in the 1980's supplying the southern enlargement of the Union through the accession of Greece, Portugal and Spain. By this process, the former Member States of the European Union (EU), mostly with a strong and potent economy, were facing less potent economies in the process of industrialisation and with much lower costs of living and working. Because of the great discrepancies of wages within the different Member States, the "old Member States" dreaded harsh consequences from free movement of workers in the enlarged Union. By relying on the free movement of workers, mature labour markets could be flooded by cheap work, resulting in high unemployment rates in high wage-countries, where workers would be unable to compete on costs. In particular the building sector was in focus, because labour costs amount to a specifically high proportion of overall-costs of doing business there, as they usually constitute up to 50 % of such costs. Hence in this sector cheap workers could have easily won contracts in high wage countries.

2. Transition provisions for the new Member States

Such prospect alarmed the "old Member States" and the urge to protect their national employment markets lead to a restriction of the EU's fundamental freedoms in the Acts of Accession. The Act of Accession for Greece, Spain and Portugal finally allowed for post-

poning the free movement of workers from their home countries to “old Member States” for up to seven years¹.

The intended effects implemented through postponing the applicability of the Fundamental Freedoms were destroyed by the ruling of the European Court of Justice (ECJ) in the *Rush Portuguesa Case*². According to this decision the protective transition provisions on restricting free movement of workers are not applicable in case of posting of workers, because those workers by providing their services cross-border do not immediately make use of their own fundamental freedoms.

“The derogation provided for in Article 216 of the Act of Accession relates to Title I of Regulation No 1612/68 on eligibility for employment . The national provisions or those provisions in agreements which remain in force during the period of application of that derogation are those relating to the authorization of immigration and eligibility to take up employment . It must accordingly be inferred that the derogation contained in Article 216 applies when access by Portuguese workers to the employment market of other Member States and the entry and residence arrangements for Portuguese workers seeking such access and for members of their families are at issue . The application of that derogation is in fact justified since in such circumstances there is a risk that the employment market of the host Member State may be disrupted. [...]The situation is different, however, in a case such as that in the main proceedings where there is a temporary movement of workers who are sent to another Member State to carry out construction work or public works as part of a provision of services by their employer . In fact, such workers return to their country of origin after the completion of their work without at any time gaining access to the labour market of the host Member State.”(para 14, 15)³

Due to this interpretation the situation of posting is an aspect of an employer’s freedom of services, Art. 56 TFEU (ex. Art.49 EC), instead of a worker’s right to free movement, Art. 45 TFEU (ex. Art. 39 EC) . For fulfilling contracts of service in foreign Member States, employers need to bring their regular workers to the country in which the service is

¹ For Greece until 1988, Act of Accession 24.5.1979, Official Journal L 291, p. 26, 27 ; for Portugal and Spain until 1993, Act of Accession 12.6.1985, Official Journal L 302, for Spain p. 35, for Portugal p. 88; *Hänlein*, EU-Beitritt der MOE-Staaten im Bereich der Arbeitnehmerfreizügigkeit und der sozialen Sicherheit, in: Europäische Zeitschrift zum Wirtschaftsrecht 2001, p. 165, 168.

² ECJ 27.03.1990, C-113/89 (Rush), para. 15, 19.

³ ECJ 27.03.1990, C-113/89 (Rush).

to be provided, so that the very fact that such worker is posted cross- border remains an element to the freedom to provide services of their employer. Contrary to the situation in which the free movement of workers would be at stake, the ongoing contractual relationship between employer and worker in the event of posting of workers would not habitually be carried out in the country to which the worker was actually posted, but despite the actual trans-border situation habitually in the country of origin. Therefore the employer as a supplier of services would be able to offer such service in all Member States freely and would neither underlie restrictions to employ domestic workers from the country of the production site nor the duty to apply for working permits for employees. In such case the application of Art. 56 TFEU (ex. Art. 49 EC) protects not only the freedom of service providers but indirectly also the free movement of employees⁴.

Since the situation of posting did not, in the light of the reasoning of the ECJ, touch the scope of the politically restricted right of free movement of workers, the transition provisions for the free access to the labour markets are inapplicable in case of posting of workers, so that the construction sector became open to competition from low wage countries. Conflict of law- rules were not functioning to solve the difficulties arising from such situation: The German Conflict of Law-Rule applicable to such case, Art. 30 Para. 2 no. 1 EGBGB⁵, determines that a labour contract is principally governed by the law of the country where the worker habitually carries out his work, even if he is temporarily posted to a different country. Because of this regulation German labour law provisions did not apply to posted foreign workers who could lawfully be employed under their domestic regulations on wages and working conditions. The result was distortion of competition on the market of such a high wage country as Germany.

⁴ ECJ 27.03.1990, C-113/89 (Rush), para. 22; ECJ 09.08.1994, C-43/93 (Vander Elst), para. 21.

⁵ Art. 30 EGBGB corresponds Art. 6 of the Rome Convention of the law applicable to contractual obligations from 1980. The Art. 1 – 21 of the Rome Convention of 1980 were implemented in the EGBGB into German Private International Law; the EBGB - Einführungsgesetz zum Bürgerlichen Gesetzbuch regulates the German Private International Law; since 17.12.2009 Art. 30 EGBGB is superseded by Art. 8 Rome I Regulation.

3. Drafts for a directive for posting of workers

Since the ruling of the ECJ annulled the intended effects of restricting the applicability of some fundamental freedoms of the EC Treaty for workers from the new Member States, the “old Member States” tried to regain control by implementing a directive about posting of workers. In 1991 the Council of the European Union tabled a first proposal⁶.

The political compromise it relied on aimed at creating a safeguard for individual workers operating transnational, but thereby hindering distortion of competition due to the assignments of cheap work from low wage countries to high wage States. Same working conditions should govern the same work at the same workplace. The scope of the directive was supposed to cover all cases in which undertakings in one Member State posted their workers temporarily for a transnational supply of services to a different Member State. In these cases a “hard core” of certain minimum working conditions, including regulations in collective agreements effective in the respective Member State in which the services were to be accomplished, should be applicable also to foreign posted workers. The applicability of the law of the working site should be superimposed to the otherwise applicable labour law of the worker’s home country. Such approach was met with fierce criticism. Especially the new Member States disagreed with the draft, because the chance of boosting their economy through the competitive advantage of posting of workers under their domestic wages would be undone.

Great Britain (for fundamental resentments) and Portugal totally declined a posting of workers directive. Greece, Italy and Ireland opted for a threshold deadline: Such a directive should govern only situations in which the duration of the posting exceeds 3 months. But such generous threshold would annihilate both intentions of the directive, since continuously replacing workers at a construction site within three months was affordable without huge costs or losing much efficiency, which would make undermining of the regulation a breeze⁷.

In addition to such differences in principle, the content of the extendable core working conditions was controversial, as was an effective implementation of the directive under the

⁶ COM (91) 230 final. – SYN 346.

⁷ *Koberski/Asshoff/Hold*, Kommentar zum Arbeitnehmerentsendegesetz, 2nd edition 2002, p. 17.

conditions of the varying **national** labour law systems was also seen as highly problematic⁸.

Responding to these frictions among Member States, the European Commission came up with a modified draft in 1993⁹. But this proposal again could not reach unanimous consent. Primarily the new Member States and the United Kingdom remained unconvinced and prevented a compromise.

4. Rejections of the proposal (Germany perspective)

Even though the German presidency to the European Council in 1994 tried to advance the draft, this proposal was not met with overall acceptance in the country itself. Even though there was consent on an urgent need for action, the concrete measures proposed and the plans how to implement them had still been received predominantly negatively in Germany¹⁰.

From the very beginning, the proposed threshold deadline (according to the revised draft: of one month¹¹) was put into question. It was contested that the intended positive effects for the German construction sector could be achieved under such threshold: As controlling the actual period of posting could be complicated, allowing for some period of time not governed by the law of the construction site would leave an easy option for circumventing restrictions applicable only at a later phase. Apart from this, a big section of the work on a construction site only takes a couple of days or weeks, like e.g. laying tiles or the erecting of scaffolding. All such operations would then legitimately fall outside the scope of the directive so that the goal to render national regulations generally applicable to posted workers would not be met at several occasions. Under these restrictions the directive would not be able to change distorted competition in the construction sector.

⁸ *Däubler*, Ein Anti-Dumpinggesetz für die Bauwirtschaft, in: *Der Betrieb* 1995, p. 726, 727; *Däubler*, Der Richtlinienvorschlag zur Entsendung von Arbeitnehmern, in: *Europäische Zeitschrift für Wirtschaftsrecht* 1993, p. 370, 373.

⁹ COM (93) 225 final. – SYN 346.

¹⁰ The successive mentioned criticism was expressed in the written statements of the German experts in labour law and from employer and employee representatives handed to the Commission for Labour and Social Policy according to the drafts for a European directive and a national law concerning the posting of workers, Bundestagsdrucksachen (in the following cited as BT. Drs.) 13/768.

¹¹ Art. 3 II COM (93).

An additional problem for Germany was the non-existence of a statutory minimum wage there, as this raised the problem of how to implement a nation-wide mandatory standard of wages. Therefore, the only remaining way of setting mandatory wages by declaring the relevant collective agreements generally applicable, did not lie within the exclusive authority of the State, but could only be achieved in consent with both sides of industry¹². As such consent, especially on the part of the national federation of employers, could never be taken for granted, the suitability of such instrument to fulfil the prospected goal was seen as rather questionable.

Under a constitutional aspect, also a possible discrimination of State nationals (“Inländerdiskriminierung”) was a matter of concern. The draft Directive proposed an obligation for foreign employers to apply national minimum standards, but German employees still could be treated worse in case they were deployed from one part of the country (e.g. the eastern part, also providing lower wages) to another part of the country under the scope of the same collective agreement. To avoid such outcome it was demanded to extend the regulation also to domestic postings.

Also the proposed scope of application of the Directive, restricted only to the building sector, was criticized by some, because other sectors were meeting comparable difficulties and therefore also deserving comparable protection from undercutting wages. However, the majority agreed that regulating the building sector had high-priority.

Other highly controversial points were the control and penalty mechanisms of the draft, which assigned the Member States to exchange information about posted workers and to co-operate in fulfilling the aims of the directive. To this purpose, Member States should also provide information to the posted workers themselves about their legal rights and guaranteed working conditions. For realizing this goal, a strict assignment of competences to public authorities would have been necessary, earlier unknown to the labour inspectorate.

Another main problem constituted the enforcement of worker’s individual rights. It would be difficult for posted workers due to their lacking command of the national language to understand their rights completely. The supporting measures of collective labour law regularly applicable to German workers would also be of little help to posted workers: Unions are competent for supporting their members only but posted workers might refrain from

¹² § 5 TVG; the TVG - Tarifvertragsgesetz is the German law about collective agreements.

joining a German union because their employers might see this as a disloyalty. The works council of the German company in charge of the construction site would not be representative to them, either.

Finally, the legal basis for the directive seemed disputable: whereas the European Commission invoked ex Art. 66 EC combined with Art. 57 EC (version of Maastricht treaty) (= Art. 62 TFEU in combination with Art. 53 TFEU), this was especially among German legal scholars, heavily criticized as not representing the proper basis for such a directive.

Another central point of concern was a possible conflict of the proposed directive with the fundamental right of free collective bargaining, which in Germany is guaranteed by the constitution. A regulation on supra-national level might endanger the exercise of such fundamental right without an involvement of the State constitutionally obliged to protect it.

Facing such disagreement on European level and much scepticism on domestic level, too, the draft could not be passed back then.

II. Development at a domestic level

1. Problems of the German construction sector

The negative consequences of the EU enlargement described above were strongly felt in Germany. In 1995, already about 150.000 workers from other EU Member States operated on the German construction sites. As a consequence, 140.000 German workers, constituting about ten percent of all workers employed in this sector, were unemployed, even under the favourable economic condition of a building boom following Germany's unification. In 1995, 100.000 additional German construction workers lost their jobs¹³.

This was the result of rather disparate wage levels in the Member States. Foreign undertakings paid their workers only half of the amount that German employees earned or even less while deploying them to German construction sites. Since labour costs make up for nearly half the total amount of expenses for a building, and as the German wage standard was one of the highest in Europe, the competition with low wage Member States was unbalanced as foreign undertakings could undercut German competitors' prices easily by 25%. The foreign undertakings deploying their employees to Germany were not bound to comply with German collective agreements and the minimum wages established by them, not even if the agreements were declared generally applicable. The number of insolvencies of domestic construction companies rose dramatically. In the area of Berlin e.g. the number had tripled from 1991 to 1994. A lot of German employers had only the choice of either keeping up in the competition by engaging foreign sub contractors and firing their own employees or becoming insolvent and losing their business. The development of the employment situation thereby leads to social dumping. German workers could not compete with the low wages of their foreign colleagues; as the living expenses in Germany were and still are much higher than in the low wage countries, they simply could not afford to work for less.

On the contrary, the low wage level in certain countries could be based on the existence there of a less developed infrastructure or working productivity. Importing low wages to Germany equals the exploitation of benefits of doing business in two different economies: The companies could combine the advantage of their low labour costs and social standards at home and the convenience of a good technical infrastructure in Germany. If German

¹³ Hold, Arbeitnehmer-Entsendegesetz gegen Lohndumping und illegale Beschäftigung im Baugewerbe, in: Arbeit und Arbeitsrecht 1996, p. 113.

undertakings, on the other hand, would try to participate from such benefits through employing cheap foreign workers, they could not legally do so: Directives 1612/68 EC¹⁴ and 2004/38 EC¹⁵ on freedom of movement for workers within the Community obliges undertakings to treat foreign workers equally to domestic workers, whereas foreign employers were not obliged to obey German standards while posting their workers only temporarily. All in all, competition in the construction sector became so fierce that domestic undertakings and their employees felt all the burdens but none of the achievements of a European Single Market.

2. Pressure on the social policy

The aggravation of the influx of foreign workers in the construction sector brought the German Government under pressure to act. Not only was an anti-EU sentiment in the population an acute danger for the approval rates of a Government accused of behaving like a helpless bystander, the consequences of the economic losses in the powerful construction sector were threatening the stability of social security systems, too. Unemployment constitutes huge costs for the national economy and the State: Unemployment benefits and tax deficits included, the costs amounted up to 40.000 DM per year and jobless person¹⁶.

Beyond that the stability of the special social security system of the building sector was afflicted. This system is a collective institution of the collective bargaining parties¹⁷ under which all domestic construction undertakings pay a monthly fee to the system. Any time a worker employed by such undertaking exercises a right conferred on them by the collective agreement, for example the right to take paid leave, the employers receive refunding of their costs out of the social system¹⁸. The advantages of such system, like avoidance of competitive distortion through a guaranteed equal sharing of costs by all domestic employers as well as granting rights to all employees, can only be maintained, if all undertakings

¹⁴ Official Journal 1968, L 257, p. 2.

¹⁵ Official Journal 2004, L 158, p. 77.

¹⁶ BT-Drs. 13/2414, p. 7.

¹⁷ § 4 II TVG.

¹⁸ Bundesratsdrucksachen (in the following) BR-Drs. 546/95, p. 15.

participate in its financing. Such 100 %-participation rate had hitherto been guaranteed through the instrument of generally applicable collective agreements. Once a collective agreement has been declared universally applicable, any undertaking doing business in the relevant sector gets bound by its norms, whether or not they participate in collective bargaining.

The attendance of foreign undertakings on the German employment market, relying on the free movement of services, endangered the stability of this social contribution system. Only non-national employers, not covered by the underlying collective agreements, were allowed to pay lower wages and undercut the benefits for employees secured through the social contribution system. Enterprises participating in the social contribution system were obliged to pay their contributions and could not achieve a competitive advantage by undercutting wages set in the collective agreement. But over and above the well-being of individual undertakings driven out of market due to competitive advantages of cheap labour and low social security contributions, for the German social contribution system in the construction sector the situation became a threat to the very survival¹⁹.

3. The German legislator's constitutional obligation to act

Under such conditions the academic debate focused on the question whether or not the Government would have to protect existing domestic systems under a Constitutional obligation for guaranteeing fundamental rights to citizens. The line of reasoning referred to a decision of the Federal Constitutional Court arguing such obligation: Once legal relationships operate not only in purely domestic situations, the court hold that the tolerable margin of infringement of fundamental rights would be wider than in national cases, but that nevertheless the implementation of fundamental rights had to be guaranteed as far as possible²⁰. This duty to protect national fundamental rights obliged the German State to obviate a circumvention of German working conditions²¹. As a consequence of such duty to

¹⁹ BT-Drs. 12/2418, p. 8.

²⁰ „Schiffsregisterurteil“, BVerfG, 10.01.1995 – 1 BvF 1/90, 1 BvR 342, 348/90, in: Neue Zeitschrift für Arbeitsrecht 1995, p. 272.

²¹ BT-Drs. 13/2418, p. 8.

protect, the Government decided to table a draft bill without relying on the eventual progress of the Directive on EU level.

Such national regulation for the posting of workers intended to achieve that foreign building contractors would not be able to deploy their workers to Germany under their national conditions for employment contracts. The goal was to impose the “same wage for same work at the same working site”.

This goal could be achieved by extending domestic regulations to posted workers. Technically this is realised through the application of mandatory rules with an overriding effect, Art. 34 EGBGB²². Such norms considered as containing fundamentally important regulations of the domestic legal system should always prevail no matter which law would otherwise be applicable to the labour contract. This way certain minimum working standards laid down in generally applicable collective agreements should be applicable for posted workers, too, even if the labour relation with their respective employer is otherwise governed by the rules and regulations of their home country.

Even though German Government had tried during their EU council presidency in the second half of 1994 to further a European solution in this direction, it decides to provide for a national solution as this goal seemed to remain out of reach²³. Following the example of France, Belgium, and Austria, Germany finally presented its own national solution.

4. Conformity of a national regulation with the fundamental freedoms

Whether such domestic law on posting of workers would be in conformity with European law depends on respecting the fundamental freedoms of the EC-Treaty, particularly the freedom to provide services. Even though such law intentionally limits competition from foreign services providers such intention does not condemn this solution as unlawful, as affirmed by the ECJ in the Rush-Portuguesa case²⁴.

²² Since 17.12.2009 Art. 34 EGBGB is superseded by Art. 9 II Rome I Regulation.

²³ BR-Drs. 546/95, p. 6.

²⁴ ECJ 27.03.1990, C-113/89 (Rush).

“[...] Community Law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily. Within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.” (para. 18)²⁵

But any restriction of the right of freedom to provide services can only be lawful under the precondition that an overriding public interest demands this intervention, and provided that the home country of the posted worker is unable to provide adequate protection.

““Lastly, as the Court has consistently held, the application of national provisions to providers of services established in other Member States must be such as to guarantee the achievement of the intended aim and must not go beyond that which is necessary in order to achieve that objective. In other words, it must not be possible to obtain the same result by less restrictive.” (para. 15)²⁶.

The German legislator relied on this line of argumentation when drafting the domestic posting of workers bill. Due to all the difficulties for the economy, the social security system and the labour market described above, an overriding public interest in regulating trans-border posting of workers was clearly established. That there could be alternative, less restrictive rules at hand reaching the same results, was not the case from the German Government's view point: In Germany this situation jeopardized the constitutionally guaranteed freedom of collective bargaining and led to social tensions. Especially the construction sector was negatively affected, due to the special relevance of labour costs for determining prices in that sector. The hopeless situation on regulation at the European level deemed a unilateral action at national level all the more important as there seemed to be no alternative means at hand.

²⁵ ECJ 27.03.1990, C-113/89 (Rush); already expressed in ECJ 03.02.1982, C- 62/81 and C- 63/81 (Seco).

²⁶ ECJ 25.07.1991 C- 288/89 (Raad van State).

III. Summary Part 1

Due to the accession to the European Union of new Member States representing significantly lower wage levels than the “old Member States”, social and economic tensions among Member States grew: Whereas the EC-Treaty provides fundamental economic freedoms, protection of social rights was rather weak. The transitional provisions in the accession treaties aiming at temporarily restricting free movement of workers for the purpose of protecting labour markets in the old Member States were interpreted by the ECJ in a way rendering them meaningless. By this line of reasoning, posting of workers from low wage-countries to high wage-countries became the single most important source for insolvencies and growing joblessness in the German construction sector. As the situation went out of control for the Government, EU regulation deemed absolutely necessary. As conflicts between Member States could not be settled so that a solution at EU-level seemed out of reach, the German government decided to enact a national posting of workers act that aimed at keeping the envisaged solution in line with the ECJ’s rulings.

C. Part 2: Development of a domestic regulation

I. German drafts for the Posting of Workers Act

The proposed legislation aimed at establishing minimum wage levels in the German construction sector by introducing “uniform minimum working conditions”. Such minimum standards should be imposed on foreign undertakings in order to limit their hitherto existing advantage from paying their workers, posted to Germany, much lower wages than their German competitors would have to pay their respective employees.

This way, competitive distortions between domestic and foreign undertakings should be counterbalanced by extending some national regulations to posted workers through the law on mandatory working conditions for providing transnational services (AEntG - Arbeitnehmer-Entsendegesetz). Notably, this draft bill was not meant to limit directly the influx of foreign service providers into the German construction sector, respecting the ECJ’s decision, that such undertakings may rely on the fundamental freedom to provide services in all Member States, ex Art. 49 EC, Art. 56 TFEU²⁷. The Government nevertheless aimed at diminishing the comparative cost advantage of such undertakings, especially in the construction sector.

1. Governmental draft

In September 1995 the Federal Government²⁸ introduced a draft bill²⁹ to the Lower House of Parliament³⁰.

a. Content of the draft bill

As there was no statutory minimum wage in Germany, the draft bill provided for an additional possibility of establishing minimum conditions in all fields relevant for price setting

²⁷ BT-Drs. 13/2414, p. 6.

²⁸ In the concerned election period the German state was governed by the parliamentary group of the CDU - Christian Democratic Union and the CSU - Christian Social Union.

²⁹ Referred to as gov. draft.

³⁰ BT-Drs. 13/2414.

in the construction sector. Such minimum conditions should become binding for all German employers first and then be extended to undertakings situated in other European Union Member States and their employees, deployed to Germany. These minimum standards were considered to be so relevant for preserving public interests that they function as mandatory norms in the meaning of Art. 34 EGBGB, overriding the norms of the sending country, otherwise governing the contract of employment³¹. The material scope of the draft bill should be limited to the construction sector³², as this was the economic area where immediate action was needed the most.

In order to fit into the existing system of determining wages and other relevant working conditions by means of collective bargaining, it should not be left to the State to determine the content of such minimum standards meant to be extended to posted workers³³. The State merely should provide for the technical means for such extension and the final decision on which (existing) regulation would be extended. Such means are provided for under German law on collective agreements that allows for a declaration of universal applicability of such agreements by State authorities. Only such regulations in collective agreements should be qualified for extension that contain rules on wages³⁴ and paid holiday leave³⁵ because of their huge competitive and social-policy importance. In the course of declaring such rules generally applicable collective agreements were extended to all employers and employees including those not hitherto bound by it. Through this means, not only foreign undertakings but also domestic undertakings would be obliged to obey the standards of the collective agreement for such workers carrying out their work anywhere on German territory. This would also include German undertakings deploying employees from one German land to another³⁶. Only through such broad scope of application the law was deemed to guarantee that discrimination of foreign employers would be avoided.

In addition to providing the substantive minimum working conditions, foreign undertakings must participate in the German social contribution system for the construction sector, if they did not already participate to a comparable system in their home country, in which case the German system allowed consideration of the already granted benefits³⁷.

³¹ § 1 AEntG gov. draft: “.....zwingend Anwendung, wenn...”.

³² § 1 I AEntG gov. draft.

³³ BT-Drs. 13/2414, p. 8.

³⁴ § 1 s.1 AEntG gov. draft.

³⁵ § 1 s. 2 AEntG gov. draft.

³⁶ § 1 I AEntG gov. draft.

³⁷ § 1 II AEntG gov. draft.

Such provisions should be applicable from the first day of posting onwards, but exceptions could be granted in case of a marginal extent of the work provided or in comparable appropriate and justified cases³⁸. Public authorities should be responsible for monitoring the employer's compliance with the regulations³⁹ and the law should oblige employers to provide the necessary data for controlling compliance with the law⁴⁰. An infringement was supposed to constitute an administrative offence and should be punished with a monetary fine between 20.000 and 50.000 DM, depending on the abuse⁴¹. The law was planned to be limited in time for two years⁴².

b. Critical reactions

In Parliament the vast majority of Members agreed to the necessity for a national solution, since a regulation on European level was not to be expected in the near future. However, the way the draft bill intended to realise its goals remained highly contested.

The disagreement included different opinions among political parties in the German Lower House of Parliament, between the Lower and the Upper House of Parliament, and among the relevant employer and employee representatives in the construction industry. It was doubted that the governmental draft could fight effectively social dumping in the building sector.

Against all main points of the Government's draft critical arguments were raised simultaneously. The different standpoints could only agree on restricting the material scope of application to the constructing sector, because the differences in levels of working conditions among Member States were especially huge in this sector⁴³. But even the type of jobs to be counted among the constructing sector was disputed. Some Members of Parliament demanded to extend the scope not only to principal construction occupations but also to the sub branches and all jobs close to the building sector⁴⁴, because a distinction in that area of

³⁸ § 1 III AEntG gov. draft.

³⁹ § 2 AEntG gov. draft.

⁴⁰ § 3 AEntG gov. draft.

⁴¹ § 4 AEntG gov. draft.

⁴² § 5 AEntG gov. draft.

⁴³ BR-Drs. 546/95 p. 5.

⁴⁴ Plenary protocol of the Upper House of Parliament 689, p. 458.

jobs would be delicate; why one job should be within the scope but another job carried out on the same working site should not be, could not be justified. At least all jobs that took place on construction sites should be captured⁴⁵.

Limiting the regulations to only minimum wage and paid leave was also considered insufficient, because other regulations important for employee protection like the ones on health and safety or on prevention of accidents would still remain on a low level⁴⁶ for posted workers..

That the law should be of limited duration for a time period of only two years⁴⁷ was also a big point in the discussion. It was highly doubted that within two years wage levels in Europe would have adapted to a more equal standard, which would render such regulation unnecessary⁴⁸.

The intended measures of control were criticised as insufficient and the planned assignment of such control functions to the general administration authorities as inexpedient⁴⁹. Instead it deemed preferable to delegate the compliance monitoring the Federal Employment Agency and the Customs Offices, since both bodies already executed functions of monitoring illicit employment.

Additional to all these differences, the biggest point for concern related to the declaration of general applicability of collective agreements.

Under the law on collective agreements, in principle only such labour relations are governed by a collective agreement where both contracting partners are members of the employer's organization or the union concluding the relevant agreement. Employers can additionally be governed by such collective agreement that they conclude as individual contracting party. Declaring a collective agreement generally applicable⁵⁰ provides for coverage of all employment relationships lying in the material scope of application of the relevant collective agreement⁵¹, even if the parties are not members of the relevant organizations. The general applicability of collective agreements provides protection for employees

⁴⁵ BT-Drs. 13/58, p. 4925 B, 4939 C.

⁴⁶ Plenary protocol of the Upper House of Parliament 689, p. 458.

⁴⁷ Plenary protocol of the Upper House of Parliament 689, p. 458.

⁴⁸ BT-Drs. 13/58, p. 4928.

⁴⁹ Plenary protocol of the Upper House of Parliament 689, p. 458.

⁵⁰ The declaration of general applicability of tariff agreements is regulated by the Tarifvertragsgesetz - TVG (Law of tariff agreements) and the Durchführungsverordnung des Tarifvertragsgesetzes – DVO TVG (Implementing order of the law of tariff agreements).

⁵¹ § 5 IV TVG.

not organized in unions or whose employers are not covered by a collective agreement⁵². On the other hand, such extension of collective agreements to employment relationships hitherto not covered represent government interference with fundamental collective bargaining rights on the one hand and contractual freedoms of labour contract parties on the other. For this reason, the administration is not free in its decision on declaring a collective agreement generally applicable. Instead, precondition for such intervention is that employers already bound by such collective agreement must employ 50 % of the workers covered within the regional, professional and personal scope of the collective agreement⁵³. Furthermore the declaration of general applicability must be demanded by public interest. The administration must balance the possibility of disadvantages for a big portion of the employees hitherto not covered against possible disadvantages of contracting parties not wanting to be covered by the collective agreement⁵⁴.

To represent the relevant interests at stake in such interest balancing a statutory committee on collective agreements had been created, whose consent is a necessary precondition for any declaration of general applicability. This committee consists of three representatives of each of the parent organizations⁵⁵ of the employers and employees⁵⁶, representing the regional scope of application of the collective agreement⁵⁷.

The declaration of general applicability is depending on a previous petition of at least one of the relevant parties to the collective agreement and on the consent of the majority of the members of the said committee⁵⁸. The final decision about the enforcement and the conditions lies with the Administration.

To reach the necessary majority in a committee composed of three representatives of each side of industry, the consent of only one side is not enough. Since the representatives of the employers had already declared in the course of the development of the draft bill that they would never approve such application for general applicability in the construction sector, this method of extending national regulation to foreign service providers through declara-

⁵² Giesen, *Arbeitsrechtskommentar*, 1st edition 2008, § 5 TVG, para. 6, 9.

⁵³ *Franzen*, *Erfurter Kommentar zum Arbeitsrecht*, 10th edition 2010, § 5 TVG, para. 11.

⁵⁴ *Franzen*, *Erfurter Kommentar zum Arbeitsrecht*, 10th edition 2010, § 5 TVG, para. 11.

⁵⁵ Parent organizations are organizations of trade unions and employers' organizations, § 2 II TVG.

⁵⁶ § 1 DVO TVG.

⁵⁷ *Koberski/Clasen/Menzel*, *Kommentar zum Tarifvertragsgesetz*, edition 1999, § 5 TVG para. 81.

⁵⁸ § 3 I DVO TVG.

tion of general application was disapproved⁵⁹. Thus many regarded the law as failed before it was even passed.

Another point of criticism relied on the fact that by the intended draft the German legislator interfered with the autonomy of collective bargaining. Through the mere fact of enacting this law the legislator would have insisted on the existence of a public interest in the general applicability of minimum wages. Under such preconditions the members of the committee on collective bargaining would have difficulties in voting against such general applicability

The Upper House of Parliament also argued that the narrow scope of application as well as the mechanisms of implementation would not be appropriate to establish equal work- and competitive conditions and that the control- and penalty measures would not suffice. The Upper House of Parliament decided by majority to decline the proposal and to introduce its own proposal⁶⁰ to the Parliament⁶¹, shortly before the opposition party in the Lower House of Parliament⁶² came up with another alternative⁶³. All such drafts followed the same intentions, but the measures of implementation were absolutely controversial.

2. Draft of the opposition party

As a reaction to the governmental draft bill, which they fiercely criticized, the minority party in Parliament⁶⁴ came up with an own alternative draft⁶⁵. The alternative concept proposed as a benchmark for foreign undertakings the applicability of standard local working conditions. All posted workers originating from the European Union and thus not needing to apply for a work permit should be covered by the scope of the law. Working conditions such as wages, protection of health and safety and sick pay were to be counted among standard local working conditions when laid down in basic collective agreements, or alter-

⁵⁹ Plenary protocol of the Upper House of Parliament 689, p. 459.

⁶⁰ BR-Drs. 546/95; BT-DRs. 13/2834.

⁶¹ 13/689, p. 458.

⁶² Bundestag is referred to as the Lower House of Parliament.

⁶³ BT-Drs. 13/2418.

⁶⁴ The concerned opposition party in that period of legislature was the SPD - Social Democratic Party.

⁶⁵ BT-Drs. 13/2418; referred to as opp. draft.

natively, when habitually granted to workers in that area for a comparable job⁶⁶. Even if such working conditions would not cover all domestic companies this would not discriminate against foreign posting undertakings according to the European Commission⁶⁷ as long as the vast majority of undertakings representative for the sector in fact are covered. Under these preconditions, the terms of the relevant collective agreement had to be respected by almost all undertakings operating in the sector⁶⁸.

Foreign employers should be obliged to contribute to the German social security system, but double claiming was supposed to be avoided here as well⁶⁹. Preliminarily to posting their workers to Germany, undertakings should be obliged to inform the authorities⁷⁰ responsible for compliance monitoring. The responsibility for supervising compliance with the law was planned to lie with the Federal Employment Agency⁷¹. The draft also intended a piercing of the corporate veil for an undertaking subcontracting to employers who do not comply with the law⁷². Employers providing working conditions in a gross disparity to the required ones should be threatened by criminal persecution additional to being liable for compensation of damages⁷³. Administrative offences should be punished by imposing a fine between 1.000 and 100.000 DM depending on the seriousness of infringement⁷⁴.

3. Draft bill of the Upper House of Parliament

A third draft bill for a national law on posting of workers originated from the Upper House of Parliament⁷⁵. Its scope was supposed to cover all undertakings and their employees situated in the European Union and the European Free Trade Association. The draft also focused on the applicability of standard local working conditions⁷⁶, which should be ex-

⁶⁶ § 1 II AEntG opp. draft

⁶⁷ BT-Drs. 13/2418; refers to COM (93) 225 final. – SYN 346.

⁶⁸ Motives according to Art. 3 COM (93) 225 final. – SYN 346.

⁶⁹ § 3 AEntG opp. draft.

⁷⁰ § 6 AEntG opp. draft.

⁷¹ § 7 AEntG opp. draft.

⁷² § 9 AEntG opp. draft.

⁷³ §§ 12, 13 AEntG opp. draft.

⁷⁴ § 14 AEntG opp. draft.

⁷⁵ The German Bundesrat is referred to as Upper House of Parliament; BT-Drs. 13/2834; BR-Drs. 546/95; cited as parl. draft.

⁷⁶ § 1 I AEntG parl. draft.

tended to the whole building sector⁷⁷. The relevant conditions should include wages and paid leave, health and safety standards, terminating employment relationships as well as continued sick leave pay⁷⁸. The law was supposed to create mandatory rules under Art. 34 EGBGB⁷⁹. Obliging the undertaking to announce the planned posting of workers to Germany to the responsible authorities should provide for sufficient control⁸⁰. As monitoring body for supervising compliance with the law the Federal Employment Agency⁸¹ was designated and the Customs Offices⁸² because of their familiarity with this subject. Sanctions for non-compliance included compensation for damages⁸³, fines for administrative offences⁸⁴ and penal provisions⁸⁵. The draft was not aimed to be valid only for a limited period of time.

4. Critical reactions

In reply to the two alternative proposals the Government refused to accept their respective main points, especially the proposal for implementing local working conditions as mandatory. The Government evaluated this as not only inconsistent with EC law but also infringing on the collective bargaining autonomy of both sides of industry, protected under Art. 9 Para. 3 GG. Since such wages could only be mandatory for foreign undertakings and not for domestic ones⁸⁶, neither the national constitution nor the fundamental freedoms of the EC-Treaty were respected. To the contrary, extending standard local working conditions to foreign undertakings might amount to unjustifiable discrimination (Art. 56 AEUV = ex. Art. 49 EGV) against other EU citizens⁸⁷.

⁷⁷ The captured scope of application: building sector according to § 75 Arbeitsförderungsgesetz.

⁷⁸ § 1 I AEntG parl. draft.

⁷⁹ BT-Drs. 13/2834, p. 12.

⁸⁰ § 6 AEntG parl. draft.

⁸¹ § 7 AEntG parl. draft.

⁸² § 10 AEntG parl. draft.

⁸³ §§ 9, 11 AEntG parl. draft.

⁸⁴ § 14 AEntG parl. draft.

⁸⁵ §§ 12, 13 AEntG parl. draft.

⁸⁶ BT-Drs. 13/58, p. 4917 A – SPD draft; BT-Drs. 13/2834 appendix 2, statement of the Federal Government-Council draft.

⁸⁷ BT-Drs. 13/2834 appendix 2, statement of the Federal Government.

II. Process of legislation

As all proposed draft bills in principle agreed on a common goal, all of them were simultaneously tabled with the Lower House of Parliament and referred to the Parliamentary Commission for Labour and Social Order⁸⁸.

The Commission argued for implementing the governmental draft with added changes⁸⁹. The restriction to the building sector was retained, but should be extended to the whole construction sector⁹⁰.

In the session of Parliament on 30th November 1995 the draft was finally adopted with the changes suggested by the Commission, with the votes of the coalition parties against the votes of the opposition⁹¹. In the same session the draft of the opposition was rejected after second reading, whereas the draft of the Upper House of Parliament was declared to be settled.

As the Commission for Labour and Social Order had voted for an amendment to the draft bill, improving the available implementation and control mechanisms and constituting unrestricted duration of its application, open questions remained. Taking into consideration the still negative opinion of the employer's representatives in the statutory commission on collective agreements, the draft bill was no guarantee for providing effective solutions in cases of conflict. Also it was questioned whether generally applicable collective agreements were the appropriate means to solve the construction sectors' problems since only few of the existing ones covered also minimum wages.

The Upper House followed this assessment of the Commission for Labour and Social Order and rejected the draft bill in its version as approved by Parliament by calling on the Arbitration Commission⁹². The Arbitration Commission reworked the draft and proposed a final version: Monitoring of compliance with the law should be provided by the Federal Employment Agency and the Main Customs Offices⁹³, posted workers need to be notified to the German authorities, and undertakings would be liable for administrative offences for

⁸⁸ In case the Upper House of Parliament does not approve the governmental draft it has the option to call in the Commission for Labour and Social Order to counsel about the draft.

⁸⁹ BT-Drs. 13/3155.

⁹⁰ BT-Drs. 13/3155, p. 6; extended scope of application: §§ 1 and 2 of the Baubetriebe-Verordnung of the 28th October (version of 1984), § 75 para. 1 no. 3 Arbeitsförderungsgesetz.

⁹¹ BT-Drs. 13/74, p. 6487.

⁹² BR-Drs. 823/1/95.

⁹³ § 2 AEntG gov. final draft.

their sub-contractors with an augmentation of the monetary fine⁹⁴. Furthermore, in case of an infringement of the law the offenders should be excluded from participation to public procurement⁹⁵.

This final draft was forwarded to the Lower House of Parliament⁹⁶, which enacted the law on the 8th February 1996. The Upper House approved (according to ex Art. 87 III s. 2 GG) one day later.

The Act on mandatory working conditions for trans-national services⁹⁷ finally became effective on the 1st of March 1996⁹⁸.

III. General applicability of collective agreements in the construction sector

The mechanism for reaching general applicability of collective agreements and extending them to foreign service providers did not rely on enactment of the new law alone: The collective agreement's mandatory regulations were not automatically binding for the posted workers. Precondition for declaring the respective collective agreements generally applicable is the consent of a majority in the Committee on collective agreements. If public authorities wish to establish mandatory minimum rules through collective bargaining mechanisms they need to reach such majority in the Committee first.

1. First round of negotiations in the committee on collective agreements

When the declaration of general applicability was requested for the first time the representatives of the Federal Employers Association stuck to their line already expressed during

⁹⁴ § 3 AEntG gov. final draft.

⁹⁵ § 5 AEntG gov. final draft.

⁹⁶ BT-Drs. 13/3663.

⁹⁷ AEntG 1996.

⁹⁸ BGBl. I 1996, p.227.

the formation of the law⁹⁹ and refused to consent, whereas the Federal trade union organisation was in favour of the declaration of its general application.

This outcome was highly contested even among the employer's organisations. The responsible representatives on employer's side in the committee were representatives of Gesamtmetall¹⁰⁰, Gesamttextil¹⁰¹, and the BDA¹⁰². Especially the Federal Employers Association BDA had fundamental objections to declaring the construction sector's collective agreements generally applicable. The construction sector paying comparably high wages, the BDA feared for requirements of unions in other sectors of the economy to achieve at least the "minimum standards" in the construction sector also for their members. On the other hand, the employer's organisation of the construction sector itself agreed with the respective union that they needed general applicable mandatory rules. General applicability of the collective agreement on minimum wages in the sector was important for undertakings to stand competitive compared to foreign employers' law labour costs. In case of failure of the negotiations in the Committee the German Central Association in the building trade and the Principal Association in the construction industry threatened to leave the parent organisation BDA, responsible for that outcome.

Nevertheless, the BDA did not compromise its position but refused to agree. The BDA's representatives declared the minimum wages as being too high in comparison with other branches, considering that a determination of such high wage levels would lead to rising wages in other sectors as well, especially the ones close to the construction sector. This would imply the risk that construction work would become even more expensive with the possible consequence of negative impacts on the investment in construction, or putting the level of employment in jeopardy.¹⁰³

For this reason, the BDA gave no consent to the application of declaring the collective agreement in the construction on sector generally applicable¹⁰⁴ in the first round of the negotiations initiated in April 1996 and so that subsequently no declaration of general application could be achieved.

⁹⁹ BT-Drs. 13/3155 p. 14.

¹⁰⁰ Association for the metal industry.

¹⁰¹ Association for the textile industry.

¹⁰² German Federal Association of employers' associations.

¹⁰³ *Sahl/Stang*, Das Arbeitnehmer-Entsendegesetz und die Europäische Entsenderichtlinie, in: *Arbeitsrecht im Betrieb* 1996, p. 652, 657.

¹⁰⁴ Bundesanzeiger No. 104, 8th June 1996, p. 6290.

2. Second round of negotiations

The Committee on collective agreements met for a second round of discussion in September 1996 referring their dispute to mediation. In this discussion the need to finally reach an agreement lead to important concessions on the part of the building sector, compromising on central points of their existing agreement in order to win the necessary vote of BDA: BDA succeeded in setting a fixed time frame for the eventual declaration of general applicability, which would be only valid for one year's time. Afterwards the procedure in that committee would have been started anew, to secure more influence on the part of BDA¹⁰⁵. Additionally, the minimum wage level had to be reduced, so that the collective bargaining procedure for the construction sector had to be re-opened¹⁰⁶.

As a consequence of these decisions the German Central Association of the building trade and the Principal Association of the construction industry left the BDA¹⁰⁷. Also other observers were fiercely critical of such behaviour on the part of the BDA. Their taking advantage of their involvement in the process of declaring a collective agreement generally applicable for the purpose of levelling down the minimum wage was seen as an infringement to the right of free collective bargaining. The denial of their consent as such was considered by some as counteracting the legislative decision in the statute according to which employee protection in posting of workers was necessary.

IV. Conformity of the AEntG 1996 with the EU fundamental freedoms

Especially legal scholars were rather critical to the AEntG 1996 as being an infringement of the EU fundamental freedom to provide services.

The aim of the law to influence competition between Member States and to implement equal wage levels and social standards was seen as an unjustified infringement of the fundamental freedom to provide services and the basic politic of the European Union to im-

¹⁰⁵ The collective agreement was limited until 31.5.1997.

¹⁰⁶ *Blanke*, Die Neufassung des Arbeitnehmer-Entsendegesetzes, in: *Arbeit und Recht* 1999, p. 417, 420; The minimum wages were reduced to 15, 64 DM for the new German states and 17 DM per hour for the old ones; the succeeding collective agreement even set the wages only at 15, 14 DM and 16,00 DM.

¹⁰⁷ *Ulber*, Kommentar zum Arbeitnehmerüberlassungsgesetz, 1998 §1 AEntG para. .31.

plement a free market economy and free competition¹⁰⁸. The law was criticized for taking away from foreign service providers their competitive advantage of more favourable wages in their home countries¹⁰⁹. This argument was nothing new, as the ECJ had already consented to such a restriction and succeeding interference with free competition, if justified through the remaining competences of the Member States¹¹⁰ in the field of social policy. Sticking to this line of reasoning, the ECJ principally confirmed that the approach of the German AEntG that imposing national terms and conditions of employment to foreign service providers was justifiable:

“ Article 59 of the Treaty (now, after amendment, Article 49 EC¹¹¹) and Article 60 of the Treaty (now Article 50 EC¹¹²) do not preclude a Member State from imposing national rules guaranteeing entitlement to paid leave for posted workers on a business in the construction industry established in another Member State which provides services in the first Member State by posting workers for that purpose, on the two-fold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the Member State where their employer is established, so that the application of the national rules of the first Member State confers a genuine benefit on the workers concerned, which significantly adds to their social protection, and (ii) the application of those rules by the first Member State is proportionate to the public interest objective pursued.” (reason of judgment no. 1)¹¹³

A national regulation to establish minimum working standards and thereby regulating fair competition through the extension of national regulations to posted workers constitutes a justified infringement of the freedom to provide services once the conditions set up by the Court were met. The Court especially emphasizes the necessary protection for individual posted workers, who should gain a genuine benefit through the minimum wage levels. In addition the AEntG 1996 makes sure expressively that no foreign employer must pay double social security contributions: If undertakings were obliged to contribute to a social security scheme in their country of residence, they would be exempted from contributing to the German system insofar.

¹⁰⁸ Löwisch/Gerken/Rieble, Der Entwurf eines Arbeitnehmer-Entsendegesetzes in ökonomischer und rechtlicher Sicht, in: Betriebs - Berater 1995, p. 2370, 2373.

¹⁰⁹ Ex Art. 49 EC, now Art. 56 TFEU.

¹¹⁰ ECJ 27.03.1990, C-113/89 (Rush); ECJ 09.08.1994, C-43/93 (Vander Elst).

¹¹¹ After the amendment of the Treaty of Lisbon, Art. 56 TFEU.

¹¹² After the amendment of the Treaty of Lisbon, Art. 57 TFEU.

¹¹³ ECJ 25.10.2001, C- 49/98, C-50/98, C-52/98 to 54/98 and C-68/98 to C-71/89 (Finalarte).

But the court also declared one regulation being an unjustified infringement of the freedom to provide services.

“[...] Paragraph 1(4) of the AEntG, which essentially provides that all workers posted to Germany by an employer established outside Germany, and only those workers, are to be treated as a business, whereas a different definition of a business applies to employers established in Germany, which may, in certain cases, result in different businesses falling within the scope of the collective agreements. [...] It follows that Paragraph 1(4) of the AEntG gives rise to inequality of treatment which, in the absence of any justification recognised by the Treaty, is contrary to Article 59 of the Treaty¹¹⁴.“ (para. 76, 82)¹¹⁵

The regulation concerned was consequently annihilated in 2003¹¹⁶.

V. Directive 96/71 EC concerning the posting of workers

After several governments in “old Member States” enacted statutes on posting of workers (e.g. Belgium, France, Austria and Germany) the European Commission could no longer afford not having a relevant Directive in place. The conflict between Member States otherwise would be going on at national level rendering Community institutions irrelevant for solving the problem. Therefore the Commission was under high pressure to finally succeed in enacting a formal solution. After a new round of debate the draft directive, even though still under huge criticism, was finally approved by the European Parliament and the European Council on 16th of December 1996¹¹⁷. Enacting such directive was measured against the subsidiary principle (ex Art. 5 II EC) and understood as being objectively justified. Sufficient protection of posted workers could only be achieved by coordinating the laws of Member States, which in turn was to be achieved through regulation at Community level¹¹⁸. Using the instrument of a directive not aiming at harmonisation of national regulations, but only at restricting of the choice of law-rules interferes as little as possible with

¹¹⁴ After the amendment of the Treaty of Lisbon, Art. 57 TFEU.

¹¹⁵ ECJ 25.10.2001, C- 49/98, C-50/98, C-52/98 to 54/98 and C-68/98 to C-71/89 (Finalarte).

¹¹⁶ BGBl. I 2003, p. 2848.

¹¹⁷ Official Journal 1997, L 18 p.1.

¹¹⁸ Motive 13 Directive 96/71 EC; COM (93) 225 final. – SYN 346, p. 9.

Member States' legal systems. The Directive determined the areas in which minimum working conditions had to be secured, but still left room for the Member States to decide how intense the regulations were nationally implemented. Free movement of labour was not at all infringed by the directive, since its scope of application only aimed at workers operating in the host country for a specific duration like in the case of posting, not regulating employment of unspecified duration in a foreign country.

The directive allows for setting a minimum standard for certain core working conditions that may not be undercut in case of deploying any worker to a foreign construction site. The exploitation of wage and social cost discrepancies cannot be totally avoided by this approach in order to also protect the interests of undertakings situated in sending States. But such undertakings lost at least parts of their competitive advantages due to having to obey "mandatory rules" of the receiving State which prevail over the usually applicable law governing the contract of employment¹¹⁹. A divergence from these regulations to the disadvantage of workers is consequently not admitted. Posting in the meaning of the Directive can come in three different forms: Under a contract concluded between the undertaking who posts workers and the recipient of services; as posting to an undertaking owned by the group of undertakings who provides the services; as posting by a temporary employment agency to another "user"-undertaking¹²⁰.

Such restriction of the freedom of the posting undertaking is only allowed concerning hard core provisions enumerated in directive¹²¹, and dependent on the purpose of workers' protection¹²². Quite different from the German act, the Directive is not at all concerned with collective bargaining and only to a limited point concerned with Member States' competency to develop their domestic social policy. Instead it relates to rules on "fair completion" and intends to protect the individual posted worker.

"[...] it is necessary to check whether those rules confer a genuine benefit on the workers concerned, which significantly adds to their social protection. In this context, the stated intention of the legislature may lead to a more careful assessment of the alleged benefits conferred on workers by the measures it has adopted." (para. 42)¹²³

¹¹⁹ Schlachter, Erfurter Kommentar zum Arbeitsrecht, 10th edition 2010, § 1 AEntG para. 4.

¹²⁰ Art. I III lit. c Directive 96/71.

¹²¹ Art. 3 I Directive 96/71.

¹²² See e.g. ECJ 15.3.2001, C-165/98 (Mazzoleni); ECJ 25.10.2001 C- 49/98, C-50/98, C-52/98 to 54/98 and C-68/98 to C-71/89 (Finalarte).

¹²³ ECJ 25.10.2001 C- 49/98, C-50/98, C-52/98 to 54/98 and C-68/98 to C-71/89 (Finalarte).

The respective regulations must be mandatory for all undertakings in the relevant geographical area, including foreign and domestic undertakings alike. If domestic law would allow only domestic undertakings to undercut such minimum standards by means of collective bargaining on a company level, this would amount to unjustifiable discrimination of foreign service providers and therefore constitute an infringement to the freedom to provide services.

"[...]the fact that, in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another Member State cannot do so, constitutes an unjustified restriction on the freedom to provide services." (para. 35)¹²⁴

Also the correctness of the directive's legal basis (ex Art. 66 EC combined with Art. 57 EC (version of Maastricht treaty) (= Art. 62 TFEU in combination with Art. 53 TFEU) of the EC treaty), was put into question among German legal scholars. Such objections were ill founded. The directive in the interpretation of the ECJ acknowledges posting of workers as a form of using the freedom to provide services. In this context workers responsible to carry out such services across border will necessarily be deployed to the host county. Consequently a directive on posting of workers would regulate the free provisions of services and the legal basis chosen is suitable. The ECJ has not opposed to this either¹²⁵.

VI. Transposing the Directive into national law

After the directive was finally enacted and several decisions had been handed down by the ECJ, German law needed to be adapted accordingly.

¹²⁴ Art. 3 VIII Directive 96/71; ECJ 24.01.2002, C-164/99 Portugaia.

¹²⁵ Däubler/Lakies, Kommentar zum Tarifvertragsgesetz, 2nd edition 2006, appendix 2 § 5 TVG, para. 35.

1. Legislative changes to the AEntG 1996

The first changes in substance became effective in the beginning of 1998¹²⁶. These amendments were deemed to be necessary after the entry into force of the first declaration of general application of the collective agreement in the construction sector according to the AEntG 1996. The amendments were not so much a consequence of having the Posted Workers Directive in place but a means of avoiding loopholes to the domestic legislation discovered over the period of its application. The personal scope of the law was therefore extended to posted, subcontracted workers to prevent circumvention. Additionally, the regulations about how to proof the relevant working time, duty of application and administrative offences were tightened and an additional jurisdiction for claims of posted workers and the social fund offices for the construction sector were introduced.

The general duty of an employer to register his employee with the employment agencies responsible for the relevant construction site, which required the name of the posted worker, the estimated duration of assignment and the identification of the construction site of operation, was expanded. Under the new version the undertaking had to provide details on the first and last name, the date of birth and the address of the responsible person for the posting within Germany, as well as an authorized recipient for documents in Germany. A nomination about a specific location, where the authorities could inspect the necessary documents about the posted worker, was required as well¹²⁷.

The scope of law was extended to temporary agencies providing trans- national employment¹²⁸. This was an important change, as the previous act disallowed any form of temporary work in the central construction sector. The new regulation allowed deploying of temporary workers to several branches of the building sector, e.g. the electric trade and opened a new field of employment for foreign workers. The employer/lender was obliged to provide identical information as the employer of a posted worker to guarantee the control of the deployed workers¹²⁹.

¹²⁶ Erstes Gesetz zur Änderung des Dritten Buches Sozialgesetzbuch, BGBl. I 1997, p. 2970; the previous amendment BGBl. I 1997, 594 was restricted to formal changes.

¹²⁷ § 3 I AEntG.

¹²⁸ § 1 IIa AEntG.

¹²⁹ § 3 II AEntG.

2. Amendment in 1998

The evolution in practice showed that such amendments were still not sufficient to implement the intended effects and to prevent effectively all circumvention strategies of foreign employers.

Consequently the newly elected Government introduced a “Law of correction concerning social insurance and employee protection”¹³⁰ in order to improve the law to combat social dumping more effectively¹³¹. At the same time this reform served the purpose of transposing the directive 96/71 EC into German national law.

a. Authorization of statutory order

One of the main points of making the law more effective was changing the relevant procedure for general application of collective agreements in order to prevent the National Employers’ Organization from interfering with the results of collective bargaining in the construction sector when the representatives of that sector applied for declaration of general applicability. The reform bill achieved that goal by introducing an alternative way for State authorities to extend a collective agreement to posted workers by authorization of a statutory order, § 1 III a AEntG¹³². This enabled the Ministry of Labour to extend collective agreements without needing to follow the hitherto established procedure for declaration of general applicability. This method promised also a faster procedure and therefore a more flexible way to adapt to economically problematic situations.

aa. Mechanism of § 1 III a AEntG

The introduction of this new method of extending collective agreements to labour contracts formerly not bound by it was the statutory answer to the behaviour of the representatives of

¹³⁰ BGBl. I 1998, p. 3843.

¹³¹ BT-Drs. 14/45 p. 3, 17; BT-Drs. 14/151 p. 3, 26 ff.

¹³² BGBl. I 1998, p. 3843.

Federal Employers Organisation during the previous negotiations on the general applicability of collective agreement in the construction sector¹³³.

Under the previous law an extension of collective agreements was dependent on the consent of the committee on collective agreements and a later implementation through the State authorities. The authorization of statutory order in §1 III a AEntG implemented the possibility for State authorities to set the working conditions by means of a legal ordinance without achieving consent in the Committee first. The decision was not even dependent on requirements of an existing public interest¹³⁴. Nevertheless, the possibility of reaching general application after the consent of the committee on collective agreements was still an effective alternative. So it was up to the collective bargaining parties concerned when applying for extending their minimum standards on foreign service providers to make the kind of application to the Ministry they think to be appropriate: If they believe that consensus in the Committee is to be achieved, they still can apply for a declaration of general applicability. If they expect their application to be blocked by BDA, they can apply for a statutory order instead. Such application would not even require a previous failure of declaration of general application, but could be implemented immediately. Through this means, the power of the committee on collective agreements to prevent the general application completely or to achieve a plain reduction of working conditions in the collective agreements¹³⁵ was severely diminished. The authorization of statutory order intended the elimination of this possibility of blockade.

In order to respect the freedom of collective bargaining, State authorities could not usher a statutory order independently once they think this was necessary. They instead are only allowed to act on application of one of the parties to the relevant collective agreement as they are supposed to know best the situation in their branch of industry.

¹³³ *Blanke*, Die Neufassung des Arbeitnehmer-Entsendegesetzes, in: *Arbeit und Recht* 1999, p. 417, 420.

¹³⁴ *Wiedemann/Wank*, Kommentar zum Tarifvertragsgesetz, 7th edition 2007, appendix 1 zu § 5 TVG, para. 12.

¹³⁵ *Koberski/Asshoff/ Hold*, Kommentar zum Arbeitnehmer-Entsendegesetz, 2nd edition 2002, §1 AEntG.

bb. Effective implementation of § 1 III a AEntG

In 1999 the collective bargaining parties to the building sector introduced a new collective agreement on minimum wages fixing a new minimum wage of 18, 50 DM for the Western Part of the country and 16, 28 DM for the Eastern Part, entering into force on the 1st of September 1999. The application for a declaration of general applicability was at first petitioned, but the BDA again refused to agree opposing the set wage level. Hence a renewed declaration of general applicability was impossible with the consequence of creating a loophole concerning the minimum wage in the construction sector: The earlier declaration of general applicability of the previous collective agreement was time limited to the end of August 1999.

Therefore the State authorities used, for the first time ever, the instrument of statutory order on application of the collective bargaining partners representing the construction sector. This measure was then heavily criticized from BDA with the arguments already described earlier on: the wage level would be prejudicial for other branches as well, leading to potentially negative impact on construction undertakings in eastern Germany. But the State authorities considered the public interest to maintain conditions for fair competition and social standards in the German construction sector to outweigh such possible negative consequences and enacted the statutory order, which became valid on the 1st of September 1999¹³⁶. The statutory order was time limited until the end of August 2000¹³⁷. Later on, this means of extending minimum standards in collective agreements to foreign service providers was habitually employed for all subsequent collective agreements to be extended under the AEntG.

cc. Compatibility with the German Constitution

¹³⁶ BGBl. I 1999, p. 1894.

¹³⁷ Statutory regulations in timely order: BGBl. I 2000, p. 1290, BGBl. I 2002, p. 3372, Bundesanzeiger 2003, p. 26093, Bundesanzeiger Nr. 164 2005, p. 13199 (changed through BGBl. I 2006 p. 926 and Bundesanzeiger Nr. 38 2008, p. 891), Bundesanzeiger Nr. 131 2008 vom 21.8.2008, Bundesanzeiger Nr. 128 2009, p. 2996.

Critics to the law accused it of being incompatible with the German Constitution, especially Art. 80 GG and the fundamental right to collective bargaining enshrined in Art. 9 Para. 3 GG.

Art. 80 Para, 1 GG requires certain preconditions for transferring the right to set norms from the legislative to the administrative branch of the State. Regulations transferring such power to administration need to declare precisely the content, purpose and dimension of the cases in which the Ministry should be empowered to take action. According to the critics, the AEntG did not meet such preconditions. Such allegations are not convincing, however. The scope of the statutory order is defined by existing collective agreements, the relevant working conditions are enumerated¹³⁸ and the employers concerned are set¹³⁹. This way, at the time of the enactment of §1 III a AEntG the legislator determined sufficiently clear what content a succeeding statutory order would have¹⁴⁰.

The bigger challenge to the AEntG was its possible infringement of the fundamental right to collective bargaining as protected by Art. 9 GG. The German constitution guarantees different aspects to the freedom to bargain collectively. The first one, the right of an individual to establish or join a union, is obviously not touched, since § 1 III a AEntG does not hinder the establishment or joining of a labour organisation and does not make such an act factually impossible. Solely the fact that a belittled influence of collective bargaining due to introduction of the authorization of statutory order could diminish the appeal of trade union membership, does not suffice to infringe Art. 9 III GG¹⁴¹.

The second aspect guaranteed in the Constitution is the right to freely decide against joining such union. This right is not infringed, either. The extension of collective agreements to employers and employees not hitherto bound by such agreement represents no obligation to join a union. Even if employers and employees as an effect of the declaration to extend collective agreements are governed by its rules, this does not force them to become members of the relevant associations¹⁴².

¹³⁸ §§ 1, 7 AEntG.

¹³⁹ The business must perform predominantly construction works in the sense of § 211 I SGB III.

¹⁴⁰ BVerfG 18.7.2000, AP Nr.4, § 1 AEntG.

¹⁴¹ The principles settled in BVerfGE 44, 322, 343 - AP Nr. 15 § 5 TVG for § 5 para.1 TVG can be transferred BVerfG 18.7.2000, in: Neue Zeitschrift für Arbeitsrecht 2000, p. 948.

¹⁴² BVerfGE 18.7.2000, in: Neue Zeitschrift für Arbeitsrecht 2000, p. 948.

The third constitutionally protected aspect to the freedom of association is the protection of the relevant organizations themselves¹⁴³. They enjoy the right to bargain in the best interest of their members in a way more focused on the relevant needs in their specific field of competence than a general law, applicable through all branches, could achieve. Here a conflict could arise in case an undertaking that is partner to another collective agreement would lose the terms and conditions of this agreement due to the State authorities' declaration on extension of a rival collective agreement. In such a situation, the declaration to extend could infringe the right of an employer's organization to regulate labour relationships for their members. The organization would not be hindered to bargain and conclude collective agreements but these would no longer have any relevance for their members once the content of a rival collective agreement has been extended. This possibility was met with huge criticism when a conflict in the branch of postal services emerged¹⁴⁴. Whereas the Federal Labour Court¹⁴⁵ accepted such outcome, the administrative courts did not; up to now, the dispute is still ongoing.

b. Further legislative changes in 1998

The personal scope of application of the AEntG was marginally enlarged in 1998, in that the scope of application was extended to shipping assistants, too.

The enumeration of minimum working conditions was enlarged in order to cover all hard core conditions described by the Directive¹⁴⁶.

A new strict liability of the service provider for claims by deployed workers of their sub-contractors was introduced¹⁴⁷. The service providers should be held liable for wage claims by the workers of all his sub-contractors as well as for unpaid contributions to the social funds of the construction sector. This special type of liability is restricted to legal persons acting as service providers, whereas natural persons commissioning construction work are not covered.

¹⁴³ BVefG 26.06.1991, in: Neue Zeitschrift zum Arbeitsrecht 1991, p. 809.

¹⁴⁴ VG Berlin 7.3.2008 – VG 4 A 439.07 - ; OVG Berlin-Brandenburg 18.12.2008 – OVG 1 B 13.08- .

¹⁴⁵ BAG 25.6.2002 - 9 AZR 439/01, AP AEntG § 1 Nr. 15; BAG 18.10.2006 – 10 AZR 576/05, in: Neue Zeitschrift für Arbeitsrecht 2007, p. 1111.

¹⁴⁶ § 7 AEntG 1996.

¹⁴⁷ § 1 a AEntG 1996.

Further the notification requirements were tightened¹⁴⁸ and the amount of monetary fines was increased to up to 1.000.000 DM for any violation of mandatory working conditions and up to 50.000 DM for irregularities concerning the notification requirements¹⁴⁹.

c. Compatibility with the directive 96/71 EG

The Posted Workers Directive obliges Member States to guarantee certain domestic minimum standards, set through statutory or administrative regulations or generally applicable collective agreements for both domestic workers and posted workers from other Member States of the EU alike. The minimum standards represented as “hard core” minimum conditions are conclusive. Member states are not competent to extent additional requirements not enshrined in that list, even though the Directive is about providing for minimum standards only. If, however, a Member State wishes to provide for better protection at a higher level, this would not be acceptable to the ECJ in that it is overly burdensome for the service provider and therefore an infringement of his fundamental freedom to provide services¹⁵⁰. Regulations set by the home country more favourable to the posted workers than the regulations set by the host country must remain applicable¹⁵¹.

The main change to national law caused by the duty to implement the Posted Workers Directive 96/71 EC into German law by 16th December 1999, was the annihilation of the time limit. This was necessary to suffice the aims of the directive to create a regulation which provides a permanent protection of minimum working standards.

The applicability of the law to transnational temporary employment services, as required in the directive¹⁵², was already incorporated in the amendments of 1997¹⁵³.

The directive demanded further the implementation of adequate measures for the workers concerned for enforcing their rights under the directive¹⁵⁴ and a special jurisdiction for

¹⁴⁸ § 3 AEntG.

¹⁴⁹ § 5 III AEntG 1996.

¹⁵⁰ ECJ 19.06.2008 C-319/06 (Commission against Luxemburg).

¹⁵¹ Art. 3 VII Directive 96/71 EC; implemented in § 1 III a AEntG 1996: “...mindestens...”.

¹⁵² Art. 1 III c Directive 96/71 EC.

¹⁵³ BGBl. I 1997, p. 2970.

¹⁵⁴ Art. 5 II Directive 96/71 EC.

such judicial proceedings¹⁵⁵. The statutory amendments allowed for workers seeking enforcement by judicial proceedings to bring their claim to German labour courts. This is a privileged situation compared to the general principle that employers may be sued by their employees either in the employer's State of domicile or in the State where the employee habitually carries out his work. As such general rule would exclude the courts of the State to which the worker was temporarily posted, a special rule had to be enacted for allowing jurisdiction in Germany. A special form of action obtaining minimum working conditions does not exist in Germany. Proceedings before a German labour court are relatively inexpensive as every party to the proceedings only has to pay their own costs, no matter who wins¹⁵⁶. This way the workers are not deterred by high costs of proceedings.

d. Compatibility with EU fundamental freedoms

Critics to the law also insisted on its being incompatible with the fundamental freedoms of the Treaty. Especially, the extension of collective agreements through the authorization of statutory order was challenged in this respect. The ECJ had to decide one aspect of the matter in 2002.

*"... Articles 59 and 60 of the Treaty preclude the application of a Member State's scheme for paid leave to all businesses established in other Member States providing services to the construction industry in the first Member State where businesses established in the first Member State, only part of whose activities are carried out in that industry, are not all subject to that scheme in respect of their workers engaged in that industry."*¹⁵⁷

The decision made it very clear that national law must provide for a regulation obliging all national employers to grant the same minimum working conditions extended through a statutory order to foreign employers. If domestic law allows for deviating such minimum standards through collective bargaining measures available for practical reasons only or primarily to domestic undertakings, the obligation to guarantee these working conditions could not be extended to foreign employers, either. Technically such overriding effect of a

¹⁵⁵ Art. 6 Directive 96/71 EC.

¹⁵⁶ § 12 a ArbGG – German Law about the proceedings in the labour court jurisdiction.

¹⁵⁷ See ECJ 25.10.2001 C- 49/98, C-50/98, C-52/98 to 54/98 and C-68/98 to C-71/89 Finalarte; ECJ 24.01.2002 C-164/99 (Portugaia).

collective bargaining agreement other than the one extended also to foreign undertakings by statutory order could be achieved by means of specificity: Under the law of collective agreements, priority is given generally to the more specific agreement which is therefore able to precede a conflicting more general collective agreements. This general principle, though, is not applied to collective agreements extended through a statutory order¹⁵⁸, at least according to the up to now predominant interpretation. Another line of reasoning argues that at least from minimum working conditions it is not possible to deviate, neither for domestic nor for foreign undertakings¹⁵⁹. German legislation tried to accommodate such preconditions by clarifying that the scope of the law includes domestic as well as foreign undertakings. For this reason, it is considered to be in conformity with the EU Treaty¹⁶⁰.

e. Later Development of the AEntG 1996

Until the expiration of the law due to the enactment of the revised AEntG 2009, the AEntG 1996 was subject to several amendments¹⁶¹. The most important changes in the course of time were the extension of the law to additional branches, like industrial cleaning¹⁶² and mail services¹⁶³ in 2007. With such extensions the German legislator used the AEntG as a tool for solving the problem of non-existence of a statutory minimum wage in Germany. On the one hand, political pressure for safeguarding employees rights in low-wage braches increased as many workers were employed under contracts providing for poor working conditions. On the other hand, the enactment of a statutory minimum wage was politically impossible. So the legislator made use of the legal situation just described, that minimum working conditions extended to foreign undertakings must not – for reasons of compliance to the fundamental Treaty freedoms – be undercut by domestic employers, either. Extending the AEntG to additional branches therefore allowed for de-facto minimum wages in

¹⁵⁸ *Wank/Börgmann*, Die Einbeziehung ausländischer Arbeitnehmer in das deutsche Urlaubskassenverfahren, in *Neue Zeitschrift für Arbeitsrecht* 2001, 177, 182.

¹⁵⁹ *Schlachter*, *Erfurter Kommentar zum Arbeitsrecht*, 6th edition 2006, § 1 AEntG, para.15.

¹⁶⁰ BAG 20.7.2004 – 9 AZR 369/03 – AP AEntG § 1 Nr.18 decided that § 1 AEntG 1996 is at least lawful since its amendment in 1998, with the new wording that clarified that the area of application also includes German Employers.

¹⁶¹ BGBl. I 2000, p.1983; BGBl. I 2001, 2267; BGBl. I 2001, p. 3584; BGBl. I 2002, p. 2787, 3760; BGBl. I 2002, p. 4607; BGBl. I 2003, p. 2304; BGBl. I 2003, p. 2848; BGBl. I 2004, p.1842; BGBl. I 2005, p. 2354; BGBl. I 2006, p. 926; BGBl. I 2007, p. 2246.

¹⁶² BGBl. I 2007, p. 576.

¹⁶³ BGBl. I 2007, p. 3140.

specific sectors, binding primarily domestic undertakings, whether or not their branch in fact faces fierce competition from foreign service providers.

VII. Summary Part 2

After several Member States had implemented their own national laws on posted workers the Commission finally was under pressure to enact a directive that was up to this point not agreeable for several Member States. When the Directive eventually entered in to force, its primary- if internally conflicting – objectives were providing for fair competition and protecting individual workers due to implementing at least minimum standards of social protection.

The margin of discretion left to each Member State is necessary to individually adapt the arrangement of the provisions to the national legal and social systems, like e.g. in Germany to the system of collective agreements. Under such conditions, the directive could neither implement one single level of core working conditions throughout Europe nor substantially narrow the gap between such standards.

D. Part 3: Recent tensions

I. Interpretation of the ECJ in the Laval Quartet

The implications of the Posting of Workers Directive on domestic legislation aiming at the prevention of “social dumping” at first seemed to be manageable for most countries. The Directive was understood as representing a compromise between conflicting goals, allowing Member States to protect their labour and social policy provisions up to a point defined through the necessity of allowing foreign undertakings to compete on domestic markets also by undercutting wages. But this compromise was reformulated in a dramatic way by the ECJ’s interpretation of the directive limiting the Member States’ discretion¹⁶⁴. The decisions meant that Member States regulating minimum labour standards through the process of collective bargaining had to accept limitations to their system. Even though the Directive emphasizes on setting minimum standards, the ECJ declared it to set the maximum level of protection for workers.

Additionally, the possibility to take industrial action for applying the relevant collective agreements also to foreign undertakings must be balanced against their freedom¹⁶⁵ to provide services, which disallows for measures not aiming at topics enshrined in the Directive. Even though the ECJ acknowledged for the first time that a right to collective action was a “fundamental right that forms an integral part of the general principles of Community” law, the decision declared at the same time that “fundamental” does not mean prevailing. Only an overriding reason of public interest can justify an infringement of the freedom of services/establishment through collective action. Justified cases of infringement of the fundamental Treaty freedoms are laid down in Art. 3 I Directive 96/71 EC. As the enumeration in the directive is conclusive and their contents are only legitimate to the level acknowledged as a mandatory minimum standard, collective action is limited in what it is allowed to ask for. Increasing the minimum standard through collective action therefore is next to impossible, only voluntary agreements are left for this purpose. Since the transna-

¹⁶⁴ ECJ 11.12.2007, C-438/05 (Viking); ECJ 18.12.2007, C-341/05 (Laval); ECJ 03.04.2008, C-346/06 (Rüffert); ECJ 19.06.2008, C-319/06 (Commission against Luxembourg).

¹⁶⁵ ECJ 11.12.2007, C-438/05 (Viking), para. 44; ECJ 18.12.2007, C-341/05 (Laval), para. 91.

tional service providers are not obliged to guarantee more than the minimum working conditions, voluntary agreements cannot be expected.

In its late decision the ECJ in principle let the freedom of services prevail over the right to collective actions¹⁶⁶, ruled out superior collective wage standards than the minimum settled in the Posted Workers Directive¹⁶⁷ and elaborated working requirements in local collective agreements¹⁶⁸. These judgements made clear that the “fundamental right to collective action” is still far away from being on an equal footing with the fundamental treaty freedoms. Member States cannot rely on Public Policy to allow for better working standards, as the ECJ allows for such solutions only under circumstances where the intended measure is absolutely necessary for the system of the country concerned. These preconditions will only rarely ever be met. Therefore the balance between the conflicting goals has changed: Member States must not use the setting of minimum standards for protecting other social policy objectives but the individual workers minimal protection.

II. EU Enlargement

In 2004 ten more Member States joined the European Union. As for the earlier Accession States, differences in levels of wages and other cost-inducing labour conditions in many of those countries allowed for harsh competition on the labour and service markets in old Member States. Due to that fact, in negotiations about an accession to the EU old Member States tried to protect their interests in advance, by restricting at least temporarily the fundamental freedoms of undertakings established in Accession States. Such political solution, though, is only suitable for a certain period of time.¹⁶⁹

Thus in the German construction sector and additionally in industrial cleaning and interior decorators, the free movement of services in case of a posting of workers can be restricted for a maximum of seven years¹⁷⁰.

¹⁶⁶ ECJ 11.12.2007, C-438/05 (Viking).

¹⁶⁷ ECJ 18.12.2007, C-341/05 (Laval); ECJ 03.04.2008, C-346/06 (Rüffert); wage standards of collective agreements, that are not generally binding would infringe the freedom of services.

¹⁶⁸ ECJ 19.06.2008, C-319/06 (Commission against Luxemburg).

¹⁶⁹ Official Journal 2003 L 236.

¹⁷⁰ Official Journal 2003 L 236, V-XIV no.13.

III. AEntG 2009

1. Content of the revised Act

Shortly the German legislator decided on revising the AEntG¹⁷¹. The objective of such reform was only to a very limited extent the reaction to developments on EU-level, but primarily domestic purposes. As described above, the non-existence of a statutory minimum wage causes severe turbulences on the domestic labour market. Therefore the legislation extended the scope of application of AEntG to six new branches: nursing care, private security business, coal mining operations, laundry services for property client services, waste management, apprenticeship and retraining¹⁷². Through the instrument of declaration of general applicability, either decided in the committee on collective agreements¹⁷³ or by a statutory regulation¹⁷⁴, minimum working standards regulated by collective agreements can be extended to all workers carrying out their work in Germany in any given branch included in AEntG. The authorization for issuing statutory orders extending collective agreements for the new branches was restricted. In case a newly listed branch is concerned, the committee on collective agreements has to be involved. But the new law widens the provisions for a solution in case of conflicting interests: in case a majority of four approving votes cannot be reached in the Committee on collective bargaining or once the committee does not deliver an opinion, the statutory regulation can still be adopted by the Ministry.

The **personal scope** of minimum working conditions for posted workers is not restricted by law. So the AEntG minimum standards apply to all workers working on German territory, whether they are German, EU-Member States' or third country nationals, whether they had been working for their current employer earlier on or were employed for the purpose of being posted to Germany only. There is also no mentioning that the posting has to be "temporarily" in nature. Quite opposite to the situation under the Social Security Regulation, labour law minimum standards are applicable to posted workers as long as they are posted. In academic literature, though, the prevailing opinion is that for an employee staying indefinitely in Germany, AEntG-regulations are not the appropriate way of standard

¹⁷¹ BGBl. I 2009, 799.

¹⁷² §§ 4, 10 AEntG 2009.

¹⁷³ § 5 TVG.

¹⁷⁴ Now a public interest is required in § 7 I AEntG 2009, but not a coverage of 50% of the tariff bound workers.

setting. How the line of demarcation should be drawn is nevertheless highly contested. What may count as common ground is the precondition that parties to a labour contract agreeing on “temporarily” working abroad must agree on some indicators when the posting should come to an end. This might include agreeing on fixed term posting, on the fulfilment of a special task or other features that allow for the conclusion that there will be no definite assignment of the worker concerned to working abroad.

Control and **enforcement mechanisms** rely primarily on public law measures, which include the duty to report posted workers to public authorities before they start working, report any changes in working site or working conditions occurring during posting, preparing documents on the actual working time of posted workers and present upon request all necessary documents that allow authorities to verify that minimum standards in fact have been complied with. Any information with significance to the calculation of wage and holiday entitlement has to be noted. Furthermore, employers have to keep documents available for the controlling authority to check compliance with ca’s working conditions. Such documents have to be in German, and they have to be presented in the course of inspections. They include the contract of employment and any document drawn up in the sending State for complying with the obligation resulting from implementing Directive 91/533/EC. Also work performance records, wage slips and effected wage payments have to be presented in case of request.

Against acts of non-compliance sanctions including fines can be imposed. Undertakings that have been penalized with at least 2,500.- € in fines could as a consequence be temporarily suspended from participating in the procedure of awarding public procurement contracts. Responsible for controlling the relevant obligations is a public authority under the supervision of the Ministry of Finance, the customs authority in Köln.

Additionally, also private enforcement mechanisms apply. Individual posted workers are entitled to bring an action for wages they are owed for the period of being posted to Germany also before a German labour court. Also the special institutions of the construction industry dedicated to social benefits for construction workers can sue foreign undertakings for financial contributions for posted workers. As these institutions are regular claimants before national courts they are used to the judicial system and not easily to be deterred from taking action. Many of the court cases arising under the AEntG in fact are initiated by that claimant.

Finally, AEntG provides for liability of contract awarders for any act of non-compliance with AEntG of their respective subcontractors. The principal contractor will therefore act as a guarantor primarily liable whenever the posted worker or the social benefits institution did not receive the wages or the social contribution owed for the period of posting. This allows both types of creditors to immediately turn to the primary contract awarder for recovering the sums they are owed once the immediate employer does not pay. Therefore, it would be in the contract awarders economic best self-interest to make sure that their subcontractors are reliable and financially sufficiently well-off to comply with the AEntG's minimum standards.

2. Critical reactions

The extension of the AEntG 2009 represents more of an internal political compromise than an instrument to transpose the relevant directive, and questions the original objectives of a law on the posting of workers. The initial reason for the enactment of the AEntG 1996 was to counteract the pressure of competition from service providers situated in low wage countries that endangered especially undertakings in the German construction sector. Through the instrument of declaring collective agreements generally applicable and extending them to foreign undertakings the AEntG 1996 was supposed to impose minimum wage standards benefitting national and posted workers deployed within Germany.

The intentions of the AEntG 2009 are diverting from this objective. The possibility to set a minimum wage through generally applicable collective agreements also in the newly listed branches follows the purpose to soften increasing differences of domestic wage levels. In the recent past a big low wage sector evolved and the duty of the legislator to protect a minimum working standard is hardly to deny. These facts might have demanded a new statutory regulation.

Extending the new AEntG 2009 to additional branches avoids the introduction of statutory minimum wages in the fields covered, and nevertheless gives the legislator new options to influence the minimum working conditions. Whereas a statutory minimum wage would create State support for the bargaining power of unions at the expense of employers, an

implementation of minimum working conditions through a declaration of general applicability has for precondition the existence of such agreement¹⁷⁵. This process is therefore neutral to the bargaining mechanism itself but relies on whatever outcome it produces.

Nevertheless, in the course of the renewal of the AEntG the power of the legislator to influence working conditions has increased, while the formation of collective agreements now has a much wider scope, since they can be extended farther than the regulating power of the negotiating parties. So from this point of view the revision of the Act may be counted as success. On the other hand, the question for the constitutionality of fixing of wages through the enactment of a quasi statutory minimum wage still remains open: The law now holds expressively that working conditions set in generally applicable collective agreements displace all lesser levels of working conditions set in other collective agreements¹⁷⁶. The AEntG 2009 refers, in case several collective agreements compete for being extended, to the representativeness of the respective agreements. Also this solution meets challenges as to its constitutionality as it prefers established unions over smaller ones.

IV. Summary Part 3

The recent development on European level has shown that the internal contradictions between the Directive's two conflicting objectives were not overcome but became more and more severe. The restrictions enshrined in the fundamental freedoms of the EC Treaty combined with the directive disallowed Member States the margin of discretion in regulating their labour policies they earlier took for granted. How a balance between the conflicting interests finally can be found, is not foreseeable for the near future. In Germany the introduction of a revised version of the Act on posting of workers nevertheless did not aim at coping directly with such problems. Even though the usual adjustments to current developments of the law through decisions of the ECJ are present there, too, the prime intention of this legislation focuses on solving domestic problems. Even as the Posting of Workers

¹⁷⁵ Däubler/Lakies, Kommentar zum Tarifvertragsgesetz, 2nd edition 2006, § 5 TVG, appendix 1 para. 21 seqq.

¹⁷⁶ § 8 II AEntG 2009.

Act will be judicially reviewed time and again, the issues at stake are specific for the German legal system and may not provide insights transferable to other Member States.

E. Conclusion and Perspective

I. Development and Changes in domestic legislation

The German Act on Posting of Workers (AEntG) had been enacted before the relevant Directive, as such Directive did not seem to arrive in time for meeting the ever more pressing demand. The aggravation of the employment situation especially in the construction sector furthered the opinion in Germany that some measures had to be taken immediately.

In anticipation of the later enacted Posted Workers Directive 96/71 EC the German legislator already implemented main principles of the directive and amended the statute according to the Directive after it finally entered into force. Both the domestic legislation and the Directive strived to balance the objective of reaching fair competition with the need for minimum standards for all workers in a given sector.

As described earlier on, preventing social dumping and unfair competition was the main aim of developing domestic legislation prior to the Directive's enactment, and this goal remained the focus of the national debate for a long time. Changes in the labour market, especially in the construction sector, had such devastating effects on unemployment figures that legislators felt obliged to react. The EU was seen insofar as furthering much rather additional problems than providing solution.

After the Posting of Workers Directive finally entered into force, it was originally understood as developing alternative (Community) means to the identical (domestic) end, i.e. allowing Member States to prevent social dumping and unfair competition through additional protection for individual posted workers. These two aims, although sometimes conflicting in details, would allow for one common approach stabilising a social model. Therefore opponents to such approach would invoke the prevailing nature of the EU's fundamental freedom to provide services as having a limiting effect as to what the Posting of Workers Directive should, and indeed legally could, allow Member States to legislate in worker protection. So domestic legislation was seen primarily as protective in nature, Union secondary law, especially the Posting of Workers Directive, as allowing such standards under a different, more individualistic heading, and the Treaties' fundamental freedoms as having a limiting effect.

Whereas the domestic statute intended to protect not only individual posted workers but also their system of collective bargaining and the national social policy, the Directive established little of such additional topics. Only through interpretation of the ECJ was it turned into an instrument of setting maximum standards of protection, and only through such interpretation it became obvious that collective action for reaching an agreement would be justifiable only to a limited extent.

The measures of setting minimum standards in domestic legislation reflect the responsibilities for worker participation shared among the legislator and collective bargaining partners: Several core conditions as laid down in the Posting of Workers Directive's list have traditionally been statutorily regulated in Germany. For such topics, transforming the Posting of Workers Directive into national law deemed easy: The legislator simply stated that national statutes on such topics become applicable to posted workers and their foreign employers, too. Problems nevertheless are not quite solved through that approach, as many of the statutes concerned have administrative bodies involved in implementing employer's legal duties. Such public law entities' authority is restricted to the national territory. They could not provide protection against dismissing a pregnant woman, as they would be able to under the relevant national law, once the employer undertaking is situated in a foreign country. There is no known practical experience with such involvement of public administration, but obviously legislation on posted workers has not gone into details when extending statutory worker protection to posted workers by simply broadening the personal scope of application of statutes.

Wages and (additional) holiday with pay, on the other hand, have traditionally been left to regulation by collective agreements. In those fields, the simple solution of extending the personal scope of a statute for transposing the Posting of Workers Directive is not available. Collective bargaining partners have to be involved in order to respect their constitutional freedoms and prerogatives. So using existing mechanisms to declare collective agreements generally applicable or modifying such mechanisms in order to better fit into the trans-border situation was the method of choice. On the other hand, collective bargaining and collective action measures in Germany were already not in a very healthy condition at the time of implementing the AEntG, and such problems only worsened over time: Trade union density and collective agreement coverage are declining and in some branches and regions are almost non-existent by now. Employers organisations had to live up to newly founded worker organisations of very distinct features: On the one hand, specialist's

unions emerged, representing i. a. Pilots, air traffic controllers, train drivers or medical doctors who are next to irreplaceable on a short-term basis and therefore make for tough bargaining partners. On the other hand, and much more relevant for posted workers, new organisations developed willing to undercut the hitherto existing wage level in collective agreements considerably in order to preserve jobs for their members. So the solution of extending “the relevant” collective agreement to foreign undertakings and their posted workers would demand an additional involvement of the State in the process of choosing which one of the possibly several co-existing agreements is the relevant one.

Facing such difficulties the reform bill had to solve, not much effort was dedicated to clarify the relation between domestic industrial relation practices and the relevant EU law. Only after the ECJ handed down its decisions in the Laval quartet, some debate arose on the consequences for domestic collective action measures. Already existing differences between the relevant collective bargaining partners have been intensified, but the legislator never saw a reason for intervention. So this part will be left to academic debate and for the courts to decide upon, as it is unusually the case with regulating industrial conflicts in Germany. The main points for discussion would be the following: Even though the ECJ acknowledges the right to collective bargaining and it being a fundamental right, the fundamental freedoms of the EC Treaty prevail. The specific focus of legal systems relying on collective bargaining for setting working conditions would justify a much wider margin of discretion in collective action than the rather limited approach of the Directive.

Later during the process of developing the **Services Directive** and due to the decisions handed down by the ECJ which clearly limited domestic means to practically enforce social standards for the sake of the freedom to provide cross-border services, domestic debate shifted its focus. Minor amendments to AEntG have been obviously guided by loyalty to the ECJ’s interpretation. But they were accompanied by feelings on the part of workers representatives that from now on they would have to defend the existing social model against interference from the EU which is seen as aiming at “liberalising” labour markets by deteriorating standards. Whether in the process of such movement to defend the social model examples of cross learning from experiences of other Member States actually happened, is not quite clear. The main field of influence seems to be the organisation of political resistance against the Services Directive’s “Bolkestein draft”. In this field, information spread across borders on how to reach coverage by the media, to influence political debate and to mobilise workers’ and political representatives for a common cause. After this draft

Directive was changed, the prevailing view was that the defence was a success and labour relations had been saved from EU's influence. So in the process of transposing the Services Directive's final version into national law the debate was among public law specialists on how to best review administrative procedures that might place burdens on service providers. Labour law experts were more or less sidelined in such debate as the common understanding was that the Directive does not aim at regulating terms and conditions of work.

II. Influence on national industrial relations

The discussion on posting of workers and their presence in the domestic labour market had some consequences for industrial relations, too.

First of all, as the ECJ would not accept any one standard of protection for posted workers as being a minimum and therefore consistent with the prevailing interpretation of the Directive once it could be undercut anywhere in the country, collective bargaining partners would have to come up with nationwide collective agreements. This has not been the custom of collective bargaining agreements before. Industrial relations were organised in a way that collective agreements were concluded for different areas at different levels in order to respect the different levels of economic development and/or degree of unionisation. Now the aspect of a special minimum wage has to be taken out of such context and regulated separately at a uniform level throughout the country.

The difference of wage levels between the branches which was already present but obviously not so much in the focus of public awareness, became a matter of strategic concern for the Association of Employers. Allowing for minimum standards in the construction sector at a level that could barely be reached by regular workers in other sectors was seen as a threat to low paying branches. So the common standards agreed upon in one sector met heavy resistance from head organisations defending their strategic influence on the labour market as such. For unions, too, specific problems arose. Concession bargaining at company level would not be acceptable any more once rescue measures would have to undercut minimum standards. Branch agreements in fields with very low union density would face the same problem: Accepting basic wages lower than the minimum standard elsewhere would not be seen by members as representing a bargaining success whereas the unions concerned would barely be in the position to force through better standards.

So both sides of industry in a way were unhappy with the legislator's solution in AEntG, setting minimum wages through generally applicable collective agreements. The conclusions drawn from such lack of satisfaction were nevertheless opposite to each other. Unions came to embrace the necessity of a statutory minimum wage that could provide for a safety net for all branches and situations where unions themselves were not powerful enough to fight for such standards. Employers' organisations on the other hand would strongly oppose statutory minimum wages and other interference of the government into the wage setting process. They would therefore rely on EU market freedoms and on the national constitution for disallowing the government to chose one collective agreement to represent the "adequate" wage level and therefore to declare this one generally applicable. Instead, they would opt for allowing all undertakings, national and foreign ones alike, to conclude collective agreements as they think appropriate for their respective field of business. As such a solution can easily lead to rather low standards, the AEntG-reform presented a statutory solution allowing the Government to have its say as to the appropriate wage level on the one hand, but leaving the main decisions to collective bargaining on the other. On international level, reactions to the problems of setting minimum levels can differ. When searching for a political solution, the clash of interests between old and new Member States will count for a hindrance. Possibilities to rectify the situation on national level, though, may be almost non-existent. Therefore the revision of the German Statute in 2009 did not even aim in this direction; it is merely the answer to a domestic problem.