

FORMULA

Free movement, labour market regulation and
multilevel governance in the enlarged EU/EEA
– a Nordic and comparative perspective

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Posting Past and Present

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Introductory observations

The object of this study-in-the-making is three-pronged at the outset. A first task is to map the background of the Posted Workers Directive 97/71/EC (PWD). This includes placing the initiatives into context with social policy and economic developments pertaining to the European Community scene at the time. The second is to chart the genesis, in a broad sense, of the PWD from the tabling of the first draft proposal in 1991 to the Directive was adopted in 1996. The third limb is to present and, to a certain extent, to discuss the rules laid down in 1996 in conjunction with the ECJ case law as it had evolved since *Seco* and *Rush* and how it continued to evolve during the time period until the PWD entered into force.

This third limb of the genesis at large points onward to a fourth topic, which is also a key theme in the present study-to-be. Having established the points of departure that can be derived from the text of the Directive, its background and conjoining case law, two further topics present themselves. One is to analyse the ECJ's "*Laval Quartet*"¹ of decisions and discuss the Court's construction of Directive provisions in confrontation, as the case may be, with the foundations derived from the third limb. The other is to identify the more important issues that are not, or not immediately, resolved by the said decisions and similarly discuss those issues. This can then be concluded with a *status presens* summarising the results of the two elements of discussion.

In a final part two somewhat different facets could be focused on. One is the underlying thinking on the part of the ECJ in the "*Laval Quartet*", its reasons and consequences. The other is linking the development of the PWD generally with the multilevel governance perspective and, where possible, bridge issues and findings with the studies on the Services Directive and general free movement law.

¹ I use this as a joint denomination for the 2007 decisions in *Viking Line* and *Laval* and the 2008 decisions in *Rüffert* and *Commission v Luxembourg*.

Sketching the road ahead

It is well known that the initial proposal for a Community instrument on posting of workers appeared in the Commissions communication on an Action Programme in 1989. That proposal was one of 47 initiatives following up and relating to the implementation of the 1989 EC Social Charter.² Besides elaborating this formal context we should endeavour to figure out what other actors or influences that may have been of the essence. This would presumably have to rely mainly on contributions in the literature. Preliminary screening however leaves the impression that little effort has been devoted to this pre-proposal stage.

The ECJ's decision in *Rush* (1990) has been dubbed the prologue to the adoption saga of the PWD (Kolehmainen, 112). It may perhaps rather be called a booster, as the first initiative had already been taken. Be that as it may, a first draft for a directive was tabled in 1991. It met with many forms of opposition and a host of amendment proposals. The Commission put forward a second draft in 1993, but it did not fare much better. A more complex pre-adoption story unfolded, with a Working Party being set up in 1994 and series of meetings and proposals ensuing. For the time being there is a lacunae in my insight into the process from late 1994 (when Norway voted No to join the EU) until well into 1996. The literature is rather mixed as regards the internal aspects of the process. However, I have been able to collect a vast primary material that should provide valuable insight into the whole of the adoption saga. That includes materials pertaining directly to some of those points that have played an important part in the Scandinavian context, such as, in particular, the so-called *Flynn* letters.

How, then, to approach and structure his adoption process? I envisage a two-pronged approach from a joint starting point. A sketch of the first draft proposal, 1991, is a fairly obvious first. This could be continued with a quite brief sketch of the way onwards to 1996. Then the first limb will go on from there to offer a longitudinal overview of the process, highlighting main institutional aspects that are relevant to understanding the discussion of the discussions to follow. The second limb will be issue based. It should start by identifying the major issues in debate and the key provisions (or groups of such) of the PWD as adopted. This will include also a few issues that did not survive through to adoption.

² COM(89) 568 final, 29 November 1989.

It is this that will provide the platform for the last of the main parts, analysing the “*Laval Quartet*” of decisions and confronting the present with the past.

The source material is rich in its way. The literature on the Directive is quite extensive. There are at least half a dozen doctoral dissertations and a huge number journal contributions etc. It remains however to be seen to what extent this is useful to the genesis perspective, which is a first point of interest here. My preliminary impression is that the legal writing concerned is more focused on “ex post” interpretation and implementation issues. In our present context, that is of more relevance to a discussion of the confrontation and the *status presens*.

The materials available are in part overwhelming in sheer volume. Merely books and articles fill more than four standard cardboard boxes for 2500 sheets of copy paper. I have yet to achieve a full overview of all of that. In addition, the primary source material pertaining to the adoption process, which consists of documents emanating directly from that process, runs to more than 5000 pages. This I still have to sort out properly; I did not receive the vast majority of the documents until late September.

The “*Laval Quartet*” decisions are of course well known. The cases, *Viking Line* and *Laval* in particular, were the subject of much writing already before the ECJ decisions came down. Since then, the literature has grown rife with articles, etc., discussing the decisions and their potential impact.

In short, there is more than enough of written material to consider – with perhaps an emphasis on more.

A sketch of time-line and issues

The starting points have already been touched upon, above. Departing from the 1991 proposal by the Commission the first leg I envisage to extend into early 1993. The major facets probably are the opinions of the ESC and Parliament and, if possible to discover, the internal proceedings leading up to the Commission's second draft directive, in 1993.

From 1993 onwards, *PreLex* offers nothing but a long jump all the way to 1996. However, it is in this phase that the better part of the adoption saga takes place, substance-wise. A Working Party of States' representatives was set up and a continuous interplay between the WP, the Commission and the Council, and the Presidency at any given time emerges from the documentation. It seems obvious that charting this phase is a major task and of considerable importance.

The third final phase then is in 1996, with the tabling of the third draft directive, the preceding common position, etc., and the very last stage leading up to adoption of the Directive.

As regards the second main limb of the developmental analysis, I envisage identifying elements and issues of importance in the Directive, as first proposed, as proposed during the process, and as adopted. The point here is that what is important is not necessarily just that which was adopted in the end. Also proposals that were made but did not succeed, or just "disappeared" in the course of the process, are relevant to and may be important to the understanding of the process and the construction of the Directive's provisions.

I envisage approaching the scope of issues in a quite conventional way. By way of an overview, the major topics can be identified as follows. First we have the matters of scope.

- ▶ The scope of activities to be covered. – Merchant shipping was excluded (art. 1.2), but there was debate on whether to limit the instrument to certain branches only. This needs to be seen in conjunction art art. 3.1.
- ▶ The types of posting situations covered and the definition of "worker".
- ▶ The scope of application in time, i.e., whether there should be an exemption for a certain period or application from "day one". This was one of the most controversial issues during the whole of the process.

Further, there are the issues of *what* and *how*.

- ▶ Laws and regulations is an easy starting point (art. 3.1).
- ▶ The real problem area is that of collective agreements. Here drafts moved from the infamous *erga omnes* clause in 1991 through various phrasings and branch restricted alternatives via the Danish proposal in 1993 that made it through as part of what is now art. 3.8; whereas the second alternative in art. 3.8 did not appear until 1996.
- ▶ The first and fundamental part of the *what* topic is art. 3.1 and the “list”. It seems that merely minor changes were made to the list items during the whole process. It needs however to be ascertained what is the basis for the distinction between what a host state is obligated to and what it may impose (e.g., minimum rates of pay).
- ▶ Article 3.10 is a second major topic in this context. This seems to have been brought up only late in 1994 and was the subject of some discussion and reservations by the Commission to the initial proposals stemming from Member States.

These items are of course not exhaustive. There is a number of conjoint issues that also should be addressed. One is the Directive’s legal base, the discussion on that point and the development of the Preamble to the Directive. Another, flowing from this, is the initial reference to ILO Convention No. 94 in the Preamble and why this disappeared some time late in 1994 or even later. Moreover, there is all reason to take up art. 3.7 of the Directive. This provision was first proposed in 1993, and as a preliminary view the documentations appears to support the interpretation of the provision that emerges in the *Laval* and *Rüffert* decisions. It is anyhow an important point which further may be seen to relate to the question of which level host state mandatory minima may be fixed at.

Sketches of discussion

I refrain from embarking on analysis of Directive provisions of ECJ decisions at present. As I have indicated above, much has been said and done already. That in fact includes me. Instead of starting all over at this interim stage I will set out some excerpts from a contribution to be published in an issue of the Bulletin Comparative Labour Relations. On a point or some it may emerge that there is a bridge to specific issues in the Services Directive studies.

Transnationality and the reach of Articles 43, 49 EC

Starting from the facts of the cases, nonetheless, *Viking Line* and *Laval* give rise to serious issues as to the ‘geographical’ reach of Article 43 and, in particular, Article 49. It is well established that the free movement provisions of the EC Treaty do not come into play in regard to ‘activities whose relevant elements are confined within a single Member State’.³ Their application presupposes a cross-border element.⁴

In the present context, the point in debate is easily illustrated with *Viking Line*. The possible industrial action that took centre stage in this case was not the possible support (or solidarity) actions of the ITF, but the collective action which the Finnish trade union had warned might be undertaken. If it were to materialize, the strike action in question would have been directed against the Finnish employer of the trade union’s members. A cross-border element thus did not pertain to the parties or their location; it was represented only by the intended re-flagging of the vessel *Rosella* – i.e. the relocation of a workplace – from Finland to Estonia. The court held this to be clearly sufficient to come within the reach of Article 43.⁵

³ Cf. Case 52/79 *Procureur du Roi v Debauve*, [1980] ECR 833 (para. 9). See further Case C-97/98 *Peter Jägerskiöld v Torolf Gustafsson*, [1999] ECR I-7319.

⁴ The points addressed below are discussed more extensively by G. Orlandini, ‘Trade Union Rights and Market Freedoms: The European Court of Justice sets out the Rules’, 29 *Comp. Lab. L. & Pol’y J.* (2008), 573-603.

⁵ See *Viking Line* paras. 67-74, in particular.

Transplant this situation away from the maritime sector across to land-based activity; relocation can well have the form of a transfer of undertaking.⁶ In the case of a transfer of undertaking, employees concerned are provided a measure of protection by national laws in pursuance of the EC Directive on transfers of undertakings.⁷ Whether, in the individual case, a transaction qualifies as a transfer within the meaning of the Directive may however be a difficult question. Moreover, as the Directive does not safeguard the continued existence or binding effect of collective agreements applying at the transferor's to the transferee, employees concerned and their trades union may have a strong interest in securing a like position. This is not eliminated if a transfer, as will often be the case, involves a relocation of the undertaking in which the employees are not, or do not choose to be, relocated. Their primary interest then as a rule is to prevent relocation and the loss of jobs involved. This applies equally to relocations nationally or cross-border.

It is obviously likely, in context with *Laval*, to presume that Court's approach in *Viking Line* is designed to apply also outside of its specific, maritime, setting. If so, the borderline between transfers and non-transfers loses in importance in this particular context. It will nonetheless remain important in that where the Transfers Directive comes into play, the protection of individual terms and conditions afforded to employees concerned certainly must be expected to impact on the proportionality assessment of collective action in regard to the norm imposed by the Court on whether 'jobs or conditions of employment ... are in fact jeopardised or under serious threat'.⁸ In a number of national contexts, this extends and accentuates the gap between domestic and transnational situations as regards possible recourse to collective action.

The cross-border issue also emerges from *Laval*, albeit perhaps not so clearly. It was a Latvian company that was party to the main proceeding, *Laval un Partneri Ltd (Laval)*. It was however not Laval that had a contract for building work in

⁶ The EC Transfers of Undertakings Directive (fn. 7, *infra*) does not apply to 'seagoing vessels', Article 1(3).

⁷ Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, O.J. 2001, L 82/16.

⁸ Cf. *Viking Line* para. 84.

Sweden. The contract was between the municipality of Vaxholm and L&P Baltic Bygg AB (Baltic). Baltic was a subsidiary of Laval but formally a Swedish registered joint stock company. The works was undertaken by Baltic, employing workers that had in May 2004 been posted to Sweden from Latvia by Laval. At the outset, then, the situation appears to be one where the building service provider, Baltic, was established in Sweden and *not* in a Member State other than that in which the service concerned was being supplied. This picture was blurred, however, by the fact that demands for a collective agreement were made to both Baltic and Laval, apparently jointly. The ECJ rejected the Swedish trades union's arguments that the case should be dismissed on the grounds that it did not involve a *bona fide* transnational situation.⁹

It is not eminently lucid precisely what kind of a situation the Court reckoned to be dealing with. To start with, Laval could hardly be considered as providing services to the municipality of Vaxholm. From this, at least three different avenues of analysis may seem possible.¹⁰

- Laval and Baltic might be considered as one and the same undertaking by way of 'identification' of companies within the same corporate group and 'piercing the corporate veil'. Considering the Court's rejection of the defendant unions' arguments to identify the two, this seems the least plausible construction of the decision.
- It may be that it was sufficient to amount to a cross-border dimension merely that Laval, as Baltic's parent company, was involved in the collective bargaining and subsequent proceedings, or that Laval itself was faced with the prospect of encountering Swedish industrial relations actors and practices.
- Or it is possible that the Court relied on a special provision in the Posted Workers Directive, para. 3(b) in Article 1 on the Directive's Scope. By this provision it is a 'transnational measure' if an undertaking posts workers 'to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting'. This point was broached by the Advocate General, maybe as one expression

⁹ Cf. *Laval* paras. 42-50.

¹⁰ Cf. *Laval*, Opinion of AG Mengozzi, paras. 107-108 and 145.

of his later observation that the Directive's provisions are one form of emanation from the general principles of Article 49 EC.

The Court was only vaguely in touch with the third alternative when rejecting to dismiss the case but did not elaborate on either of the three.¹¹ Which approach to settle on is however of considerable importance. The third one suggests a narrow construction of what is a relevant transnational measure or situation in the *Laval* context. The others imply a quite wide reaching construction of Article 49, to cover many situations that can not immediately be seen to be caught by the wording of the provision.

The Court certainly does not shy away from expansive interpretation of what is transnational under Article 49 when it sees fit. This is demonstrated in case law, e.g. by the *Carpenter* decision.¹² In view of the consequences to labour law and industrial relations involved in the *Laval* quartet case law the issues broached above no less merit further attention and discussion. But that must be left off here.

The reach and construction of the PWD

The Court's discussion and application of the PWD in *Laval* is upheld and significantly added to by the decisions in *Rüffert* and *Luxembourg*. With those decisions the basic structure and essential reach of the Directive is emphatically laid down. In the present context we may concentrate on three main aspects. The first is *which kinds* of requirements may be imposed on a foreign services provider. The next is which *levels* of terms and conditions for workers that can be imposed. Third is a question on *how* applicable standards must be fixed.

Which kinds of terms and conditions

The first facet of the issue of *what* can be stipulated is which kinds of terms and conditions for its posted workers a foreign employer can be required to comply with. The starting point is of course the 'catalogue' in Article 3(1) PWD. A host state is obliged to make the majority of enumerated topics applicable. Two are however voluntary, the regulation of temporary work, and minimum wages. Both

¹¹ Cf. *Laval* para. 48.

¹² *Case C-60/00 Mary Carpenter v Secretary of State for the Home Department*, [2002] ECR I-6279.

are topics that would not necessarily be the subject of regulation in a given country.

In the larger picture, minimum wage is a key element in the overall context. The concept of ‘minimum rates of pay, ...’ in Article 3(3)(c) was not in issue in *Laval*; nothing of the kind obtained in Sweden. It is brought up in *Rüffert* but broached only tangentially (see p. 11 *infra*).

Otherwise, the message in *Laval* is abundantly clear, in the Court’s analysis of the Directive as well as in its assessment of the compatibility of industrial action with Article 49. Pursuant to Article 3(1) it is only such rules on this ‘limited list of matters’ that may be imposed (also) on a transnational service provider posting workers to the host state. The host state is barred from going beyond the thematic scope described in Article 3(1) regardless of whether the law applicable to domestic employers is more comprehensive. The list in Article 3(1) is *exhaustive* – save for the sole exception prescribed in Article 3(10) PWD.

By its first indent para. 10 permits states, ‘on a basis of equality of treatment’ to apply provisions on terms and conditions of employment on matters other than those referred to in Article 3(1) ‘in the case of *public policy provisions*’. In *Laval*, the Court did not comment on the thematic scope of this concept. This was not at issue in the case. The Court’s concern seems rather to have been to lay down another hallmark of the concept: Public policy provisions must be emanations of government (‘national authorities’). Trade unions and employers’ associations ‘not being bodies governed by public law’ hence cannot invoke Article 3(10) to attain public policy status for collective agreement rules or arrangements.¹³ Building on this in the *Luxembourg* case the Court has underlined that ‘public policy’ in the PWD is a Community law concept. Its scope cannot be determined unilaterally by a Member State; and it must be regarded as an exception clause derogating from the basic free movement principles and must therefore be ‘interpreted strictly’.¹⁴ From this the Court proceeded to render Article 3(10) a fairly narrow scope in assessing a number of statutory measures in Luxembourgian law, thereby also

¹³ To the above, see *Laval* paras. 60 and 73-84.

¹⁴ See *Luxembourg* paras 26-33. The ‘strict interpretation’ clause is of course familiar from ECJ case law in general.

demonstrating that a Member State is not at liberty to decide on what in its labour law is so important that everyone should abide by it.

Which level(s) of terms and conditions

The second aspect is the level of terms and conditions to be applied to posted workers. Setting off from Article 3(1) the Court in *Laval* stated that inasmuch as the Directive does not ‘harmonise the material content’ of rules on matters covered by it, the content of such rules may ‘be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law’. The *level* of protection thus at the outset is for the host Member State to decide. On the other hand, however, the Court underlined that the rules concerned are such that are *mandatory minimum* rules (‘mandatory rules for minimum protection’) that may be imposed. The Court made very clear that pursuant to Article 3(1) it is solely domestically mandatory minimum standards on topics listed in items (a) to (g), and Article 3(10) as the case may be, that a posting employer may be required to comply with.¹⁵

The ECJ explicitly rejected to interpret Article 3(7) to another effect. Effectively, Article 3(7) was held to apply to ‘more favourable’ terms and conditions applicable in a worker’s *home* state. Hence it grants no opening to a host state to ‘make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection’.¹⁶ This robust stance was forcefully repeated in *Rüffert*.¹⁷ The Court’s construction of Article 3(7) was by no means a matter of course and departed from wide-spread opinion prior to the *Laval* decision.¹⁸ With the two decisions it is nonetheless no avoiding it as the matter now stands.

In *Rüffert*, the matter of the level of protection was touched on also more specifically in relation to ‘minimum rates of pay’. The Niedersachsen statute at issue entailed a higher minimum wage than that already applying federally

¹⁵ See to this also *Laval* paras. 60 and 73-84.

¹⁶ Cf. *Laval* paras. 79-81.

¹⁷ Cf. *Rüffert* paras. 32-34.

¹⁸ Both points may well be illustrated by the fact that in both cases the Advocates General argued that the PWD should be interpreted in such a way that it did not prevent imposing improved protection in the host state. See the opinion of AG Mengozzi in *Laval* and the opinion of AG Bot in *Rüffert*.

according to the collective agreement declared ‘universally applicable’ in pursuance of the German Act on Posting of Workers (Arbeitnehmer-Entsendegesetz). When the Court turned to Article 3(7) in its reasoning, that had precisely the effect of emphasizing that a higher rate of pay than the nationally applicable rate could not pass muster. Had it wished to do so, the Court could have passed by this particular point. It had already held that the means by which the state pay rate was fixed did not conform to the PWD’s requirements.¹⁹ In conjunction with this it is important to note that the Court did not expound on the permissible rate of a minimum wage properly fixed. Neither *Rüffert* nor *Laval* is capable of supporting inferences to there being certain minimum levels that can not be exceeded. In this regard it still holds true that it is for the host Member State to decide the level of protection to be observed. This also implies that it is not out of the question to set a higher level than a nationally applicable mandatory minimum, e.g. for pay or holiday entitlements, if done by proper means. Such arrangements on a sector or industry basis, etc., are well known from several Member States and have figured, but not been challenged, in a number of ECJ cases.²⁰

Which means may be used to prescribe terms and conditions

This brings us to the third aspect, the *how*-issue. As we have seen above, content counts but content alone is not decisive. Form – the formal means of stipulation – is prerequisite. Article 3(1) allows of setting relevant minimum standards by law, regulation or administrative provision, and/or by collective agreements²¹ ‘which have been declared universally applicable within the meaning of’ Article 3(8). The latter provision sets out different alternatives and conditions.

In *Laval* the starting point was simple. Sweden has no system for declaring collective agreements ‘universally applicable’. The options remaining under Article 3(8) then are either to rely on collective agreements that are ‘generally

¹⁹ See *Rüffert* paras. 32-34 and 23-30.

²⁰ E.g., *SMIC* and ‘universally applicable’ collective agreements in France, Joined Cases C-49/98 a.o. *Finalarte Sociedade de Construção Civil Ld.^a* and *Urlaubs- und Lohnausgleichskasse der Bauwirtschaft*, a.o., [2001] ECR I-7831, Case 164/99 *Infringement proceedings against Portugaia Construções L^{da}*, [2002] ECR I-787, Case C-60/03 *Wolff & Müller GmbH & Co. KG v José Filipe Pereira Félix*, [2004] ECR I-9553.

²¹ ‘or arbitration awards’; nothing is lost, however, by leaving this out here.

applicable to all similar undertakings in the industry concerned’ or to make use of agreements ‘which have been concluded by the most representative employers’ and labour organizations at national level and which are applied throughout the national territory’. Both alternatives are contentious and beg elaboration and clarification. Unfortunately, the ECJ did not take on such a task.

In Article 3(8) it is said that Member States may, ‘if they so decide, base themselves on’ one or the other alternative. In Sweden there is no minimum wage legislation. Wage setting is essentially a (collective) bargaining matter. The Swedish Act on implementation of the PWD is based on this but contains no provision to that effect or any explicit stipulation that existing collective agreements may be applicable. This is precisely where the Court focussed its attention. Its reasoning is less than clear, however. The only, cursory, observation offered, three times over, is that Sweden ‘has not made use of the possibility provided for in the second subparagraph’ of Article 3(8). The requirement implicit in the reasoning on this point would seem to be that if a State wishes to “so decide” pursuant to Article 3(8) some form of statutory means must be employed. Perhaps the underlying consideration is to facilitate “transparency” or something in that vein. Without any explication by the Court one is left to speculate.²²

The *Rüffert* decision offers no assistance on this point. The instrument in question there was a state law. It was common ground that the collective agreement to which the law made reference was not a ‘generally applicable’ agreement within the meaning of Article 3(8) PWD. What then remained was the law itself. This the Court held to not be a ‘law’ within the meaning of Article 3(1) of the Directive, since it did not itself fix any minimum rates of pay.²³

It needs to be noted that the measure at issue in *Rüffert* corresponded fully to the general requirement stipulated in ILO Convention No. 94, the 1949 Labour Clauses (Public Contracts) Convention. By this states are obliged to include clauses in public works contracts to ensure that workers enjoy terms and conditions not less favourable than those established by laws, collective agreements, etc., for ‘work of the same character in the trade or industry concerned in the district where the work is carried on’ (Article 2). Germany has

²² To this, see *Laval* paras. 62-72.

²³ See *Rüffert* paras. 21-30

not ratified ILO Convention No. 94; only ten Member States have. Nonetheless it is remarkable that the Court failed to even touch on the Convention. It was brought to the fore in submissions by a number of States intervening, and the Court's reasoning entails a challenge, if not an outright conflict, for States being contracting parties to the Convention.

Some consequences and reflections

The quartet of ECJ decisions under consideration also provides fertile ground for conflict with EU/EEA Member States' domestic law. The Scandinavian countries are a case in point. Their national industrial relations and labour law regimes differ on certain counts but the essential problem areas are largely the same. I leave analysis of the Court's reasoning on the lawfulness or not of industrial action under EC law aside; this is not part of the topic here. Some aspects nonetheless will enter into the observations below. Problems pop up as we move along.

Permissible means to prescribe terms and conditions

A first point to consider is by which means terms and conditions that are to apply to posted workers may be fixed. The Court's restrictive approach to the *kinds* of terms and conditions that can be encompassed and to the permissible levels narrows the field. This effectively disallows collective agreements 'as is' in the Scandinavian tradition, which all predominantly encompass a quite wider scope of employment terms and conditions as well as procedural rules, etc. Moreover, the Court's clearly negative attitude to workplace level bargaining for wage fixing collides head on with well established schemes in a large number of collective agreements in different sectors and for different categories of workers. Both points are amply illustrated in *Laval*. In the absence of clarity as to the construction of Article 3(8) PWD trade unions are left with a situation where themes and levels must be narrowed down from the wider scope of prevailing collective agreements. Moreover, as minimum rates of pay are not set by legislation in Denmark and Sweden the 'transparency' requirement the Court emphasized in *Laval* entails considerable uncertainty.²⁴ The ensuing problems are evident in those countries

²⁴ Notwithstanding the somewhat enigmatic statement in *Laval* para. 68. It is difficult to appreciate how this could substantially alter the requirements and restrictions otherwise obtaining.

but do not impact on the situation in Norway in the same way, as Norway employs a particular form of fixing minimum standards by public law regulations.²⁵

Encroachment on collective bargaining

Secondly, and in conjunction with this, the case law in issue encroaches upon freedom of collective bargaining more broadly. By these decisions the Court has constructed a specific ‘protection’ for transnational service providers or cross-border establishment. No such protection obtains for domestic employers. This amounts to a striking case of *Inländerdiskriminierung*. Obviously, trade unions may take recourse to collective action in (interest) disputes with the employer side, and this right is not restricted to pursuing demands that do not go beyond statutory minima. On the contrary, one of the fundamental functions of collective bargaining and the concomitant right to collective action since the dawn of day has been to attain more favourable terms and conditions. The mere thought of this being not permissible is so alien it is absurd. This is of course not unique to the Scandinavian or Nordic countries. But from the Scandinavian perspective, anyway, the Court’s approach in *Laval* and *Viking Line*, in particular, lends itself to be criticized for a flawed understanding of the industrial relations context and reality. Moreover, the Court’s approach amounts to a form of *étatisme*. It requires state intervention into the setting of standards and the means by which applicable standards may be laid down, for Article 3 PWD in general and for Article 3(10) in particular. This departs from predominant traditions and embedded views in the Nordic context, impinging on the autonomy of collective bargaining partners.²⁶

Encroachment on industrial action law

Thirdly, and no less significant, is the introduction of a proportionality principle in collective action law. In the Scandinavian context this is essentially alien, in part

²⁵ This is not to say that the statutory instrument concerned, Act of the 4 June 1993 No. 58 on Making Collective Agreements Generally Applicable, etc., or the practice of the Board issuing regulations in pursuance of the Act are devoid of potentially contentious issues. That must however be left aside here.

²⁶ Dubbed ‘The Nordic autonomous collective bargaining model’ by J. Malmberg and T. Sigeman, ‘Industrial Actions and EU Economic Freedoms: The autonomous collective bargaining model curtailed by the European Court of Justice’, 45 *C.M.L.Rev.* (2008), 1115-1146.

anathema.²⁷ The common basic principle is that as long as strictly formal rules on notices, etc., are abided by collective action is lawful. Its lawfulness is not subject to review by any judicial body on substantive grounds of reasonableness, proportionality, or the like. This applies to primary action as well as to sympathy (secondary, solidarity) action. Thus the Court's doctrine here too cuts into the sphere of autonomy of labour market parties and fundamentally changes the prevailing ground rules – if only in part, i.e., vis-à-vis cross-border establishment or *foreign* employers providing cross-border services.

Closing observations

In conclusion it can safely be said that the ECJ has rocked the boat by its four decisions in discussion. Some like it, some not. Regardless, the current case law entails a wide range of problems. Strictly in law, a large number of interpretation issues pertaining to Article 3 PWD are yet unresolved. Some of those may be crucial to legality assessments of national measures and proportionality considerations. In a wider context the decisions pose considerable challenges to many domestic legal orders as well as to European law. Member States are faced with the prospect of maybe having to enact legislative change in order to fall into line with state of Community law as decreed by the ECJ. The EU itself is confronted with the dilemma of how to reconcile the Court's doctrines with conflicting Member States' interests and with international policy declarations and commitments. This is obviously an issue of some importance. The EU cannot credibly insist on 'Decent Work' standards in external relations if core standards are disallowed internally. Further, and finally, the ECJ decisions in question impact on political debate concerning the internal market and market freedoms, in particular with regard to the Services Directive. Rightly or wrongly, this has for a long time been a factor of considerable importance in the Norwegian debate on whether to accept the Services Directive into the EEA Agreement, and it still is (as per ultimo November 2008).

²⁷ A certain reservation applies for Denmark, where a limited doctrine of 'rimeligt fagligt formål' (reasonable professional purpose) obtains. The ECJ's notions of proportionality are however considerably more far-reaching.