

***FORMULA***

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

# **Monitoring Compliance with Labour Standards**

## **Restriction of economic freedoms or effective protection of rights?**

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WORK IN PROGRESS.

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# 1 Introduction

## 1.1 Restriction of economic freedoms or effective protection of rights?

According to the Posting of Workers Directive, the Member States shall ensure that posted workers during the posting are guaranteed ‘the hard nucleus’ of the labour law in the host state. This chapter will deal with the legal and institutional arrangements aiming at making sure that these basic employment conditions are actually applied to posted workers.

From a labour law perspective different institutional arrangements for monitoring of employment conditions are primarily analysed as a means of effective protection of rights. The potential effect of monitoring is not limited to individual posted workers, but could also affect the functioning of the national labour market. The absence of effective control mechanisms for posted worker, it is argued, risk distorting competition between national and foreign service providers and employees.

From the perspective of market integration and particularly the free movement of services, national monitoring measures are, on the other hand, primarily analysed as restrictions of economic freedoms. National monitoring measures could make it impossible for a foreign service provider to operate in another Member State using its own employees. Such measures could also cause delays or administrative burdens for the service providers. Further, it is argued that national control measures do not in practice aim at protecting posted workers, but rather aim at protecting national markets from foreign competition. In this way the national monitoring measures is an obstacle for realising a fully integrated service market.

The aim of this chapter is to analyse how these perspectives on arrangements on monitoring of labour standards for posted workers are reflected in the position taken by the EU institutions and the Member States. Are arrangements restrictions of economic freedoms or effective protection of rights? Another question concerns who is responsible for the monitoring. Is the host state or the state of origin the main responsible?

Section 2 contains an analysis of the legal evolution. We will try to describe the role of different actors in the evolution shaping the state of law. We will also try to point at how the evolution has shifted the balance of national measures from industrial relations processes to an increased role for administrative enforcement processes.

Section 3 contains a legal analysis of the restrictions on national monitoring measures following from EU law as it stands today.

## 1.2 Enforcement of national labour law

The Member States have traditionally used and still use different methods to ensure compliance with their labour law, on their own citizens as well as on posted workers. It is possible to distinguish between three main categories.<sup>1</sup> The first category is the enforcement of employment and working conditions through judicial procedures in courts or tribunals initiated by the employees themselves, possibly with the support of workers' representatives or public organs (*the judicial process*).

In the second category, the enforcement and supervision is the responsibility of public authorities such as labour inspectors or equality bodies (*the administrative process*). When health and safety legislation was introduced at national level, it was clear that it would not be effective if enforcement was left to the parties themselves.<sup>2</sup> Thus, specific administrative processes were introduced; such administrative enforcement procedures are particularly common in the regulation of health and safety, including working time. Different forms of administrative supervision of the enforcement of discrimination legislation have also been introduced in most Member States.

In the third category enforcement is entrusted to trade unions, work councils or other workers' representatives (*the industrial relations process*). Many national legal orders contain extensive regulations underwriting the role of trade unions and other workers' representatives in the enforcement of labour law. It is commonly

<sup>1</sup> For the following, see Malmberg et al, *Effective enforcement of EC labour law* and Malmberg in Hepple & Veneziani (ed) *The transformation of labour law in Europe: a comparative study of 15 countries 1945-2004*, p. 263 ff.

<sup>2</sup> Hepple (ed) *The making of labour law in Europe a comparative study of nine countries up to 1945*, p. 77–88.

accepted that employee representatives in the workplace have an indispensable role to play in the enforcement of labour law. Where there are suspicions that a certain law has been violated, information, consultation and negotiation will be used to assess the facts and to discuss whether there has indeed been a breach of the law and how this should be remedied. In most Member States we find rules on information, consultation, and negotiation that aim to underpin industrial relations processes as means of enforcing substantive rules of labour law. Such rules strengthen the opportunities for workers' representatives to influence managerial decisions (notably, for example, on collective redundancies) and control how substantive rules are applied in the workplace.

These methods are often applied alongside each other at national level, but it differs between different countries which method is the most important.

A comparative analysis of national labour law clearly indicates that the Member States has not considered it enough for an effective enforcement of employment rights to leave it to the workers themselves to go to court. The judicial processes have regularly been complemented with other enforcement measures. Further, the national experiences indicate that monitoring of employment and working conditions has to take place close to the work place.

## 2 The legal evolution

### 2.1 Posting before the Directive

#### 2.1.1 Introduction

Before the Posting of Workers Directive the *acquis communautaire* did not contain any set of law regarding employment conditions for posted workers. In *Seco & Desquenne* from 1982 the ECJ made clear that EU law does not preclude Member States from extending their national legislation or labour agreements to any person who is employed, even temporarily, within the Member State, no matter

where the employer is established.<sup>3</sup> This statement was repeated in *Rush Portuguesa* from 1990.<sup>4</sup>

Another aspect of *Rush Portuguesa* is that the ECJ found that workers who carry out work as a part of a service contract, provided by their employer, never get access to the labour market of the Member State where the work is carried out. Hence, these workers are not to be placed under the free movement of workers but form a part of the free movement of services. Such workers, the Court explained, 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.<sup>5</sup>

The Member States' choice to extend national labour laws to posted workers was then a part of their competence to pursue a national social policy. The Member States competence may not, however, be used contrary to the economic freedoms according to the Treaty, especially the free movement of services (now article 56 TFEU). The interpretation of the limitations of the Member States' competence to pursue national social policies that followed from the Treaty was in the hands of the European Court of Justice, which shall ensure that the law is observed in the interpretation and application of Treaty (now 19 TFEU).

### 2.1.2 The Member States

Prior to the Posting of Workers Directive, most of the Member States did not consider the need for additional enforcement measures in order to ensure that posted workers enjoy reasonable employment conditions. In general, monitoring of workers rights was left to the trade unions, except for health and safety issues. This was the case in the Nordic countries, the UK and in the Netherlands, but not in Germany.

After *Rush Portuguesa*, which made clear that regulating employment conditions of posted workers was subject to the free movements of services in the Treaty, Sweden and Denmark did not take any further legislative actions, while Norway introduced an extended right for the Norwegian labour market parties to boycott an employer in order to make him comply with a Tariff Board deci-

<sup>3</sup> Joint cases 62 and 63/81 *Seco & Desquenne* [1982] ECR 223.

<sup>4</sup> C-113/89 *Rush Portuguesa* [1990] ECR I-1417

<sup>5</sup> C-113/89, *Rush Portuguesa* [1990] ECR I-1417, paragraph 15 – 17.



sion on terms and conditions of employment i.e. reinforcing the power of the private actors.<sup>6</sup>

Germany had early experiences of posted workers and established a national Posting of Workers Act before any legislative action was taken on Community level.<sup>7</sup> The national substantive requirements on minimum wage were combined with rules on registration and information, mandatory for undertakings posting workers within the German territory. Germany did also, on an early stage, establish rules on liability of German contractors for deployed workers working for their sub-contractors.<sup>8</sup> The fact that Germany already had a developed system for posted workers made it an early subject for the ECJ's scrutiny, as shows from the case law presentation below.

### **2.1.3 The Court**

Already in *Seco & Desquenne* and *Rush Portuguesa* the Court made clear that the Member States had the right to enforce such national rules by appropriate means.<sup>9</sup> Consequently, regardless if the worker was a migrant worker or a posted worker, the host state had the possibility to ensure that employers complied with the parts of their national labour law which had been extended to posted workers. The ECJ indicated that there were some limits to the host state power to monitor the application of its labour law:

‘(S)uch checks must observe the limits imposed by Community law and in particular those stemming from the freedom to provide services which cannot be rendered illusory and whose exercise may not be made subject to the discretion of the authorities.’<sup>10</sup>

The position taken in *Seco* and *Rush* was that the host states were, within certain limits, entitled to extend their national labour law to posted workers. In doing so they were, however, pursuing national

<sup>6</sup> Evju S, *Safeguarding the National Interests, Norwegian Responses to Free Movement of Services, Posting of Workers, and the Services Directive*, Formula Working Paper no 19, 2010, p. 25.

<sup>7</sup> Schlachter M, *the Posting of Workers Directive – German Reactions and Perceptions*, Formula Working Paper No. 20, 2010, p. 18.

<sup>8</sup> Schlachter M, *the Posting of Workers Directive – German Reactions and Perceptions*, Formula Working Paper No. 20, 2010, p. 39.

<sup>9</sup> Joint cases 62 and 63/81, *Seco & Desquenne* [1982] ECR 223, paragraph 14 and C-113/89, *Rush Portuguesa* [1990] ECR I-1417, paragraph 18.

<sup>10</sup> C-113/89, *Rush Portuguesa* [1990] ECR I-1417, paragraph 17

social policies and not EU law. Further, at that time the interpretations of the Treaty provision on free movement of services, was that it precluded all discrimination against a service provider on the grounds of his nationality or the fact that he is not established in the host state other than that in which the service must be provided.

During the early 1990's the ECJ made clear that the free movement of services was not limited to discriminatory measures. An early statement is found in *Säger*:

‘(T)he Treaty requires not only the elimination of all discrimination against a person providing services on the ground of his nationality but also the abolition of any restriction, even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services.’<sup>11</sup>

The Court strengthening of its interpretation of the free movement of services took place in parallel with the process of establishing the Single Market.<sup>12</sup>

In *Säger*, the Court made clear that it is not sufficient to take non-discrimination into consideration, while extending national labour law to posted workers or establishing which control measures that accompany them. The Member States also had to analyse the level of restriction of the national measures. The Court further established that restrictions of the free movement of services can be accepted only if justified by overriding reasons of public interest and if they are proportional (that is, the measure is suitable for securing the attainment of the objective pursued and does not go beyond what is necessary in order to attain it). This formula has been applied by the ECJ ever since (although with some difference in the wording).<sup>13</sup>

Since then, most cases concerning enforcement measures brought before the ECJ has concerned non-discriminatory, but restricting measures. The ECJ has scrutinized national measures in cases concerning requirements to have a representative on the terri-

<sup>11</sup> C-76/90, *Säger* [1991] ECR I-04221 paragraph 12.

<sup>12</sup> COM (85) 310 final, *White Paper on Completing the Internal Market*.

<sup>13</sup> See section 3 below.

tory of the host Member State<sup>14</sup>, requirements to obtain authorization from the authorities in the host Member State<sup>15</sup>, requirements to make a declaration to the host Member State's authorities before posting<sup>16</sup> and requirements to keep and maintain social documents on the territory of the Host Member State<sup>17</sup>.

## 2.2 The Posting of Workers Directive

### 2.2.1 The Directive

The Posting of Workers Directive was adopted in 1996. According to the Directive the host state must ensure that some parts of their national labour – the hard nucleus – are applied to the posted workers. With the adoption of the Posting of Workers Directive the questions of how to protect the employment conditions for posted workers is no longer purely a question of national social policy, but forms a part of the *acquis communautaire social*.

The Posting of Workers Directive does not give the Member States any precise instructions on how to ensure the rights conferred to posted workers. The Member States shall take appropriate measures in the event that a posting employer fails to comply with the Directive. They shall particularly ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under the Directive (Article 5). In addition, the Member States should make sure that the posted worker could institute a proceeding against the employer in the host Member State (Article 6). Apart from this, no concrete measures are required or recommended.

Furthermore, the Directive establishes a system of cooperation on information (Article 4). According to the Article the Member States have to create liaison offices. These liaison offices are supposed to work as a link between monitoring authorities in the Member States, but also to facilitate the access to national work and employment conditions relevant for posting employers and posted employees. The Member States are obliged to cooperate

<sup>14</sup> Joined Cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435 and C-319/06, *Commission v Luxembourg* REG 2008 I-04323.

<sup>15</sup> See for example, C-76/90, *Säger* [1991] ECR I-04221 paragraph 12.

<sup>16</sup> See for example, C-515/08, *Santos Palhota* REU 2010 I-0000.

<sup>17</sup> See for example, joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435.

with each other by, for example, answering questions from corresponding authorities in other Member States, which could be used as a means to monitor posting undertakings and work as a complement to national enforcement processes.

In this way the Directive, on the one hand, indicates that the host Member State is responsible for arranging the monitoring of the employment conditions for posted workers and, on the other hand, the host state and the state of origin are to cooperate concerning information.

However, although the Posting of Workers Directive prescribes that the Member State shall take appropriate measures to ensure posted workers the employment conditions following from the Directive, are the measures to be taken not harmonised at European Union level. The Court has stressed that the Posting of Workers Directive seeks to coordinate the substantive employment conditions of posted workers, independently of the ancillary administrative rules designed to enable compliance with those terms and conditions to be monitored. The different control measures do not fall within the scope of that directive and may be freely defined by the Member States, in compliance with the Treaty and the general principles of European Union law.<sup>18</sup>

### **2.2.2 Transposing the Directive and responding to *Säger* and *Arblade***

Following the implementation of the Posting of Workers Directive, all Member States had to appoint one or several liaison offices. This constituted a public feature which, in some of the Member States, differed from other, private enforcement measures. However, the liaison offices have not been as active as intended by the EU.

Further, all Member States, subject of the Formula study, except the UK, has explicitly implemented the jurisdiction clause in Article 6 in the Posting of Workers Directive. Nevertheless, workers posted in the UK can bring claim before the Employment Tribu-

<sup>18</sup> C-515/08, *Santos Palhota* REU 2010 I-0000.

nal.<sup>19</sup> In case of a collective agreement, the labour market parties have *locus standi*.

Some Member State did also respond to the case law of the European Court of justice. In Austria, a former requirement to obtain an authorisation was replaced by an EU Posting Confirmation for undertakings established within the community posting workers from non-member States. The aim was to be in line with Community law, as interpreted in *Säger*. In order to comply with the findings in *Arblade*, Belgium adopted simplified rules for undertakings established in another Member State posting workers in Belgium. Both these adjustments were later to be found insufficient.<sup>20</sup>

## 2.3 Posting in the light of the Lisbon strategy and the enlargement

### 2.3.1 Introduction

From 1992 and until the beginning of the new millennium, integration measures for the Internal Market were mainly carried out by the ECJ in its case law, mainly in preliminary rulings. At the end of the 1990s, other Community institutions started once again to stress the importance of the service sector, claiming that it was time to continue the work started in the 1980s in order to reach the goal of a full unification of the Internal Market that never was reached in 1992.<sup>21</sup> At its summit in Lisbon 2000, the European Council put forward the idea that EU was going ‘to become the most competitive and dynamic knowledge-based economy in the world’.<sup>22</sup>

The Commission drew up a comprehensive strategy for strengthening services on the internal market. The aim of this strategy was to allow services to move across national borders as easy as within a Member State. The package proposed, inter alia, to launch

<sup>19</sup> Houwerzijl M and von Hoek A, *Comparative Study of the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, VT/2009/0541, March 2011, p. 137.

<sup>20</sup> C-168/04, *Commission v Austria* REG 2006 I-09041 and C-515/08, *Santos Palhota* REU 2010 I-0000.

<sup>21</sup> CSE (97)1 final, *Action Plan for the Single Market*, COM (2000)888, COM (2002)441. Är det föregående rätt \$\$\$See also De Witte B, *Setting the Scene – How did Services get to Bolkestein and Why?*

<sup>22</sup> Lisbon Presidency Conclusions, paragraph 5, 23 and 24 March 2000.

a systematic survey of barriers to services at national level and to identify areas where infringement procedures were needed. Further the Commission initiated the process of adopting a horizontal directive on the free movement of services.<sup>23</sup>

### **2.3.2 Intensified infringement procedures**

On the basis of the findings of the ECJ in *Säger, Arblade* and *Finalarte*, the Commission in the early 2000s initiated a series of infringement procedures concerning national monitoring measures considered to restrict the free movement of services. Several of these were brought before the ECJ.

[...]

### **2.3.3 Adopting the Service Directive**

#### *The Bolkestein proposal*

In 2004, a proposal for a directive on services in the internal market – the Bolkestein proposal – was presented by the Commission in order to meet some of the problems identified in the process.<sup>24</sup>

The Commission proposed a horizontal directive, making it applicable on all undertakings providing services established within the Community. Its main objective was to provide a legal framework that would eliminate the obstacles to the freedom of establishment and the free movement of services. Its three main chapters contained rules on the freedom of establishment, the free movement of services and mutual assistance.

One of the Directive's key features was the country of origin principle (Article 16). It provided that the service provider only was subject to the provisions in the Member State of origin, no matter where the service was carried out. Furthermore, it was the Member State of origin who had the main responsibility for the supervision, regardless if the service was carried out within the Member State or in another Member State (Article 16(2)).

In order to ensure the supervision of the service providers the Member States were obliged to assist each other. That included

<sup>23</sup> COM (2000)888, p. 8 – 9.

<sup>24</sup> COM (2004)2 final, p. 3.

supplying information to other Member States and to the Commission (Article 36). At the request of the Member State of origin, the host Member State could supervise undertakings providing services within their territory. They also had the possibility to conduct checks, inspections and investigations on the spot as long as these were objectively justified (Article 36).

As can be seen from Article 16(3), a Member State was not allowed to restrict a service provider from another Member State, in particular by imposing any of the requirements listed in the article. The article listed amongst other things the prohibition on obliging the provider to make a declaration or a notification to, or to obtain an authorisation from the authorities in the host Member State. Furthermore, the article included a prohibition against an obligation on the provider to have an address or a representative in the host Member State.

Critics argued that this would distort the competition. Member States would not be allowed to impose the same strict requirements on foreign service providers as on the ones established in the Member State. The country of origin principle would create incentives for service providers to select the Member State with the least restrictive regulation as their country of origin in order to get competitive advantages.<sup>25</sup> This could lead to Member States lowering their demands on service providers and not putting a great effort in ensuring compliance with work and employment conditions.

Posted workers were, on the other hand, excluded from the application of the country of origin principle, since Article 16 was not applicable on matters covered by Posting of Workers Directive (Article 17(5)). Contrary to the main rule, the host Member State was responsible for carrying out checks and inspections to ensure compliance with the working conditions applicable under the Posting of Workers Directive (Article 24(1)). The substantive rules to enforce were the minimum conditions laid down in the host Member State's legislation.<sup>26</sup>

<sup>25</sup> Kowalsky W, *The Services Directive: the Legislative process clears the first hurdle*, European Review of Labour and Research, 2006 12:231.

<sup>26</sup> Note that the proposal for the Services Directive came almost four years before the judgement in the Laval and Viking cases. Critics argued that the proposal restricted the national conditions possible to enforce on posting undertakings, making the rights conferred to workers in the Posting of Workers Directive the maximum level that the host Member State could impose. See for example Bruun N, *Employment Issues Memorandum*, 11 November 2004, p. 13 – 14.

However, in doing so the host Member State was limited in what measures it could take. The list, presented in Article 24(1), corresponded to a great extent with the list in Article 16(3). Consequently, in this sense the host Member State had the same restrictions in how the checks were to be carried out in compliance with Community law as was laid down for services not falling under the Posting of Workers Directive.

The above mentioned requirements in Articles 16(3) and 24(1) were used by several Member States as measures to ensure that undertakings providing services on their territory complied with labour regulations. They had also been, or were about to be, examined by the ECJ at the time the Bolkestein proposal was presented. The ECJ had recognised, or was about to recognise, these measures' restrictive effect, but would still consider them possible to justify under certain conditions.

The Bolkestein proposal, however, reversed the perspective. While the ECJ examined whether a certain measure could be justified in a specific context, leaving it open whether other types of similar enforcement measures could be acceptable in another context, the Bolkestein proposal went further and established a definite ban. The focus was not anymore to handle specific national measure, whose effect distorted the EU cooperation, but rather to, from EU level, create a new system in order to replace existing national systems.<sup>27</sup>

### *Reactions to the Bolkestein proposal*

The Bolkestein proposal triggered an intense debate. The European Trade Union Confederation (ETUC) expressed at an early stage concern about the impact the proposed directive might have on labour law.<sup>28</sup> It emphasized that the country of origin principle most likely would have effect on the efficiency of the monitoring of service providers and protection against abuses. The European Federation of Public Service Unions (EPSU) expressed the same concerns.<sup>29</sup> Even though the Bolkestein proposal excluded matters

<sup>27</sup> For further reading, see Höpner M and Schäfer A, *A New Phase of European Integration: Organised Capitalism in Post-Ricardian Europe*, West European Politics, Vol. 33, No. 2, March 2010.

<sup>28</sup> ETUC position paper, Brussels 17 – 18 March 2004, <http://www.etuc.org/a/243>.

<sup>29</sup> ETUC position paper, Brussels 17 – 18 March 2004, <http://www.etuc.org/a/243>, para 11 and EPSU Congress Resolution on the Directive on Services in the Internal Market, 15 June 2004.



covered by the Posting of Workers Directive from the country of origin principle, the unions were concerned about the restrictions laid down in Article 24. Regarding posted workers,

“the Directive on one hand explicitly acknowledges the duties of the Member State of posting to carry out on its territory the necessary checks and inspections to enforce the working conditions as laid down in the Posting Directive, and to take measures against a service provider who fails to comply with these. On the other hand however, the Directive prohibits to subject the provider or the posted worker with any form of authorisation, registration, keeping of documents, thereby depriving the Member State of posting from effective tools to prevent and monitor potential abuses. Although the Directive in addition obliges the Member State of origin to assist the Member State of posting to ensure compliance with the applicable employment and working conditions, which in itself is a positive proposal, this can hardly be seen as an equivalent substitute.”<sup>30</sup>

ETUC hardened its position in a statement published later the same year.<sup>31</sup>

At the public hearing, held at the European Parliament in November the same year, similar opinions were expressed by Professor Niklas Bruun. He as well was concerned for the proposal’s effect on enforcement measures.<sup>32</sup>

The employers’ organisations, on the other hand, had no uniform opinion. The Union of Industrial and Employers’ Confederations of Europe (UNICE, now BUSINESSEUROPE) welcomed the proposal. Overall, UNICE considered it as a useful basis for reducing obstacles to the freedom of establishment and cross-border provision of services in the European Union. But even if they were generally positive to the proposal they thought that it needed some clarifications, particularly the sections relating to the posting of workers.<sup>33</sup>

<sup>30</sup> ETUC position paper, Brussels 17 – 18 March 2004, <http://www.etuc.org/a/243>, para 11.

<sup>31</sup> ETUC’s statement on: The proposed Directive on Services, 9 – 10 June, <http://www.etuc.org/a/432>.

<sup>32</sup> Bruun N, *Employment Issues Memorandum*, 11 November 2004.

<sup>33</sup> UNICE press release, Services in the Internal Market: Adopt Improved Directive Rapidly to Help Fulfil Lisbon Promises, 11 November 2004, <http://www.buinesseurope.eu/DocShareNoFrame/docs/1/HBEIKIBCONFCBHA CEBLEGALIPDBK9DWG719LI71KM/UNICE/docs/DLS/2004-01995-EN.pdf>

The European Association of Craft, Small and Medium-sized Enterprises (UEAPME) presented a clearer criticism. Even though it welcomed the objective of the Services Directive, it considered the proposal to go beyond the goal to realise the Internal Market by, in a too large extent, questioning the national systems. UEAPME was also critical to the prohibited requirements in Article 24(1), since it might have ruled out effective monitoring.<sup>34</sup>

The criticism against the Bolkestein-proposal spread to Member State governments and NGOs. There were also critics among members of the European Parliament that meant that the proposal did not take other interests sufficiently into consideration. This was also the view in a report, commissioned by MEP Anne von Lancker. Regarding the restrictions on national enforcement measures, the author claimed that it would most likely have been impossible to guarantee enforcement of the hard nucleus as required in the Posting of Workers Directive.<sup>35</sup>

It became hard for the EU-institutions not to listen to the protests. It became the European Parliament's task to find a solution. Due to a united opposition against the proposal and the need to find a solution that a broad majority could accept, an amended proposal was submitted by the European Parliament.<sup>36</sup> The European Parliament's draft erased the country of origin principle and Articles 24 – 25. Furthermore, it stressed the fact that labour law should not be affected by the Services Directive.<sup>37</sup>

### *The rewritten proposal*

The intense critic and the European Parliaments amended draft resulted in a re-writing of the proposal to Services Directive. In

<sup>34</sup> UEAPME, Position Paper on the Proposal for a Directive of the European Parliament and of the Council on Services in the Internal Market, November 2004, <http://www.ueapme.com/spip.php?rubrique26>.

<sup>35</sup> Gekiere W, *Towards a European Directive on Services in the Internal Market: Analysing the Legal Repercussions of the Draft Services Directive and Its Impact on National Services Regulations*, p. 40, report commissioned by Anne van Lancker, Rapporteur Committee Employment and Social Affairs, the European Parliament.

<sup>36</sup> For further reading, see Dølvik, J E & Ødegård A M, *The Services Directive Strife: a turning Point in EU Decision-making?*, Formula Working Paper no. 7 (2009), and Kowalsky W, *The Services Directive: the Legislative process clears the first hurdle*, European Review of Labour and Research, 2006 12:231.

<sup>37</sup> A6-0409/2005 Final, *Report on the proposal for a directive of the European Parliament and of the Council on the services in the Internal Market*.

April 2006 the Commission put forward a new proposal.<sup>38</sup> The new proposal was essentially based on the European Parliament's text. Consequently, the country of origin principle in Article 16 is replaced with a provision on the freedom to provide services. Article 16(1) section 3 and article 16(3) provide that the host Member State can apply its national rules provided that these are justified on grounds of public policy, public security, public health or the protection of the environment, they are non-discriminatory, necessary and proportionate. Article 16(3) also clarifies that the Member States, in conformity with Community law, may apply their employment conditions.

Article 17 was renamed to “*Additional derogations from the freedom to provide services*” and provided areas to which the Services Directive was not applicable, including matters covered by the Posting of Workers Directive. Moreover, Articles 24 – 25 were deleted, meaning that the rewritten proposal did not contain any provisions concerning the removal of administrative obstacles or obligations of Member States to cooperate regarding the posting of workers – whether they were Community nationals or third country nationals.

Nonetheless, the Commission stressed that it was of great importance to address any unjustified administrative burdens which hinder the opportunities for service providers to provide cross-border services by posting their staff and that it was important to improve administrative cooperation between the Member States in order to combat black labour and social dumping. These issues were therefore to be addressed in a different context.<sup>39</sup>

#### **2.3.4 Commission's interpretations**

In parallel with the exclusion of posted workers from the Services Directive, the Commission found it necessary to address the interpretation of what kind of national requirements that could be considered consistent with Community law in another way. In April 2006 the Commission presented a guide on the interpretation of when national enforcement measures are inconsistent with the free movement of services established in the Treaty. This guide on the posting of workers where presented at the same time as the second

<sup>38</sup> COM (2006)160

<sup>39</sup> COM (2006)160, p. 13.

proposal on the Services Directive.<sup>40</sup> The purpose of the guide was to ‘tell the Member States how to observe the Community *acquis* as interpreted by the European Court of Justice with reference to Article 49 EC and how to achieve the results required by the (Posting of Workers) Directive in a more effective manner’.<sup>41</sup> Thus, it dealt with partly the prevailing Community law on administrative procedures earlier laid down in Article 24(1) and partly the mutual assistance earlier laid down in Article 24(2) which as well can be deduced from article 4 in the Posting of Workers Directive.

The guide pointed out the four administrative procedures listed in Article 24(1). The limits of these national measures needed to be clarified, according to the Commission.

(1) According to the Commission, *a requirement to have a representative domiciled in a specific Member State “appears to be incompatible with Article 49 EC Treaty”*.<sup>42</sup> The Commission refers to *Arblade*<sup>43</sup> but also a case concerning the requirement to elect domicile with an approved agent, found inconsistent with Community law.<sup>44</sup> The latter case does not concern protection of workers.

The Commission concluded that the requirement to have a representative domiciled in the host Member State is disproportionate, but did not comment on the possibility to require a representative without an obligation on residence. In that sense, the Commission did not give the Member States who require representatives any guidance in how they can change their legislation in order to comply with Community law without causing too much damage to their national system.

(2) Further, the Commission stated that a general requirement to obtain an *authorisation*, applicable on all activities constitutes a disproportionate restriction. The Member States may, however, require prior authorisation for certain activities as long as it can be justified. This requirement must take into account the controls and the monitoring already carried out in the Member State of establishment.

<sup>40</sup> COM (2006)159.

<sup>41</sup> COM (2006)159 p. 3.

<sup>42</sup> COM (2006)159, p. 4.

<sup>43</sup> See chapter 6.2.5 above.

<sup>44</sup> C-478/01 *Commission v Luxembourg*, REG 2003 s. I-02351, p. 19.

(3) Regarding the requirement to make a *declaration*, the Commission referred to *Commission v Luxembourg*<sup>45</sup> and *Commission v Germany*<sup>46</sup> where the ECJ establishes that a prior declaration is a less restrictive but just as effective measure to monitor compliance with the relevant, national labour law. Consequently, the Commission concluded that a prior declaration which contains information on the workers who have been posted, the type of service they will provide, where, and how long the work will take, is a proportionate measure.<sup>47</sup> This differs from the Bolkestein proposal which did not accept any prior declaration.

(4) As regards the requirement to keep and maintain *social documents* on the territory of the host Member State, the Commission found that it was in line with Community law as long as the Member States considered the requirements laid down in the Member State of establishment's legislation.<sup>48</sup> The Commission claimed, however, that the scope to require social documents will get reduced by the system of cooperation and information laid down in Article 4 of the Posting of Workers Directive.<sup>49</sup>

The cooperation between the Member States would according to the Commission replace national requirements on service providers. There is no basis for that assumption in the ECJ's case law, but it seems to be in line with the intention of the mutual assistance in the Services Directive.

The second part of the guide deals with the Member State's obligation to cooperate on information. In the attached Staff working document, the Commission presents information collected from the social partners, national governments, undertakings and other stakeholders.<sup>50</sup> It becomes, for instance, clear that not all liaison offices, at this time, provided detailed information on other languages than the one/s spoken in the Member State. Neither did the liaison offices make full use of the possibility to receive information from each other. The Commission found as well that improvement needed to be done in regard to information directed to posting employers and posted employees and then pointed out that

<sup>45</sup> C-445/03 *Commission v Luxembourg* REG 2004 s. I-10191.

<sup>46</sup> C-244/04 *Commission v Germany* REG 2006 s. I-00885.

<sup>47</sup> COM (2006)159, p. 6.

<sup>48</sup> COM (2006)159, p. 7–8.

<sup>49</sup> COM (2006)159, p. 7.

<sup>50</sup> SEC (2006) 439.

the Member States had to deepen their cooperation in order to facilitate the access to information.<sup>51</sup>

The guide from 2006 was in 2007 followed by another communication, where the Commission presented the follow-up on, mainly, the duties of the liaison offices.<sup>52</sup> It showed that the situation was improved, but that there still existed deficiencies. The main problem was the quality of the information addressed to posting employers and posted workers. Several liaison offices did not provide information on all relevant languages and the information provided was often too limited and/or complex.<sup>53</sup> As regard the cooperation between Member States, the liaison offices were rarely used. From the few requests that were sent to different liaison offices it was clear that the methods developed at EU level were not always used. The Commission considered the administrative cooperation was essential for the compliance control of the Posting of Workers Directive and therefore it was considered of the utmost importance to correct its deficiencies.<sup>54</sup> A more recent comparative study shows that the situation has visibly improved.<sup>55</sup>

Furthermore, some Member States and the social partners pointed out the mechanism put in place to remedy deficiencies would not be sufficient. Social partners stressed the lack of collective legal actions, whereas some Member States stressed the need for EU-instruments for the effective cross-border sanctioning of infringements by non-national service providers.<sup>56</sup>

### 2.3.5 National responses

The discussion on monitoring of employment conditions for posted workers at EU level took, as we have just seen, at the time place within the frame of free movement of services and in the light of the Lisbon strategy.

The point of departure for the legislative activity in many Member States were however another. Instead it was the enlargement

<sup>51</sup> COM (2006)159, p. 8 – 10.

<sup>52</sup> COM (2007) 304.

<sup>53</sup> COM (2007) 304, p. 9.

<sup>54</sup> COM (2007) 304, p. 9.

<sup>55</sup> Houwerzijl M and von Hoek A, *Comparative Study of the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, VT/2009/0541, March 2011, p. 106.

<sup>56</sup> COM (2007) 304, p. 10.

which motivated new legislation in the area. Many Member States found it necessary to establish additional control measures, due to increased, or fear of increased, worker mobility from the new Member States in Eastern Europe. This activity has increased after the judgements in the Laval quartet.

*Norway* introduced a requirement for posting undertakings to see that the employees had identity cards. This was complemented by an obligation on contracting employers to give detailed information on contractors and employees. The former, exclusively private supervision of work and employment conditions was combined with extended responsibilities for the Labour Inspectorate.<sup>57</sup> After *Laval*, the Norwegian government gradually increased the Labour Inspectorate's capacities. Following its new programme against social dumping, it also introduced an obligation for contracting employers to inform contractors of their obligations and the right to obtain information under certain conditions for trade union representatives working in a contracting employer's undertaking.<sup>58</sup> The latest measure taken was the adoption of joint and several liability for wages including overtime supplements and holiday pay (in force from 1 January 2010).<sup>59</sup>

In 2008, *Denmark* established an obligation for posting undertaking to notify the authorities before posting. This obligation was combined with a register for foreign service providers (RUT). The adoption of RUT derives from the enlargement of the EU in 2004 which, according to the preparatory works had lead to a sharp increase of posted workers in Denmark.<sup>60</sup> Furthermore, Denmark held that effective monitoring by the public authorities was a prerequisite for granting posted workers the rights laid down in the Posting of Workers Directive. Denmark also considered the measures taken to be in line with the Commission's communication COM (2006)159.<sup>61</sup> RUT is intended to operate on the basis that

<sup>57</sup> Evju S, *Safeguarding the National Interests, Norwegian Responses to Free Movement of Services, Posting of Workers, and the Services Directive*, Formula Working Paper no 19, 2010, p. 26.

<sup>58</sup> Evju S, *Safeguarding the National Interests, Norwegian Responses to Free Movement of Services, Posting of Workers, and the Services Directive*, Formula Working Paper no 19, 2010, p. 27.

<sup>59</sup> Evju S, *Safeguarding the National Interests, Norwegian Responses to Free Movement of Services, Posting of Workers, and the Services Directive*, Formula Working Paper no 19, 2010, p. 26 – 27.

<sup>60</sup> Gräs Lind M, *The Danish Law on the Posting of Workers*, Formula Working Paper no 24, 2010, p. 7 – 8.

<sup>61</sup> Gräs Lind M, *The Danish Law on the Posting of Workers*, Formula Working Paper no 24, 2010, p. 8 – 9.

foreign undertakings themselves register information on RUT via a website. Several public authorities such as the National Labour Market Authority and the Working Environment Authority have access to RUT.<sup>62</sup> The trade unions are, on the other hand, treated as any other private actor and have no special access to RUT. Their possibility to monitor is limited to the undertakings which whom they have concluded collective agreements.<sup>63</sup>

In *Finland*, posting did not become an issue until the neighbouring countries in the Baltic became Member States. As a result of the enlargement, Finland established stricter control on posting of workers. These rules comprised a requirement on posting undertakings to keep social documents and to have a representative available for continuous contact with the Finnish authorities. Moreover, rules regarding the contractor's liability when hiring temporary agency workers or subcontracting work were established. The Commission has expressed that it found the Finnish legislation to be on the border line of what was consistent with EU law, but has not taken any actions.<sup>64</sup>

In the *Netherlands*, the enlargement together with the debate following the Bolkestein proposal created a shift from reluctance to legislate on enforcement measures to a more active approach. The national authorities and the labour market parties concluded a framework agreement on cooperation on information in order to facilitate enforcement of the conditions covered by the Posting of Workers Directive, which resulted in giving the Labour Inspectorates a more active role.<sup>65</sup> Contractor's liability in subcontracting and for temporary agency workers was introduced in 2010.<sup>66</sup>

Over all, increased workers' mobility and new requirements from the EU level due to the legal development the last decade has led to the adoption of more public enforcement measures, creating a mix of industrial relation processes and administrative processes,

<sup>62</sup> Gräs Lind M, *The Danish Law on the Posting of Workers*, Formula Working Paper no 24, 2010, p. 9.

<sup>63</sup> Gräs Lind M, *The Danish Law on the Posting of Workers*, Formula Working Paper no 24, 2010, p. 17.

<sup>64</sup> Bruun N, *Finland*, Formula Working Paper No 15, 2010, p. 7 – 8.

<sup>65</sup> Houwerzijl M, *the Dutch Understanding of Posting of Workers in the Context of Free Services Provision and Enlargement: a Neutral Approach?*, Formula Working Paper No. 23, 2010, p. 27 – 28.

<sup>66</sup> Houwerzijl M, *the Dutch Understanding of Posting of Workers in the Context of Free Services Provision and Enlargement: a Neutral Approach?*, Formula Working Paper No. 23, 2010, p. 31 – 32.



new to many Member States. Other Member States have a history of regulating and controlling posting of workers. These countries have, to a larger extent, due to the same legal development on EU level, been subject to the ECJ's scrutiny and therefore been forced to revise the national control measures used, making them more simplified and adjusted to the opinions of the ECJ.<sup>67</sup>

*Sweden* and the *UK* have continued to rely exclusively on private enforcement. Naturally, they are also the two countries who show the largest concern for the *Laval* Quartet's impact on private enforcement.<sup>68</sup> Together with the Netherlands, whose legislation also lack a requirement on posting undertakings to make a declaration prior to posting, they might not have problems with national administrative control measures restricting the free movement of services, but on the other hand, they might not be able to ensure posted workers their rights stemming from the Posting of Workers Directive. As shown from the *Laval* case, Sweden and the UK might not be able to rely on industrial relations processes in the same extent as before, since private enforcement measures have been deemed able to have the same unjustified restricting effect as administrative control measures.<sup>69</sup>

### **2.3.6 A new European strategy?**

The legal evolution of EU law concerning the monitoring of employment conditions of posted workers has not run smoothly during the last decade. The planned Services Directive was transformed into a vaguer version which omitted the rules on enforcement of labour law. The recent case law of the ECJ and the Commission's interpretation of the same led to criticism, especially from the trade unions and from Member States where the enforcement of work and employment conditions to a great extent relied on the trade unions.

With the Lisbon Treaty entering into force, the economic crisis and the above-mentioned problem implementing the policy follow-

<sup>67</sup> Houwerzijl M and von Hoek A, *Comparative Study of the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union*, VT/2009/0541, March 2011, part 4.

<sup>68</sup> Novitz T, *UK Implementation of the Posted Workers Directive 96/71*, Formula Working Paper No.22, 2010 and Ahlberg K, *The Age of Innocence – and Beyond*, Formula Working Paper No. 21, 2010. [Refer to chapter 3 and/or 7 in this book!](#)

<sup>69</sup> [See chapter 7 in this book?](#)

ing the Bolkestein proposal, the Commission found it necessary to yet again “relaunch the Single Market as a key strategic objective of the new Commission”<sup>70</sup>

The first step was to prepare a report containing options and recommendations in order to improve the Single Market. This task was entrusted to Professor Mario Monti. The aim of the Monti Report is to make an overall analysis of what is needed to be done to build a stronger single market, but also of what is needed in order to build a consensus on a stronger single market. In the report it is pointed out that the judgements in the Laval Quartet have revealed the split between those who advocate great market integration and those who believe that it leads to the dismantling of social rights protected at national level. According to professor Monti it is crucial to resolve this divide, or else the EU integration risks losing former supporters such as the trade unions.<sup>71</sup>

The measure needed to be taken, according to the report, is, firstly, to bring more clarity to the interpretation and the implementation of the Posting of Workers Directive. This should be done on the European level.<sup>72</sup>

The Commission presented in its work programme for 2011 that it would put forward a legislative proposal to improve the implementation of the Posting of Workers Directive.<sup>73</sup>

### 3 National monitoring measures and the free movement of services – the state of law

#### 3.1 Introduction

The ECJ has since the 1990s applied the same formula. National monitoring measures are regarded as a restriction of the free movement of services if they are liable to prohibit, impede or ren-

<sup>70</sup> Pres(2009) D/2250, Mission letter from the President of the European Commission to Professor Mario Monti, Brussels 20 October 2009.

<sup>71</sup> *A new Strategy for the Single Market*, Mario Monti, 9 May 2010, p. 68.

<sup>72</sup> *A new Strategy for the Single Market*, Mario Monti, 9 May 2010, p. 70

<sup>73</sup> COM(2010) 623, *Work Programme 2011* p. 6.

der less advantageous to provide services cross border. It seems as every thinkable national monitoring measure is liable of at least making less advantageous to provide services cross border. The question is thus if the measure, as a restriction of the free movement of services, could be justified by overriding reasons of public interest and if it is proportional.

This abstract formula has been applied by the ECJ to different kinds of monitoring measures and we will in the following summarise the conclusions which could be drawn from that case law.

### 3.2 Authorisations and other mandatory controls prior to posting

A series of cases has concerned different measures where the host state require the foreign service provider to contact the host state authorities and await a decision of the authority before posting may take place.

Already in *Säger* (1991) the ECJ established that a requirement to obtain authorization from the authorities in the host Member State before providing services in the country constitutes a restriction on the free movement of services.<sup>74</sup> In the case the German lawyer Manfred Säger, who provided patent renewal services, complained that the English company Dennemeyer provided such services without the necessary licenses, which was only given to persons holding a special professional qualification, such as a qualification as patent agent. The aim of the license was to protect the consumers. In *Säger* the requirement of a license was applied formally equally for both national and foreign service provider, but the requirements were de facto difficult to meet for the foreign service providers. It seems as it was the substantive requirements for obtaining the license which constituted the restriction.

The subsequent case law has mainly treated the situation where employers established in a Member State post workers who are third country nationals. The first case was *Vander Elst* (1994).<sup>75</sup>

Vander Elst, a Belgian service provider, carried out demolition work in France using inter alia four workers which were Moroccan nationals. These workers were lawfully residing in Belgium and had been is-

<sup>74</sup> C-76/90, *Säger* [1991] ECR I-04221 paragraph 14.

<sup>75</sup> C-43/93 *Vander Elst* [1994] ECR I-038003.

sued with work permits. However they did not have work permits issued by the French authorities, which was mandatory according to the French Labour Code. Vander Elst was charged with an administrative fine as the penalty for infringement of the French labour code.

The ECJ considered it a restriction of the free movement of services to prescribe a work permit for the workers from a non-member state in the host Member State when the service provider already fulfilled the same requirement in the Member State of origin. The restriction could not be justified. The third country nationals were hired on long-term contracts and the ECJ noted the fact that the application of the Belgian system excluded any substantial risk of the workers being exploited or of competition between undertakings being distorted.

In *Commission v Luxembourg* (2004), the ECJ examined the conditions for obtaining a work permit which aimed at reducing the risk of underpaid third country workers.<sup>76</sup> According to Luxembourgian law, an undertaking engaging workers from a non-member state had to be able to provide a bank-guarantee in order to obtain an individual or collective work permit. A collective work permit was only issued if the workers in question had a contract of employment of indefinite duration with their undertaking of origin and that that contract began at least six months prior to the employment in Luxembourg.

The ECJ held that a work licensing mechanism structured as the one in the Luxembourg legislation could not be considered an appropriate means to ensure that the national labour legislation or labour agreements were followed. The conditions resulted in formalities and procedural delays which might discourage service providers who provide services with workers who are third country nationals.<sup>77</sup> Further, the requirement of a bank-guarantee to cover costs in the event of repatriation of a worker was also considered to constitute a disproportionate measure relative its objective. According to the ECJ, it would be equally effective and less restrictive to order to pay costs actually incurred due to repatriation.<sup>78</sup> Furthermore, the condition that the workers covered by a collective work permit had to have contracts of employment of indefinite

<sup>76</sup> C-445/03 *Commission v. Luxembourg* REG 2004 I-10191.

<sup>77</sup> C-445/03, *Commission v. Luxembourg* REG 2004 I-10191, paragraph 30.

<sup>78</sup> C-445/03, *Commission v. Luxembourg* REG 2004 I-10191, paragraph 47.

duration concluded six months prior to the deployment in Luxembourg render it difficult for undertakings in sectors that, due to the particular features of the activity in question, frequently uses short-term and service-specific contracts.<sup>79</sup> It was also considered to affect the situation of newly-created undertakings. The ECJ stated that a less restrictive measure would be to provide the local authorities with information showing that the situation for the workers is lawful.<sup>80</sup>

In *Commission v Germany (2006)* Germany applied an application procedure to obtain a visa with a prior check in order to ensure that information about the employment conditions for workers from non-member states was provided and that the relevant conditions were met.<sup>81</sup> The ECJ considered that, although the German system was not an authorization like the procedure in *Commission v Luxembourg (2004)* the administrative procedure could, due to the prior check, render it more difficult or even impossible to exercise the freedom to provide services through posted workers from non-member states, especially when the services to be provided necessitate a certain speed of action.<sup>82</sup> The ECJ concluded that a less restrictive measure would be to demand that the service provider makes a prior declaration certifying that the situation of the workers concerned is lawful. The national authorities could then *subsequently* check that the information given comply with the national requirements.<sup>83</sup> Germany had therefore not fulfilled its obligations under Article 56 TFEU.

In *Commission v Austria (2006)* a procedure where the foreign service had to receive a confirmation by the host state authorities before the posting could take place was equated with a prior authorisation.<sup>84</sup> The ECJ concluded that a measure that would be just as effective yet less restrictive was the general obligation on a service provider to report to the local authorities the number of workers to be posted, the anticipated duration of their presence and the provision or provisions of services justifying the posting.<sup>85</sup> A prior declaration of that sort would, according to the ECJ, enable the national

<sup>79</sup> C-445/03, *Commission v. Luxembourg* REG 2004 I-10191, paragraph 33.

<sup>80</sup> C-445/03, *Commission v. Luxembourg* REG 2004 I-10191, paragraph 46.

<sup>81</sup> C-244/04 *Commission v Germany* REG 2006 I-00885.

<sup>82</sup> C-244/04, *Commission v Germany* REG 2006 I-00885, paragraph 35.

<sup>83</sup> C-244/04, *Commission v Germany* REG 2006 I-00885, paragraph 45.

<sup>84</sup> C-168/04, *Commission v Austria* REG 2006 I-09041, paragraph 41.

<sup>85</sup> C-168/04, *Commission v Austria* REG 2006 I-09041, paragraph 52.

authorities to check the compliance with Austrian regulations *during the posting* and ensure that the third country nationals carrying out the work did not constitute a threat to public policy or public security.

*Santos Palbota* (2010) did not concern procedures specially related to posted third country citizens, but some administrative procedures in Belgium aiming at making it possible to monitor the compliance of employers posting foreign workers to Belgium with the terms and conditions of employment set out in Posting of Workers Directive.

According to Belgian law an employer established in Belgium shall draw up and keep some social documents regarding their employees, in particular of individual accounts and pay slip. An employer failing to do so may be subject to penal sanction. Belgium has introduced a simplified procedure concerning employers posting workers to Belgium. Such an employer may be relieved from these requirements during six months, if he or she first, send the Belgian authorities a prior declaration of posting and, second, keep available to those authorities copies of the equivalent document. The Belgian authorities will, within five working days after the declaration, certify the declaration by sending a registration number to the employer. The Posting begins only after the registration number has been notified.

The ECJ concluded that a general declaration cannot be combined with other requirements prior to the posting in order to be consistent with Community law.<sup>86</sup>

It follows from this case law that a general obligation to have a work permit or other kinds of general authorizations issued by the host Member State are not in line with the free movement of services, due to the risk of delays. The host Member State has the right to check that posted third country nationals lawfully reside in the country of origin, but that check should be based on information provided by the posting undertaking and should not be combined with an authorisation in the host Member State.

However, requirements to obtain authorization to provide services can nevertheless be acceptable *within certain sectors* (see below).

The ECJ has, on the other hand, stated that the host Member State may require a prior declaration from the posting undertaking.

<sup>86</sup> C-515/08, *Santos Palbota* REU 2010 I-0000.

The declaration may, however, not be combined with any kind of prior check by or confirmation from the authorities in the host Member State. Furthermore, the ECJ has established that the host Member State cannot require that the posting undertakings inform the authorities each time a worker changes job site within the host Member State, at least not if the same requirement does not apply for undertakings established within the territory of the host Member State.<sup>87</sup>

### 3.3 Social documents

Access to relevant information is, according to the ECJ, a key prerequisite for the national control of posting undertakings.<sup>88</sup> Thus it is important to examine the Member States' possibilities to require information from posting undertakings.

In *Arblade* (1999) the ECJ stated that undertakings established in another Member State have to comply with the rules of the Member State of the establishment. If they also have to draw up and maintain social documents according to the rules in the host Member State they are subject to additional economic and administrative burdens, which constitute a restriction of the free movement of services.<sup>89</sup>

The question is thus if the restrictions of providing social documents could be justified according to the Gebhard-test.

The ECJ has recognised the host Member State's need of access to information in order to be able to perform effective control measures.<sup>90</sup> Difference in the social documents required in the Member States might make it impossible to carry out the monitoring necessary to ensure the protection of the posted workers. Where such differences exists it is justified to require that the posting undertaking, besides the requirements in the Member State of establishment, also draws up documents according to the rules in the host Member State.<sup>91</sup> On the other hand, certain differences in form and content cannot justify the burden of keeping two sets of

<sup>87</sup> C-490/04, *Commission v Germany* REG 2007 I-06095.

<sup>88</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 61 – 62.

<sup>89</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 58 – 59.

<sup>90</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 61.

<sup>91</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 63.

documents. When the employer is subject to obligations in the Member State of establishment, for instance to keep social documents, which are comparable regarding their objective and apply to the same workers and the same working period, the documents drawn up according to the rules in the Member States of establishment must be considered sufficient. In that case, it is enough that the posting undertaking ensure that the social documents drawn up according to the rules in the Member State of establishment are kept at the work place or in another way are accessible for the monitoring authorities in the host Member State.<sup>92</sup>

In *Finalarte* (2001), the ECJ, on the other hand, accepted that a host State could claim more extensive information from undertakings established in other Member State than from undertakings established within the Member State in question.<sup>93</sup>

*Finalarte* concerned the German paid leave funds scheme established for construction workers. Since the construction industry is characterised by short term employments the paid leave funds scheme was designed to ensure construction workers paid leave despite a frequent change of employers. The system enabled the worker to accumulate holiday entitlement acquired with different employers in the course of a reference year and to claim the full entitlement from his current employer. The ECJ stated that the fact that undertakings established in another Member State had to dispense more extensive information constituted a restriction of the free movement of services, especially compared to *Arblade* where undertakings established in another Member State had equal obligations as undertakings established in the host Member State, but were the national rules, nevertheless, constituted a restriction.<sup>94</sup> The ECJ pointed out that the difference in treatment could, after all, be explained by objective differences.<sup>95</sup> Whether that was the case in the current situation was up to the national court to determine. The ECJ had although opened for the possibility to require more extensive information from undertakings established in another Member State.

<sup>92</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 64 and 66.

<sup>93</sup> Joined cases C-49/98, C-50/98, C-52/98 – C-54/98 & C-68/98 – C-71/98 *Finalarte* REG 2001 I-07831.

<sup>94</sup> Joined cases C-49/98, C-50/98, C-52/98 – C-54/98 & C-68/98 – C-71/98 *Finalarte* REG 2001 I-07831, paragraph 71.

<sup>95</sup> Joined cases C-49/98, C-50/98, C-52/98 – C-54/98 & C-68/98 – C-71/98 *Finalarte* REG 2001 I-07831, paragraph 73.



In *Commission v Germany* (2007) the ECJ established that an obligation to translate social documents to the language spoken in the host Member State constituted a restriction on the freedom to provide services, due to additional administrative burdens.<sup>96</sup> On the other hand, without translated documents, the monitoring executed by the national authorities would be extremely difficult or nearly impossible to carry out.<sup>97</sup> The restriction could therefore be justified. The ECJ added that the burden due to the translation of the four documents required by the German rules, was not excessive compared to the decisive importance it had for the possibility to ensure compliance with the national rules on labour protection.<sup>98</sup>

The national authorities can require that the social documents concerning the workers in question are the authorities at hand before the deployment of the workers.<sup>99</sup> The provision, establishing the conditions for the retaining of documents, must however be clear and foreseeable in order to not dissuade undertakings to post workers in the host Member State.<sup>100</sup>

In *Arbalade* and *Finalarte* the ECJ held that it is the responsibility of the authorities in the host Member State to make the final proportionality test.

### 3.4 A branch or a representative in the host state

The requirement to have a branch in the host Member State has been examined in two cases concerning posting of workers. Commonly, the Member States have argued that certain sectors, because of their distinctive characters, constitute risks for workers or give the workers specific authorities that justify the requirement of a branch within the Member State.

The former concern was raised by Italy in *Commission v Italy* (2007), where one of the conditions to obtain the authorisation needed to provide temporary labour was that the undertaking had a branch in Italy. The ECJ established that an obligation to set up a branch in a Member State in order to carry out a service is directly contrary to the freedom to provide services since it renders it im-

<sup>96</sup> C-490/04, *Commission v Germany* REG 2007 I-06095, Paragraph 68 – 69.

<sup>97</sup> C-490/04, *Commission v Germany* REG 2007 I-06095, paragraph 71.

<sup>98</sup> C-490/04, *Commission v Germany* REG 2007 I-06095, paragraph 76.

<sup>99</sup> C-515/08, *Santos Palhota* REU 2010 I-0000, paragraph 54.

<sup>100</sup> C-319/06, *Commission v Luxembourg* REG 2008 I-04323, paragraph 78 – 81.

possible for undertakings established in other Member States to provide services in the Member State in question. For such a requirement to be accepted it must be shown that it constitutes an indispensable condition for attaining the objective pursued.<sup>101</sup> Italy stressed the fact that the provision of temporary labour was considered a sector where workers are particularly vulnerable and, therefore, it was important to ensure that Italian workers could bring proceedings against their employer in an Italian court. The ECJ rejected the argument. The requirement was considered to go beyond what was necessary to protect the safety of workers. Furthermore, the 1968 Brussels Convention made it possible to sue the employer in the contracting state where the workers usually work, independent of the domicile of the employer.<sup>102</sup>

*Commission v Germany (2001)* concerned an indirect requirement to have a branch in the host Member State.<sup>103</sup> In order to contract out labour, an undertaking had to obtain an authorisation. In the building sector, contracting out of labour, as a professional activity, was prohibited. It was nevertheless allowed to contract out labour between undertakings in the building sector if they were covered by the same framework collective agreement. Furthermore, the secondment of workers within a consortium in the building sector was, according to the German law, not to be considered as contracting out workers if the same collective agreement covered all members of the consortium. Only undertakings established in Germany could be covered by German collective agreements, consequently, undertakings established in other Member States were blocked from the above mentioned activity. The ECJ did not find the German measures taken consistent with the freedom to provide services. As mentioned above Germany had not shown that the above mentioned requirement were indispensable to provide social protection in the building sector.

Another question is if a Member State can require that a posting undertaking has a representative on the territory of the host Member State. This question was addressed in *Arblade* and *Commission v Luxembourg (2008)*.<sup>104</sup> Both cases concerned a requirement to have a

<sup>101</sup> C-279/00, *Commission v Italy* REG 2002 I-01425, paragraph 17 – 18.

<sup>102</sup> C-279/00, *Commission v Italy* REG 2002 I-01425, paragraph 24.

<sup>103</sup> C-493/99, *Commission v Germany* REG 2001 I-08163.

<sup>104</sup> Joined Cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435 and C-319/06, *Commission v Luxembourg* REG 2008 I-04323.

representative with a residential address in the host Member State, whose responsibility was to keep available the social documents required according to the rules in the host Member State. The representative also had to be a natural person.

In *Arblade*, the representative was obliged to retain the social documents for five years after the employer had ceased to employ workers in the host Member State. This could not be justified according to the ECJ. At least not under the conditions put down in the national law, where the representative had to be a natural person and not a legal person.<sup>105</sup> During the posting, the employer had the possibility to choose if the social documents were to be kept at one of the workplaces or at the place of residence of the representative. That was not the case in *Commission v Luxembourg* where the social documents had to be kept at the residential place of the representative.<sup>106</sup>

In *Arblade*, the ECJ had established that it was not a sufficient justification that an enforcement measure, such as a representative on the territory of the host Member State, may make it easier for the authorities of that State to perform their supervisory task. It must be shown that the national authorities cannot carry out their supervisory task effectively unless the posting undertaking has a representative designated to retain the social document.<sup>107</sup> The ECJ did not find that the requirement to have a representative that retained the documents for five years after the posting of workers had ended was necessary since there were other less restrictive measures, such as sending the documents to the competent authorities in the host Member State.<sup>108</sup>

In *Arblade* the ECJ focused on the requirement to have a representative that kept the documents after the posting of workers had ended. In *Commission v Luxembourg*, on the other hand, the ECJ focused on the keeping of documents during the posting. The ECJ found that there were less restrictive measures to take. Instead of having a representative resided in the host Member State responsible for the documents, the employer could designate a worker with

<sup>105</sup> Joined Cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 77.

<sup>106</sup> C-319/06, *Commission v Luxembourg* REG 2008 I-04323, paragraph 7.

<sup>107</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 76.

<sup>108</sup> Joined cases C-369/96 and C-376/96, *Arblade* REG 1999 I- 08435, paragraph 78.

the responsibility to ensure that the documents are available for the competent national authorities.<sup>109</sup>

### 3.5 Chain liability

In *Wolff & Müller (2004)* the Court addressed a national system of chain liability.<sup>110</sup>

A Portuguese worker, Félix, was employed by a Portuguese construction undertaking which carried out construction work for the German company Wolff & Müller. After discovering that he had received a salary lower than the German minimum wage, Félix sought payment jointly from his employer and from Wolff & Müller for unpaid remuneration. The German court found that Wolff & Müller could be liable as a guarantor according to German law, but that the German provision might be contrary to Article 56 TFEU.

The ECJ starts by stating that the Posting of Workers Directive is applicable and that, according to that directive, the Member States are obliged to take appropriate measures in event of non-compliance with its terms.<sup>111</sup> The Court further states that that it is apparent from the wording of Article 5 that the Member States have a wide margin of appreciation in determining the form and detailed rules governing the adequate procedures. In doing so they must however at all times observe the fundamental freedoms guaranteed by the Treaty.<sup>112</sup> According to the Court a provision, such as the German contractor's liability, that reinforces the procedural arrangements, enabling for a posted worker to assert his right must be seen as a worker protection measure.<sup>113</sup> As such it can constitute a justified restriction of the freedom of services. The ECJ did not comment on whether the German provision constituted a restriction or if such a possible restriction was justifiable under these specific circumstances, but left that for the national court to decide. However, it follows from the Courts reasoning that national provisions on chain liability are not contrary to EU law *per se*.

<sup>109</sup> C-319/06, *Commission v Luxembourg* REG 2008 I-04323, paragraph 91.

<sup>110</sup> C-60/03, *Wolff & Müller* REG 2004 I-09553.

<sup>111</sup> C-60/03, *Wolff & Müller* REG 2004 I-09553, paragraph 28.

<sup>112</sup> C-60/03, *Wolff & Müller* REG 2004 I-09553, paragraph 30.

<sup>113</sup> C-60/03, *Wolff & Müller* REG 2004 I-09553, paragraph 36 – 37.

## 4 Concluding remarks

[...]