



Kenner, Jeff (2017) The enterprise, labour and the Court of Justice. In: Enterprise and social rights. Kluwer Law International, pp. 199-247. ISBN 978-90-411-8621-8

**Access from the University of Nottingham repository:**

<http://eprints.nottingham.ac.uk/44122/1/Enterprise%20and%20Social%20Rights%20-%20Chapter%2012%20-%20Kenner%20PUBLISHED.pdf>

**Copyright and reuse:**

The Nottingham ePrints service makes this work by researchers of the University of Nottingham available open access under the following conditions.

This article is made available under the University of Nottingham End User licence and may be reused according to the conditions of the licence. For more details see: [http://eprints.nottingham.ac.uk/end\\_user\\_agreement.pdf](http://eprints.nottingham.ac.uk/end_user_agreement.pdf)

**A note on versions:**

The version presented here may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the repository url above for details on accessing the published version and note that access may require a subscription.

For more information, please contact [eprints@nottingham.ac.uk](mailto:eprints@nottingham.ac.uk)

## CHAPTER 12

# The Enterprise, Labour and the Court of Justice\*

Jeff Kenner

---

### 12.1 INTRODUCTION

There is a palpable disconnect between the standard bi-dimensional model of the employment relationship and the multidimensional mutations in contractual arrangements and the organisation of enterprises in the early decades of the twenty-first century.<sup>1</sup> European Union (EU) labour laws, originating from the 1970s, regulate the behaviour of the enterprise<sup>2</sup> and its workers, reflecting the standard model. Transnational labour regulations were drafted on the assumption that both the enterprise and its workforce were easily identified, were relatively static, were in a proximate physical space, and knew each other directly, or at least indirectly through representatives of management and labour. Over time, however, both enterprises and workers have become more frangible as a consequence of the phenomena of globalisation, liberalisation and

---

\* This Chapter is based on a presentation made at Ca' Foscari University of Venice on 6 July 2015.

1. See Adalberto Perulli in the Introductory Chapter in this collection.
2. For the purposes of this Chapter, and to be consistent with the theme of the book, I have used the term 'enterprise' generically, to include 'an undertaking', which may be public or private, and also a 'business' or 'firm'. See R. E. Allen (ed.), *The Concise Oxford Dictionary of Current English*, 8th edn, 390 (Clarendon Press 1990). I also agree with Jean-Phillipe Robé that a 'multinational company' is also an 'enterprise' because it is 'an economic organization that produces goods or services and which has structured its business activities on the territory of numerous States'. See Jean-Phillipe Robé, *Globalization and Constitutionalization of the World Power System*, in Jean-Phillipe Robé, Antoine Lyon-Caen and Stéphane Vernac (eds), *Multinationals and the Constitutionalization of the World-Power System* 11, 13 (Routledge 2016).

privatisation. The standard enterprise model has undergone, what Hugh Collins has described as ‘vertical disintegration’, under which managers of large firms arrange, as a concerted strategy, ‘subcontracting, franchising, concessions and outsourcing’ of aspects of production.<sup>3</sup> Also, workspaces have become ‘de-territorialised’ as workers, under contracts for services, become disconnected and reconnected to national territory as labour markets integrate,<sup>4</sup> heightening concerns about, on the one hand, undercutting of labour standards or social dumping and, on the other hand, undermining the bonds of social solidarity. This process of transformation of the enterprise has been accelerated by liberalisation of services and rules on the establishment of companies in the EU’s single market, leading to regulatory competition between Member States,<sup>5</sup> and a drive by the European Commission, under the European semester process of economic policy guidance,<sup>6</sup> to encourage labour market reforms in a policy climate that, as Catherine Barnard observes, prioritises ‘the economic over the social’.<sup>7</sup>

As a consequence, EU labour law today simply does not fit with multidimensional globalised systems of corporate organisation and contracting where strategic decisions affecting continuing operations at subsidiaries or units of the enterprise, situated in Europe, are taken unilaterally, often without informing local management, and sometimes outside the territorial reach of EU regulation. Indeed, it is often difficult to identify the employer. Is it the global corporation, which may be domiciled outside the EU, or a group of enterprises linked by complex and often opaque organisational arrangements designed to avoid tax liabilities. Moreover, just as the decision-making processes of the enterprise have changed, so too have the methods for deploying its workforce. As a result, an increasingly diminishing *core* of workers fall under the protective umbrella of EU labour law, while an ever growing *contingent* workforce of outsourced or subcontracted labour, posted workers, agency workers, casual or on demand ‘zero-hour’ contract workers, or ‘gig’<sup>8</sup> workers, have limited employment

- 
3. Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws* (1990) 10/3 OJLS 353, 353.
  4. See Ines Wagner, *Posted Work and Deterritorialization in the European Union: A Study of the German Construction and Meat Industry* (2015) *Jyväskylä Studies in Education, Psychology and Social Research* 521, p. 26: <https://jyx.jyu.fi/dspace/handle/123456789/45494>
  5. See Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?* Centre for Business Research, University of Cambridge Working Paper No. 323, March 2006: <https://core.ac.uk/download/pdf/7151307.pdf>.
  6. See European Commission, ‘The European Semester’: [http://ec.europa.eu/economy\\_finance/economic\\_governance/the\\_european\\_semester/index\\_en.htm](http://ec.europa.eu/economy_finance/economic_governance/the_european_semester/index_en.htm)
  7. Catherine Barnard, *EU Employment Law and the European Social Model: The Past, the Present and the Future* (2014) 67 *Current Legal Problems* 199, 204–205.
  8. Workers in the ‘gig economy’ have individual contracts to work, when required, usually via a mobile phone app. Examples include Uber taxis and Deliveroo drivers. See Will Hutton, *The Gig Economy Is Here to Stay. So Making It Fairer Must Be a Priority*, *The Guardian* (4 September 2016).

protection or none at all.<sup>9</sup> Contingency, as Antonio Lo Faro observes, is synonymous with the flexibility of both the enterprise and the worker, and, in its most extreme form, the worker is ‘not part of the organisational and productive “core” of the disintegrated firm’.<sup>10</sup>

This chapter addresses two specific issues arising from the transformation of the relationship between enterprises and workers with reference to case law of the Court of Justice of the EU (the Court). The first issue, discussed in Part 12.2, concerns the approach of the Court to interpreting and applying the concepts of ‘employer’, ‘undertaking’ and ‘establishment’ in complex corporate redundancy scenarios falling within the scope of the EU Collective Redundancies Directive (CRD).<sup>11</sup> It asks to what extent, if at all, in the light of this case law, the Directive is effective in its aim of protecting workers in a variety of redundancy contexts, such as strategic ‘downsizing’ decisions taken at the global or national level of the enterprise or insolvencies leading to mass redundancies in multiple local establishments.

The second issue, in Part 12.3, concerns the Court’s rulings on the validity of national or local laws, or collective agreements, concerning terms and conditions of employment in contracts, such as a requirement to pay the applicable minimum wage, falling within the scope of EU directives on posted workers and/or public procurement. In particular, the cases discussed concern, mainly, the Posted Workers Directive (PWD), 96/71,<sup>12</sup> which provides a guarantee for workers posted to the territory of a Member State of, *inter alia*, minimum rates of pay as defined by law or applicable collective agreements, and, secondly, the Public Procurement Directive, now Directive 2014/24, which grants contracting authorities the right to lay down ‘special conditions’ relating to the performance of a contract which may concern ‘social or employment-related considerations’.<sup>13</sup> In the context of both directives, any national measure must be compatible with the freedom to provide services under Article 56 TFEU. Based on analysis of this case law, it asks, to what extent the relevant provisions in these directives can be used to provide minimum protection for workers, both core and contingent, and mitigate against the most harmful effects of social dumping. Finally, Part 12.4, adds some concluding remarks.

---

9. See generally, Edoardo Ales, Olaf Deinert and Jeff Kenner (eds), *Core and Contingent Work in the European Union* (Hart Publishing 2017).

10. Antonio Lo Faro, *Contingent Work: A Conceptual Framework*, in Edoardo Ales et al., *ibid.*, 7–23, 8.

11. Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 225, 12.8.1998, 16–21.

12. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, 1–6.

13. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242, Art. 70 (replacing Directive 2004/18, Art. 26).

## 12.2 COLLECTIVE REDUNDANCIES

### 12.2.1 Analysis of the CRD

The EU CRD, 98/59,<sup>14</sup> was first introduced as a crisis measure intended to alleviate the consequences for workers of economic decline in the mid-1970s, particularly in the private manufacturing sector where unemployment was rising fast as factories closed.<sup>15</sup> It was not intended to be interventionist. According to the European Commission, closing down some companies was ‘an integral part of the evolution towards more promising activities’.<sup>16</sup> Ultimately the decision of the management to close down an enterprise, or drastically reduce the size of the workforce, is unfettered by the Directive. Instead, the Directive, as amended, provides a mechanism for constructive dialogue between the social partners to ensure that, where ‘collective redundancies’<sup>17</sup> are contemplated by the employer in qualifying ‘establishments’, but the decision has not yet been made to terminate employment contracts, a process is followed whereby consultations begin with workers’ representatives ‘in good time with a view to reaching an agreement’.<sup>18</sup> Such an agreement should, at least, cover ‘ways and means of *avoiding* collective redundancies or *reducing* the numbers of workers affected, and *mitigating* the consequences by recourse to accompanying social measures’ such as redeployment or retraining.<sup>19</sup> In order to enable workers’ representatives ‘to make constructive proposals, the employers shall in good time during the course of the consultations’ supply them with relevant information including specific details notified in writing.<sup>20</sup> It is only once the ‘employer’ is ‘contemplating’ redundancies that the procedural safeguards

---

14. Council Directive 75/129/EEC of 17 February 1975 on the approximation of the laws of the Member States relating to collective redundancies, OJ L 48, 22.2.1975, 29–30. *See also*, Council Directive 92/56/EEC of 24 June 1992 amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies, OJ L 245, 26.8.1992, 3–5. The two directives were consolidated and replaced by *Council Directive 98/59/EC of 20 July 1998 on the approximation of the laws of the Member States relating to collective redundancies*, OJ L 225, 12.8.1998, 16–21.

15. *See* Jeff Kenner, *EU Employment Law* 28 (Hart Publishing 2003).

16. European Commission, Explanatory Memorandum, 1972, reproduced in *Bulletin No. 4*, Institute of Labour Relations, University of Leuven, 206 (1973).

17. Directive 98/59, Art. 1(1)(a) defines ‘collective redundancies’ as ‘dismissals effected by an employer for one or more reasons not related to the individuals concerned’. The Court has given a Union meaning to the concept of redundancy as ‘any termination of [a] contract of employment not sought by the worker, and therefore without his consent’, *Case C-55/02 Commission v. Portugal* [2004] ECR I-9387, para. 50. For further discussion, *see* Catherine Barnard, *EU Employment Law*, 4th edn, 630–642 (OUP 2012).

18. *Directive 98/59/EC*, Art. 2(1).

19. *Ibid.* Art. 2(2). Emphasis added.

20. *Ibid.* Art. 2(3). Under Art. 2(3)(b) the specified information includes: the reason for the projected redundancies; the number and categories of workers to be made redundant by reference also to the numbers normally employed; the period over which the projected redundancies are to be effected; the criteria proposed for the selection of workers to be

outlined above apply, introducing a subjective element into what is otherwise meant to be an objective process.<sup>21</sup>

Each Member State is left with considerable freedom to apply the Directive in a fashion that fits with their indigenous systems of labour law and industrial relations.<sup>22</sup> For example, Member States can choose between options for rules governing the size of qualifying ‘establishments’ and the timescale of the redundancies. These rules significantly limit the scope of the Directive. To count as ‘collective redundancies’ for the purpose of the Directive, the minimum number of redundancies relating to the size of the ‘establishment’ under Article 1(1)(a) is:

- (i) Either, over a period of thirty days:
  - at least ten in establishments normally employing more than twenty and less than 100 workers;
  - at least 10% of the number of workers in establishments normally employing at least 100 but less than 300 workers;
  - at least thirty in establishments normally employing 300 workers or more;
- (ii) or, over a period of ninety days, at least twenty, whatever the number of workers normally employed in the establishments in questions.

Such flexibility demonstrates that the CRD ‘carries out only a partial harmonisation of the rules for the protection of workers in the event of collective redundancies’.<sup>23</sup> Partial harmonisation allows for significant diversity in the transposition of the Directive, as a minimum standards measure, including the possibility of introducing ‘provisions which are more favourable to workers or to promote or to allow the application of collective agreements more favourable to workers’.<sup>24</sup>

An important feature of the Directive, as amended in the early 1990s, is a transnational dimension whereby, under Article 2(4), the information and consultation obligations are applicable ‘irrespective of whether the decision regarding collective redundancies is being taken by the employer or by an undertaking controlling the employer’. Also, it is not a defence on the part of the employer that ‘the necessary information has not been provided to the employer by the undertaking which took the decision leading to collective redundancies’. The revised Article 2(4) was necessary to respond to ‘accelerating corporate

---

made redundant in so far as this is a requirement of national law and/or practice; and the method for calculating any redundancy payments other than those arising out of national law and/or practice.

21. See Barnard, *supra* n. 17, at 631.

22. Case C-383/92 *Commission v. UK* [1994] ECR I-2435.

23. Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy* [2009] ECR I-8163, para. 60.

24. Directive 98/59, Art. 5.

restructuring' arising from mergers and takeovers often involving enterprises based outside the EU, but no further updating of the Directive has taken place over a twenty-five-year period in which there has been exponential growth in the power and influence of globalised enterprises using communication and trade networks, to distribute products and services worldwide, often operating outside the boundaries of State authority.<sup>25</sup>

The Directive contains a range of terms to describe the enterprise, or parts thereof, specifically: 'undertaking'; 'controlling undertaking'; 'establishments'; and 'employer'. Article 1, concerning definitions and scope, is silent on the precise meaning of these terms. It is therefore left to the Court to interpret them in the context of the Directive's overarching aim, whereby 'it is important that greater protection should be afforded to workers in the event of collective redundancies while taking into account the need for balanced economic and social development within the [Union]'.<sup>26</sup> Let us now turn to four cases that illustrate the difficulty of this judicial task.

### 12.2.2 Case Law

In the first case, *AEK v. Fujitsu Siemens Computers* ('*AEK*'),<sup>27</sup> a reference from the Supreme Court of Finland, the Court was asked to consider, for the first time, the scope of the obligations under the Directive, including the revised Article 2(4), in a situation where the decision to close an undertaking was taken by the board of directors of the undertaking's parent company. The redundancies arose following a merger between the computer businesses of Fujitsu and Siemens to form a new parent group of companies, Fujitsu Siemens Computers (Holding) BV (Netherlands). Following the merger, the board of directors of the parent company, based in the Netherlands, accepted a proposal from the company's executive council to 'disengage' from a production plant in Finland. On the same day, the local management of the parent company's Finnish subsidiary, Fujitsu Siemens Computers Oy, began a six-week period of consultations with the trade unions at the plant. Immediately after this process was complete, the board of the parent company took a final decision to terminate the company's operations in Finland with the exception of computer sales. Following this decision, the Finnish subsidiary dismissed 450 out of 490 employees at the plant. The main trade union at the plant, AEK, brought an action against the subsidiary claiming that it had infringed its obligations under the Finnish law transposing the Directive. It was argued that the parent company had separated the Finnish factory from the company group and it had, alone, made the decision to close the

---

25. See especially, Robé, *supra* n. 2, at 11.

26. Directive 98/59, recital 2 of the preamble.

27. Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy* (hereinafter '*AEK*') [2009] ECR I-8163.

factory. The national court asked a series of questions which can be distilled into three core questions, with subquestions, summarised below.<sup>28</sup>

Firstly, what is the meaning of the expression ‘is contemplating redundancies’ so as to determine the time at which the obligation to hold consultations starts? Is the obligation to start consultations triggered when the strategic decision to make collective redundancies is finally made or at an earlier stage at which a need for collective redundancies is expected?<sup>29</sup>

In its answer, the Court emphasised the temporal application of the Directive. The obligations of consultation and notification become operative when there is an intention to make ‘projected’ collective redundancies but prior to the employer’s decision to actually terminate employment contracts.<sup>30</sup> This means that the notification by the employer is not a *fait accompli* but rather it is the commencement of a process under which there is a possibility of avoiding or at least reducing collective redundancies, or mitigating the consequences.<sup>31</sup> Once the employer has contemplated collective redundancies, or has a plan for them, the information and consultation obligations are triggered.<sup>32</sup> In the specific context of the case, the effect of the revised Article 2(4), concerning decisions taken by controlling undertakings, is to trigger the obligation to hold consultations ‘where the prospect of collective redundancies is not directly the choice of the employer’<sup>33</sup> and ‘even though the employer may not have been immediately and properly informed of that decision’.<sup>34</sup> Applying Article 2(4), therefore, ensures, in the context of ‘an economic background marked by the increasing presence of groups of undertakings’, there is ‘greater protection for workers in the event of collective redundancies’ in situations where there is a controlling undertaking.<sup>35</sup> It followed that, for this objective to be fully effective, ‘the consultation procedure must be started by the employer once a strategic or commercial decision compelling him to contemplate or to plan for collective redundancies has been taken’.<sup>36</sup>

Secondly, in a case involving a group of undertakings, does the obligation to start consultations on the collective redundancies contemplated arise even

---

28. For the full set of questions *see*, *AEK*, para. 30.

29. *AEK*, para. 36.

30. *AEK*, paras 38–40, referencing Directive 98/59, Arts 2(1) and 3(1). *See* further, Case C-188/03 *Junk* [2005] ECR I-885, paras 36–37.

31. *AEK*, para. 38.

32. *AEK*, para. 41. *See* Case 248/83 *Dansk Metalarbejderforbund and Specialarbejderforbundet i Danmark* [1985] ECR 553, para. 17.

33. *AEK*, para. 42.

34. *AEK*, para. 43.

35. *AEK*, para. 44, referencing recital 2 of the preamble cited above. *See* Case C-270/05 *Athinaiiki Chartopoïia* [2007] ECR I-1499, para. 25.

36. *AEK*, para. 48.



before the employer is able to supply all the required information to the workers' representatives?<sup>37</sup> Also, when is the consultation procedure to be concluded?<sup>38</sup>

In reply, the Court explained that the process is designed to be flexible, to ensure that even if the subsidiary, the 'employer', did not have all the required information at the start of consultations it would be possible to provide it 'during the course of the consultations'<sup>39</sup> and 'to enable the workers' representatives to participate in the consultation process as fully and effectively as possible and, to achieve that, any new relevant information must be supplied up to the end of the process'.<sup>40</sup> For the purposes of Article 2(4), 'the decision' has been taken by the parent company and it is obliged to provide the necessary information to the employer under its control so that the latter can fulfil the information, consultation and notification obligations.<sup>41</sup> Therefore, the obligation to start consultations does not depend on whether the employer is already able to supply the workers' representatives with the necessary information concerning, *inter alia*, the reasons for the projected redundancies, the number of redundancies, and the period over which they are to be effected.<sup>42</sup> Also, the employer must fulfil all of the consultation obligations in the Directive before any decision on the termination of contracts is taken.<sup>43</sup>

Thirdly, should the obligation to start consultations arise when the employer or the parent company, which controls the employer, is contemplating collective redundancies and, in order for the obligation to start consultations to arise, must the subsidiary, within which the redundancies are contemplated, be identified?<sup>44</sup>

The Court's answer was very specific. Under the scheme of the Directive only the employer, who is in an employment relationship with the workers, has the obligation to inform, consult and notify.<sup>45</sup> The fact that the parent undertaking controls the employer, even if it can take decisions which are binding on the employer, does not make it the employer.<sup>46</sup> As the Directive provides only partial harmonisation it does not restrict the freedom of a group of undertakings to organise their activities in a fashion that best suits their needs.<sup>47</sup> It followed, as a specific consequence of the introduction of Article 2(4), that the Finnish subsidiary, as the immediate 'employer' of the workers in the 'establishment', could not escape from its obligations under the Directive simply because the decision to disengage from the plant was taken by the parent company. Because

---

37. *AEK*, para. 50.

38. *AEK*, para. 66.

39. *AEK*, paras 52–53.

40. *AEK*, para. 53.

41. *AEK*, EU:C:2009:241, Opinion of Advocate General Mengozzi, para. 40.

42. *AEK*, judgment, para. 55, with reference to Art. 2(3)(b) of Directive 98/59.

43. *AEK*, paras 66–72, applying Case C-188/03 *Junk* [2005] ECR I-885, para. 45.

44. *AEK*, para. 56.

45. *AEK*, para. 57.

46. *AEK*, para. 58.

47. *AEK*, paras 59–60. See also Case C-449/93 *Rockfon*, EU:C:1995:420, para. 21.

the employer was part of a group of undertakings, the Court ruled, it was compelled to contemplate redundancies and initiate the consultation procedure, whether or not it had prior knowledge of the decision of the parent or controlling undertaking.<sup>48</sup> It is for this reason that it is not possible to start the consultations until the subsidiary has been identified.<sup>49</sup>

In its ruling in *AEK*, the Court demonstrated a strongly purposive reading of the scope of the CRD, specifically the gap-filling Article 2(4). The judgment recognises that the underlying teleology of the Directive, as amended, is to afford greater protection to workers in the event that collective redundancies are contemplated in situations where restructuring decisions are taken at the central headquarters of the parent enterprise, wherever it is located.<sup>50</sup> The provisions of the Directive are effective even where those decisions have been taken without the direct involvement, or even knowledge, of the subsidiary that is the immediate employer of the workers being made redundant. Nevertheless, deeming the subsidiary, once it has been identified, to be contemplating redundancies in situations where ‘the decision’ is unexpected and the subsidiary has little or no knowledge of the plan, is unlikely to lead to meaningful local consultations with workers’ representatives. Although an obligation can be inferred on the parent company making ‘the decision’, that obligation is only valid between the parent company and the subsidiary, it does not affect the obligation to hold consultations which remains the responsibility of the subsidiary as ‘employer’.<sup>51</sup> The employer may be able to supply the required information, at least during ‘the course of the consultations’, or even up to the end of the consultations,<sup>52</sup> but there is no corresponding obligation on the real decision-maker, the central undertaking, to participate in the consultations. Even if the reasons for the restructuring or closure decision are provided to the subsidiary, so long as it conducts the consultations in good faith and provides all the necessary information over the applicable timetable, the minimum requirements of the Directive will have been met without the subsidiary, as ‘the employer’, being able, in practice, to take any significant steps to avoid or reduce the redundancies or otherwise ameliorate their effects.

Three further cases on the scope of the CRD, decided in quick succession by the Court in the spring of 2015, each concerned the meaning of the terms ‘establishment’ or ‘establishments’, for the purpose of calculating the threshold and the time period for the number of redundancies to qualify as ‘collective redundancies’, depending on the option chosen by the Member State concerned under Article 1(1)(a). These cases also highlight the potential for broader

---

48. *AEK*, para. 62.

49. *AEK*, para. 63.

50. Although the restructuring decision was taken in another Member State, there is no territorial limit to Art. 2(4) and nothing in the judgment to suggest that the ruling would have been any different if the parent company had been located in a third country.

51. *AEK*, Opinion of Advocate General Mengozzi, para. 40.

52. *AEK*, judgment, para. 65.

protection of workers in Member States that choose to make use of Article 5 of the Directive, by introducing laws, regulations or administrative provisions, or allow the application of collective agreements, that are 'more favourable' to workers.

The first two cases, from the United Kingdom, *Lyttle*<sup>53</sup> and *USDAW and Wilson*,<sup>54</sup> concerned redundancies arising as a consequence of mass closures of retail stores after the owners had been declared insolvent. In both cases the central issue was whether each individual store was an 'establishment', for the purpose of calculating the threshold of 'at least 20' redundancies over a period of ninety days, to fall within the definition of 'collective redundancies' under Article 1(1)(a)(ii), *see above*, the option chosen by the UK under its implementing legislation.<sup>55</sup>

In *Lyttle*, Bluebird UK Bidco 2 ('Bluebird'), had taken over the ownership of Bonmarché following the insolvency of the previous owners. At the time when the business was transferred in January 2012, Bonmarché had 414 clothing stores in the UK employing around 4,200 workers. In the spring of 2012 Bluebird carried out a redundancy programme, reducing the number of stores to 273 with approximately 3,000 employees. The claimants, Ms Lyttle and others, worked at four different branches of Bonmarché in Northern Ireland each of which had fewer than twenty workers. The stores where they had been working were closed and the redundancies took effect in March 2012. It was not disputed that the redundancy consultation did not satisfy the requirements of the Directive.

*USDAW and Wilson* concerned the insolvency of the high street chains Woolworth and Ethel Austin in 2011. By contrast with *Lyttle*, there was a total liquidation of the businesses without a transfer of ownership leading to closure of all the stores and several thousand redundancies. In stores that had employed twenty workers or more, protective awards were made by the UK Secretary of State in accordance with the national legislation applicable where the employer has failed to comply with the requirements of the Directive.<sup>56</sup> However, 4,500 of the redundant workers, who had been working in stores employing fewer than twenty workers, were denied a protective award on the ground that each of those stores was a separate 'establishment' and therefore below the threshold for 'collective redundancies'. Ms Wilson, one of those affected, and her trade union, USDAW, contended that the dismissed workers at all the Woolworth and Ethel Austin stores were within the scope of the Directive and were entitled to protective awards on the basis that the stores, collectively, were 'establishments' for the purpose of Article 1(1)(a)(ii).

---

53. Case C-182/13 *Valerie Lyttle and Others v. Bluebird UK Bidco 2 Limited*, EU:C:2015:317, referred from the Industrial Tribunals (Northern Ireland) – hereinafter *Lyttle*.

54. Case C-80/14 *Union of Shop, Distributive and Allied Workers (USDAW), B Wilson v. WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd, Secretary of State for Business, Innovation and Skills*, EU:C:2015:291, referred from the Court of Appeal (England and Wales) – hereinafter *USDAW and Wilson*.

55. The Trade Union and Labour Relations (Consolidation) Act 1992, s. 188(1).

56. *Ibid.* s. 189(3), transposing Directive 98/59, Art. 6.

In each case, therefore, the crux of the issue raised in the questions referred to the Court, was either whether the term ‘establishments’ referred to the whole of the retail business, which should be treated as a single economic unit that was contemplating mass redundancies, or did it refer only to the particular units or stores to which the workers concerned had been assigned their duties? If the answer was the former, the protective awards would be payable to all workers dismissed in the course of the same restructuring exercise, irrespective of the size of the store at which they had worked.<sup>57</sup>

In separate judgments, which were essentially identical on the main issues, the Court followed its previous case law on the scope of ‘establishment’ in Article 1(1)(a)(i), the alternative option to the one chosen by the UK. In *Rockfon*,<sup>58</sup> a Danish case concerning the scope of Article 1(1)(a)(i), the Court had held that, as the term ‘establishment’ is not defined in the Directive, it must be interpreted autonomously and uniformly in the EU legal order and cannot, therefore, be defined independently in the laws of the Member States.<sup>59</sup> It followed that the term ‘establishment’ is defined by reference to the ‘employment relationship’ of the individual workers which is ‘essentially characterised by the link existing between the worker and the part of the undertaking or business to which he is assigned to carry out his duties’.<sup>60</sup> From this perspective, the term ‘establishment’ in Article 1(1)(a) ‘must be interpreted as designating ... the unit to which the workers made redundant are assigned to carry out their duties’.<sup>61</sup> Based on the Court’s narrow view of an ‘establishment’ it is not necessary that ‘the unit in question is endowed with a management that can independently effect collective redundancies’.<sup>62</sup> According to the Court, an ‘establishment’ is a ‘distinct entity’ from an ‘undertaking’ if the undertaking has several units each ‘having a certain degree of permanence and stability, which is assigned to perform one or more given tasks and which has a workforce, technical means and a certain organisational structure allowing for the accomplishment of those tasks’.<sup>63</sup> The meaning of the term ‘establishment’ was

---

57. See Opinion of Advocate General Wahl, EU:C:2015:68, para. 47. The Advocate General’s Opinion was issued for all three cases under consideration: *Lyttle, USDAW and Wilson*, and Case C-392/13 *Andrés Rabal Cañas v. Nexea Gestión Documental SA and Fondo de Garantía Salarial* (discussed below).

58. Case C-449/93 *Rockfon*, EU:C:1995:420.

59. *Lyttle*, para. 26, *USDAW and Wilson*, para. 45, applying Case C-449/93 *Rockfon*, EU:C:1995:420, para. 25 and Case C-270/05 *Athinaiiki Chartopoiia AE v. L Panagiotidis and Others*, EU:C:2007:101, para. 23.

60. *Lyttle*, para. 28, *USDAW and Wilson*, para. 47, applying Case C-449/93 *Rockfon*, EU:C:1995:420, para. 32.

61. *Lyttle*, para. 28, *USDAW and Wilson*, para. 47.

62. *Lyttle*, para. 28, *USDAW and Wilson*, para. 47.

63. *Lyttle*, paras 30–31, *USDAW and Wilson*, paras 49–50, applying Case C-270/05, *ibid*, para. 27.

identical regardless of which option the Member State had chosen under Article 1(1)(a). The two options were ‘substantially equivalent’ alternatives.<sup>64</sup>

The Court noted that the provisions of Directive 2002/14/EC, establishing a general framework for informing and consulting employees in the EU, contain a clear distinction between the terms ‘undertakings’ and ‘establishments’.<sup>65</sup> Under that Directive an ‘undertaking’ is ‘a public or private undertaking carrying out an economic activity, whether or not operating for gain, which is located within the territory of the Member States’,<sup>66</sup> whereas an establishment is ‘a unit of business *defined in accordance with national law and practice*’.<sup>67</sup> In Directive 2002/14, therefore, the term ‘establishment’ is not given an autonomous and uniform meaning unlike the term ‘undertaking’. Large retailers, of the size of Bonmarché and Woolworths/Ethel Austin before insolvency, with a single owner, would fall within the very broad definition of ‘undertaking’ in that Directive. If, as the Court had already asserted in both *Lyttle* and *USDAW and Wilson*, an ‘undertaking’ covers ‘all the separate employment units of the undertaking’,<sup>68</sup> it is legitimate to suggest that the term ‘establishments’, plural, used in Article 1(1)(a) of Directive 98/59, is the same as ‘undertaking’. The Court dismisses the use of the term ‘establishments’ in Article 1(1)(a), which is in, *inter alia*, the English, French, Italian and Spanish versions of the Directive, on the basis that the singular term ‘establishment’ is used in some language versions and the latter is deemed to preclude equating an ‘establishment’ with an ‘undertaking’.<sup>69</sup> This is rather odd as it could, conversely, be suggested that the use of ‘establishments’ in several language versions, specifically, in context of Article 1(1)(a)(ii), which refers to ‘the number of workers normally employed in the establishments in question’,<sup>70</sup> points to the opposite interpretation. Unlike Directive 2002/14, the CRD makes no distinction between ‘undertakings’ and ‘establishments’ and, it is submitted, to include all workers in the undertakings’ ‘establishments’ in the calculation of the number of redundancies in situations where redundancies are contemplated across multiple units of the enterprise, is more consistent with the protective aim of the Directive and should therefore be preferred.

---

64. *Lyttle*, para. 37, *USDAW and Wilson*, para. 56.

65. *Lyttle*, para. 50, *USDAW and Wilson*, para. 69. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L80, 23.03.2002, 29–34.

66. Directive 2002/14, Art. 2(a).

67. Directive 2002/14, Art. 2(b). Emphasis added.

68. *Lyttle*, para. 47, *USDAW and Wilson*, para. 66.

69. *Lyttle*, para. 36, *USDAW and Wilson*, para. 55. Advocate General Wahl, at para. 53 of his Opinion, points to the Croatian, Danish, German, Finnish, Hungarian and Swedish versions.

70. Directive 98/59, Art. 1(1)(a)(ii).

What is remarkable is how the Court's very specific Union definition of 'establishment' in *Lyttle* and *USDAW and Wilson* has had the effect of excluding large numbers of workers from protection under the Directive in a situation where a single enterprise, or its administrator, is contemplating the dismissal of hundreds or, in the case of Woolworths and Ethel Austin, thousands of workers simultaneously. The only difference between these mass dismissals and a similar number of dismissals that might occur in a redundancy scenario in a single large factory, such as the Fujitsu Siemens plant in *AEK*, arises from the particular organisation of the retail trade into multiple store units.

According to the Court, the fact that, theoretically, an inclusive approach might cover a single worker of an establishment, would be contrary to the ordinary meaning of the term 'collective redundancy'.<sup>71</sup> This argument is erroneous because, even if there had only been a single worker in one of the stores, that worker would have been made redundant by a decision taken by central management of the enterprise to make all, or a substantial proportion of the workforce, redundant, providing a collective dimension. Ultimately, in both *Lyttle* and *USDAW and Wilson*, all the redundancies had been contemplated by central management and put into effect nationwide. It is difficult to rationalise how an interpretation, which has such inequitable effects between identically situated workers employed in different-sized stores, is justified.

In explaining its reasoning, the Court recognised that an *erga omnes* interpretation of the concept of 'establishment' to cover all affected workplaces within the undertaking and treat them as a single entity, would have significantly increased the number of workers eligible for protection, corresponding with one of the objectives in the Directive of affording greater protection to workers.<sup>72</sup> According to the Court, however, the objective of worker protection in the event of collective redundancies must be balanced with a need 'to ensure comparable protection for workers' rights in different Member States and to harmonise the costs which such protective rules entail for EU undertakings' and thus 'rendering comparable the burden of those costs in all Member States'.<sup>73</sup>

None of these arguments is convincing. The logical approach would be to apply the same interpretation of 'establishments' to all Member States, regardless of which option in Article 1(1)(a) applies, so as to include the total number of redundancies across all establishments of an enterprise where these are effected as part of a single management plan. It would also ensure comparable protection of workers in enterprises contemplating redundancies regardless of whether the workforce is in single or multiple locations. It might entail different costs for enterprises, depending on the method chosen to carry out consultations, but this would be a natural consequence of the organisation of the enterprise and does not justify inequitable treatment of the workforce. An inclusive interpretation would also be consistent with the Directive's core aim,

---

71. *Lyttle*, para. 45, *USDAW and Wilson*, para. 64.

72. *Lyttle*, para. 42, *USDAW and Wilson*, para. 61.

73. *Lyttle*, paras 43–44, *USDAW and Wilson*, paras 62–63.

which not only affords greater protection to workers in the event of collective redundancies, but also takes account of ‘the need for balanced economic and social development’.<sup>74</sup> It would protect small businesses, or indeed autonomous franchises of retail chains, with fewer than twenty workers, who make their own decisions, and would be outside the scope of the Directive whichever option in Article 1(1) is chosen.<sup>75</sup>

Finally, the Court suggests that it would have been open to the UK to introduce ‘more favourable’ provisions under Article 5 in order to extend protection ‘to all workers affected by redundancy in an undertaking or part of an undertaking of the same employer, the term “undertaking” being understood as covering all the separate employment units of that undertaking or that part of an undertaking’.<sup>76</sup> It would have been possible to lay down more favourable rules without affecting the ‘autonomous and uniform’ interpretation given to the term ‘establishment’.<sup>77</sup> It is submitted that this is the wrong approach. The main purpose of EU social policy harmonisation is to extend the basic guarantee of directives as widely as possible to achieve a common standard,<sup>78</sup> which should, under the CRD, encompass all those affected by large scale redundancies initiated by an enterprise as part of a single plan. It should then be left to some Member States, who have chosen to avail themselves of the ‘more favourable’ provisions to workers, to improve the quality of protection when collective redundancies are contemplated by, for example, introducing more stringent rules to improve the quality of the information and consultation process and introduce more effective remedies.

The third case, *Rabal Cañas*,<sup>79</sup> referred from a Spanish court, concerned redundancies made by Nexea, an undertaking providing hybrid email services which formed part of a group of undertakings owned by the Spanish State. Nexea had two establishments: an administration department and production site in Madrid with 164 employees, and an operations centre in Barcelona with twenty employees. Although the Barcelona site was an extension of Nexea’s Madrid operation carrying out substantially identical tasks, it did have its own manager. Following losses in 2011, and the forecast of further losses in 2012, Nexea gradually carried out dismissals at both locations from August 2012, reducing the number of workers employed at its Barcelona site to 16 by December 2012. At that point it decided to close its operation in Barcelona leading to the dismissal of Mr Rabal Cañas and twelve other workers on economic grounds.

---

74. Directive 98/59, recital 2 of the preamble.

75. Consistent with Art. 153(2)(b) TFEU.

76. Lyttle, para. 47, *USDAW and Wilson*, para. 66.

77. Lyttle, para. 48, *USDAW and Wilson*, para. 67.

78. See Kenner, *supra* n. 15, at 30–31 and Brian Bercusson, *European Labour Law* (Butterworths, 1996) 52.

79. Case C-392/13 *Andrés Rabal Cañas v. Nexea Gestión Documental SA and Fondo de Garantía Salarial*, EU:C:2015:318.

Spain's implementing legislation was, on the one hand, apparently more favourable to workers because it used 'undertaking' rather than the 'establishment' as the sole reference unit but, on the other hand, it was more restrictive, limiting the concept of collective redundancies to particular types of termination based on 'economic, technological, organisational or production grounds'.<sup>80</sup> Spanish law was somewhat aligned with the option in Article 1(1)(a)(i) but there were differences. The definition of 'collective redundancies' included, terminations, over a period of ninety days, affecting, *inter alia*, at least ten workers in undertakings employing fewer than 100 workers, or 10% of the workers in undertakings employing between 100 and 300 workers. It was argued by Mr Rabal Cañas that, at the time of his dismissal, the total number of dismissals over a period of ninety days was eighteen which amounted to 10% of the total personnel of the undertaking and therefore the threshold had been met for 'collective redundancies' under the national legislation. Conversely, the Spanish Government contended that the national legislation had to be interpreted consistently with the options in Article 1(1)(a)(i) and (ii), which required there to be at least twenty workers in 'establishments' for the dismissals to be deemed collective redundancies. By using the latter formulation, and treating the Barcelona site as an 'establishment', the threshold had not been met.

In its judgment, the Court addressed the question of whether the national legislation, which used only the undertaking as the reference unit, was compatible with the Directive. Applying its previous case law, including the recently decided *Lyttle* and *USDAW and Wilson* cases, the Court was satisfied that Nexea's operation in Barcelona was an 'establishment' as distinct from an 'undertaking'.<sup>81</sup> Having deemed it an 'establishment', the Court, without any further reasoning, accepted the argument of the Spanish Government that there had to be a minimum of twenty workers for the dismissals to count as 'collective redundancies'.<sup>82</sup> It appears, therefore, that the expression 'more favourable' provisions under Article 5 does not extend to lowering the threshold even though this would have benefited the workers concerned. On the central point behind the reference, the Court observed that replacing the term 'establishment' with 'undertaking' could be regarded as more favourable to the workers concerned, and thus compatible with the Directive, but only if it did not mean that the protection afforded to workers is lost or reduced.<sup>83</sup> It followed that national legislation was incompatible with the Directive if it had the effect of precluding the information and consultation procedure provided for in the Directive, when the dismissals would have been considered 'collective

---

80. 'Law on the Workers' Statute', Art. 51(1).

81. *Rabal Cañas*, para. 51.

82. *Rabal Cañas*, para. 55.

83. *Rabal Cañas*, para. 52.



redundancies' under the definition in Article 1(1)(a), had the establishment been used as the reference unit.<sup>84</sup>

*Rabal Cañas* highlights continuing difficulties with the Court's interpretation of the Directive in the context of restructuring. Nexea had chosen to establish an outreach operation in Barcelona when it was expanding its business. When the economic climate became more difficult, it was able to gradually reduce its workforce in Barcelona in stages and ultimately shut down the site over a period beyond the maximum ninety days stipulated in Article 1(1)(a), keeping below the threshold and thereby avoiding any obligations under the Directive. It would not have been able to avoid those obligations if it had slimmed down its staffing in Madrid instead of closing down its operation in Barcelona. If the Court had, instead, applied a literal interpretation of the national legislation, by treating Nexea as a single 'undertaking', the dismissals in Barcelona would have been subject to the national rules on information and consultation. The Spanish legislation was rather sloppily drafted and involved some 'cherry picking'<sup>85</sup> but it is somewhat contrary for the Court to suggest, in *Lyttle* and *USDAW and Wilson*, that the UK had the option of widening protection for workers, by using the freedom offered by Article 5 to introduce 'more favourable' provisions for workers, but then to proceed, in *Rabal Cañas*, to override Spain's exercise of its 'right'<sup>86</sup> to introduce such provisions. The Court is correct in its desire to ensure that national legislation should not be interpreted in such a way as to deny workers the protection afforded by the Directive but this theoretical problem only arose because of its own narrow interpretation of the language contained therein.

### 12.2.3 Ways Forward

In the example of the CRD, partial harmonisation has led to a degree of convergence in the laws of the Member States but there is significant differentiation in protection arising from the choice of model for calculating and timing of redundancy decisions and the use of more favourable provisions to widen the scope of protection for workers in redundancy situations. As outlined above, the underlying purpose of EU regulation is not to question the employer's rationale for *contemplating* redundancies but rather to offer a process of information and consultation that may lead, after negotiations on constructive proposals from workers' representatives, to a rethink or at least a less unpalatable plan. The CRD, operating within a very narrow window, offers the prospect of a less harsh outcome, but only for those workers coming within its scope.

---

84. *Rabal Cañas*, para. 57.

85. *Rabal Cañas*, para. 57.

86. Directive 98/59, Art. 5. Emphasis added.

When the CRD was amended in the 1990s it extended its arc of coverage to ‘cases where the redundancy decision is taken by a decision-making centre or an undertaking located in another Member State’.<sup>87</sup> Recognising that transnational restructuring was becoming increasingly common, arising in part by mergers of enterprises within the single market, the revised CRD ‘eliminated’ a loophole.<sup>88</sup> In *AEK*,<sup>89</sup> case analysis has shown that the Court met this basic challenge by upholding the revised Article 2(4) to ensure that workers were protected notwithstanding the fact that the decision taken to dismiss them was made by central management located in another Member State. The outcome of the case is, nevertheless, unsatisfactory because the full obligation for transmitting information and conducting consultations lies with local ‘establishment’ of the ‘undertaking’. Formally the information and consultation requirements can be met, but the ‘establishment’ or ‘employer’ may have its hands tied and be able to offer little to ameliorate the scale or impact of the redundancies. Any improvements offered must be sanctioned by the central management at arms-length from the consultation process. It is submitted that the CRD should be amended to ensure that, where the employer is unable to effectively negotiate on proposals from workers’ representatives, in line with the protective aims of the CRD, responsibility should be placed on the shoulders of the real decision-maker, the central management, to conduct the consultations.

In *Lyttle*<sup>90</sup> and *USDAW and Wilson*,<sup>91</sup> analysis demonstrates that the Court’s adoption of a rigid formula for the concept of an ‘establishment’, to give this term a uniform meaning, has led to inequality of protection for otherwise identically situated workers made redundant, collectively, as a consequence of the transfer or liquidation of the enterprise after insolvency. By treating each unit of the organisation as a micro ‘establishment’ the CRD, as interpreted by the Court, allows for restructuring plans to be based on divide and rule, and worse still those who work in the units below the threshold of twenty workers can be excluded altogether. It is submitted that this runs contrary to the purpose of the Directive, not least language used at the time of restructuring that recognised that key corporate decisions are taken at a higher level than the place where the worker is employed, all pointing to a need for flexibility to ensure that where

---

87. European Commission, ‘Proposal for a Directive amending Directive 75/129/EEC on the approximation of the laws of the Member States relating to collective redundancies’, COM(91) 292 final, 3.

88. *Ibid.*

89. Case C-44/08 *Akavan Erityisalojen Keskusliitto AEK ry and Others v. Fujitsu Siemens Computers Oy* [2009] ECR I-8163.

90. Case C-182/13 *Valerie Lyttle and Others v. Bluebird UK Bidco 2 Limited*, EU:C:2015:317.

91. Case C-80/14 *Union of Shop, Distributive and Allied Workers (USDAW), B Wilson v. WW Realisation 1 Ltd, in liquidation, Ethel Austin Ltd, Secretary of State for Business, Innovation and Skills*, EU:C:2015:291.

mass redundancies are being contemplated by the central management across multiple sites of the enterprise within one or more Member States, the total number of employees in the combined ‘establishments’ of the ‘undertaking’ are brought with the umbrella of protection. At the very least, in order to escape from the inflexible meaning given to ‘establishment’ by the Court, the CRD should be revised to leave the definition to ‘national law and practice’ as is the case with the Framework Directive on Information and Consultation of Employees, 2002/14.<sup>92</sup> This approach would also ensure that workers in situations similar to those in the Spanish case, *Rabal Cañas*,<sup>93</sup> would be counted at both establishments, towards the threshold, although this could have been achieved by recognising the approach of Spain as a ‘more favourable’ provision.

To conclude on the CRD, it is necessary to carry out a further revision to ensure that its mechanisms are more robust. The Commission’s proposed ‘European Pillar of Social Rights’,<sup>94</sup> contains references to the need for adequate compensation in the event of dismissal and strengthened involvement of workers in enterprises. It is necessary to convert this initiative into an EU-wide basis for reviewing labour law. An important reference point is Article 27 of the Charter of Fundamental Rights of the EU which, as EU primary law,<sup>95</sup> provides that workers or their representatives must ‘at the appropriate level, be guaranteed information and consultation in good time in the cases and under the conditions provided by Union law and national laws and practices’. The Court has taken a restrictive approach to the interpretation of Article 27 in *AMS*,<sup>96</sup> ruling that it cannot be relied on by a private party in a dispute with another private party, limiting its use to the public sector. It is noticeable that Article 27 has not featured in the cases under discussion in this Chapter. In the absence of any prospect of judicial activism by the Court, it is submitted that EU law falls short of offering the guarantee promised by Article 27 and this should now be addressed.<sup>97</sup>

---

92. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community – Joint declaration of the European Parliament, the Council and the Commission on employee representation, OJ L80, 23.03.2002, 29–34, Art. 2(b).

93. Case C-392/13 *Andrés Rabal Cañas v. Nexea Gestión Documental SA and Fondo de Garantía Salarial*, EU:C:2015:318.

94. European Commission, ‘Towards a European Pillar of Social Rights’, 14 September 2015: [http://ec.europa.eu/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights\\_en](http://ec.europa.eu/priorities/deeper-and-fairer-economic-and-monetary-union/towards-european-pillar-social-rights_en).

95. Treaty on European Union, Art. 6(1).

96. Case C-176/12 *Association de médiation sociale v. Union locale des syndicats CGT*, ECLI:EU:C:2014:2.

97. See further, Filip Dorssement, ‘Article 27’, in Steve Peers, Tamara Hervey, Jeff Kenner & Angela Ward (eds), *The EU Charter of Fundamental Rights: A Commentary* 749 (Hart 2014).

## 12.3 POSTED WORKERS, PUBLIC PROCUREMENT AND 'FAIR COMPETITION' IN THE EU'S SINGLE MARKET

### 12.3.1 The Posted Workers Directive

Although the PWD, 96/71,<sup>98</sup> has its roots in EU social policy<sup>99</sup> it operates within the framework of the provision of services in the Union's single market,<sup>100</sup> an ambiguity that has caused problems regarding both the perception of its essential purpose and the scope of its application to enterprises and labour. By the mid-1990s, services were rapidly liberalising. The dynamism of the single market had encouraged enterprises 'to develop their transnational activities and increasingly to provide transnational services'.<sup>101</sup> In turn, transnational services had led to transnational employment relationships and a deterritorialisation of labour law, raising questions about the best method of protecting workers posted temporarily to another Member State to perform work under a service contract and prevent social dumping so as to ensure fair competition in the single market.

Under the Rome Convention of 1980, and now the Rome I Regulation,<sup>102</sup> the presumption is that the employment contract is governed by the law of the country in which the employee habitually carries out his work, even if he is temporarily employed in another country,<sup>103</sup> but it permits 'overriding mandatory provisions' to be applied by the receiving country under certain

---

98. Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ L 18, 21.1.1997, 1–6.

99. The source of the Directive is the draft of the European Community Charter of the Fundamental Social Rights of Workers, COM(89) 248, point 3. See Kenner, *supra* n. 15, at 138. At the time of its adoption, unanimity would have been required to adopt it as a social policy measure. Unanimity was not possible because the United Kingdom and Portugal were opposed. The legal bases for the Directive are TFEU Arts 53 and 62, relating to free movement of services, which only require a qualified majority vote in the Council of the EU. See further, Jonas Malmberg, *Posting Post Laval – International and National Responses*, Uppsala Center for Labor Studies, Working Paper 2010:5, 6. (2010).

100. Recital 4 of the preamble of Directive 96/71 explains that 'the provision of services may take the form either of performance of work by an undertaking on its account and under its direction, under a contract concluded between the undertaking and the party for whom the services are intended, or of the hiring-out of workers for use by an undertaking in the framework of a public or private contract'.

101. European Commission, *The Implementation of Directive 96/71/EC in the Member States*, COM(2003) 458 final 4.

102. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008, 6–16. For discussion, see Catherine Barnard, *The UK and Posted Workers: The Effect of 'Commission v. Luxembourg' on the Territorial Application of British Labour Law*, 38 ILJ 122 (2009).

103. Directive 96/71, Art. 8(2).

conditions.<sup>104</sup> In particular, if labour conditions, such as wages and working hours, are less advanced in the home country of the posted worker by comparison with the host country, the practice of posting, in an environment of liberalised services, will inevitably cause social dumping by undercutting. Indeed, as early as 1988, the Commission anticipated downward pressure on social conditions because of the demands of competition in the single market with a particular intensification of social dumping expected in areas such as public works contracts, construction and transport.<sup>105</sup> This was precisely the issue that arose in *Rush Portuguesa*,<sup>106</sup> a case involving Portuguese construction workers posted temporarily to France to perform a service contract, in which the Court made it possible, but not obligatory, for France, as host, to extend labour law rules, including provisions in collective agreements, to posted workers.<sup>107</sup>

The PWD seeks to address this problem by making obligatory the application by the host Member State of certain terms and conditions of employment to posted workers with the aim of providing ‘a climate of fair competition and measures guaranteeing respect for the rights of workers’.<sup>108</sup> The PWD applies horizontally to undertakings established in any Member State that posts workers to another Member State.<sup>109</sup> It includes three types of posting by undertakings:<sup>110</sup>

- (a) posting workers directly under a contract concluded between the undertaking and the party for whom the services are intended;
- (b) posting to an establishment or an undertaking owned by the group; and
- (c) posting by a temporary employment or posting agency.<sup>111</sup>

In each case the posted worker must have an employment relationship with the undertaking or agency. Additional provisions to identify genuine

---

104. Directive 96/71, Art. 9.

105. European Commission, *The Social Dimension of the Internal Market*, Social Europe, Special Ed., 65–66 (1988).

106. Case C-113/89, *Rush Portuguesa Lda v. Office national d’immigration*, EU:C:1990:142.

107. See Barnard, *supra* n. 17, at 218; Kenner, *supra* n. 15, at 15.

108. Directive 96/71, recital 5 of the preamble.

109. Directive 96/71, Art. 1(1). Under Art. 1(4) undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.

110. Directive 96/71, Art. 1(3).

111. Also, under Directive 96/71, Art. 3(9), Member States can choose to extend the principle of equal treatment between temporary agency workers and workers of the user undertaking to posted agency workers. In practice this would mean that the rights of posted agency workers in those Member States would be equivalent to those provided by Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, 9–14.

posting and prevent abuse and circumvention of the Directive can be found in the subsequent Posted Workers Enforcement Directive adopted in 2014.<sup>112</sup>

In its core provisions, the PWD sets out a framework for the coordination of laws of the Member States ‘in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided’.<sup>113</sup> These ‘hard core’<sup>114</sup> rules, must be introduced by law and/or, in the case of activities involving building work,<sup>115</sup> by means of certain types of collective agreement or arbitration award,<sup>116</sup> to provide a ‘guarantee’ for ‘posted workers’<sup>117</sup> of terms and conditions of employment<sup>118</sup> under Article 3(1) covering, *inter alia*:<sup>119</sup>

- 
112. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ L 159, 28.5.2014, 11–31.
  113. Directive 96/71, recital 13.
  114. Directive 96/71, recital 14.
  115. Defined in the Annex of Directive 96/71 as including ‘all building work relating to the construction, repair, upkeep, alteration or demolition of buildings’ and certain particular types of building work listed therein.
  116. Directive 96/71, Art. 3(8). In some Member States collective agreements or arbitration awards can be made ‘universally applicable’, which means that they ‘must be observed by all undertakings in the geographical area and in the profession or industry concerned’. Alternatively, if a Member State does not have such a system, there are two alternatives for them to base their rules on. First, collective agreements or arbitration awards must be ‘generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned’ and/or, second, ‘collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory’. Both of these alternatives must apply to all the undertakings covered by the Directive and must ensure ‘equality of treatment’, meaning the same obligations between national undertakings and posting undertakings in a similar position as regards the matters listed in Art. 3(1) and also a requirement ‘to fulfil such obligations with the same effects’.
  117. Directive 96/71, Art. 2(1) defines a ‘posted worker’ as ‘a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works’. Under Art. 3(6) the length of the posting shall be calculated on the basis of a reference period of one year from the beginning of the posting.
  118. Social security coordination is excluded. It is covered by Regulation (EC) No. 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, OJ L 166, 30.04.2004, 1–123.
  119. Directive 96/71, Art. 3(1). Under Art. 3(3), if the posting is for less than one month, the provisions on work periods, rest periods and holidays can be waived by Member States, after consulting management and labour. Under Art. 3(5), it is possible to have an exemption from those provisions for a longer period on the grounds that the work to be done is not significant. Also, under Art. 3(4), if the posting is for less than one month it is possible to waive the provision on minimum rates of pay but only by means of a collective agreement as defined in Art. 3(8). These derogations do not apply to posted agency workers.

- (a) maximum work periods and minimum rest periods;
- (b) minimum paid annual holidays;
- (c) minimum rates of pay defined by national law and practice of the host Member State;<sup>120</sup>
- (d) the conditions of hiring-out workers, in particularly the supply of workers by temporary employment undertakings;
- (e) health, safety and hygiene at work;
- (f) protective measures with regard to the terms and employment of pregnant women or women who have recently given birth, of children and of young people;
- (g) equality of treatment between men and women and other provisions on non-discrimination.

Also, under Article 3(10), Member States, are not precluded from applying Treaty compatible terms and conditions of employment on matters not listed in Article 3(1) either by means of ‘public policy provisions’ or, in the case of activities other than building work,<sup>121</sup> by collective agreements or arbitration awards that meet criteria laid down in Article 3(8).<sup>122</sup> Such an extension of scope must be based on equality of treatment between national undertakings and undertakings of other Member States.<sup>123</sup> Finally, Article 3(7) ‘shall not prevent’ Member States applying terms and conditions of employment which are ‘more favourable’ to workers.

By contrast with social policy measures, the PWD coordinates but does not harmonise minimum standards for workers within its scope.<sup>124</sup> This reflects the fact that it was adopted on the basis of Treaty provisions concerned with the coordination of service provision.<sup>125</sup> In the absence of harmonisation, there have been significant variations in implementation, such as, differential approaches to the use of laws to put into the effect the mandatory terms and conditions, the application of collective agreements for this purpose, introducing ‘more favourable provisions’, and including terms and conditions on other matters as public policy provisions.<sup>126</sup> Differentiation has caused particular problems of interpretation for enterprises, social partners and the courts.

---

120. Under Directive 96/71, Art. 3(7) allowances specific to the posting shall be considered part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.

121. As defined in the Annex, *see supra* n. 104.

122. *See supra* n. 116.

123. Directive 96/71, Art. 3(10).

124. *See* Barnard, *supra* n. 17, at 221.

125. TFEU Arts 53(1) and 62.

126. European Commission (n. 90) 8–9. European Parliament Directorate-General for Internal Policies, *Posting of Workers Directive – current situation and challenges: STUDY for the EMPL Committee*, June 2016, IP/A/EMPL/2016-07 PE 579.001, 9.

An additional factor, when considering the cases discussed below, is the competing visions of two broad groups of Member States: those who are the main recipients of posted workers, who tend to favour strong regulation; and those who are exporters of posted workers, who are seeking market access for their services. Also problematic has been the ‘framework of services’ context which provides the point of reference for the Court when it seeks to reconcile the ‘inherent tension’ within the PWD between ‘a free relatively unrestricted cross-border provision of services, and guaranteeing a means with which to meet the objectives related to the social protection of posted workers’.<sup>127</sup> The next part offers analysis on selected case law of the Court in which it has had to address the ‘regulatory balance’ between these perhaps incompatible principles.<sup>128</sup> Also important are related cases where liberalisation of services, as a result of the application of EU public procurement rules, has increased the use of posted workers, or the transfer of jobs from one Member State to another. In such cases there is a complex interaction between provisions in the EU’s Public Procurement Directive, now 2014/24, which allow for contract compliance in public works contracts concerning, *inter alia*, ‘social and employment-related’ considerations,<sup>129</sup> and the PWD, where the point of reference is only the ‘hard core’ terms and conditions.

### 12.3.2 Case Law

#### 12.3.2.1 *Laval, Commission v. Luxembourg and Rüffert: Preventing or Promoting Social Dumping?*

In the short period from December 2007 to June 2008 the Court delivered a trilogy of powerful judgments – *Laval*,<sup>130</sup> *Commission v. Luxembourg*,<sup>131</sup> *Rüffert*<sup>132</sup> – that collectively demonstrate that the Court mainly views the PWD through the lens of free movement of services and not labour law. Indeed, following these cases, the PWD is so constrained in its application that, in its present form, and in isolation, it offers very limited potential to be used by the host Member State to prevent social dumping and may even be promoting it.

---

127. European Parliament, *ibid*, 9.

128. *Ibid*. 21.

129. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242, Art. 70 (replacing Art. 26 of Directive 2004/18).

130. Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

131. Case C-319/06 *Commission v. Luxembourg*, EU:C:2008:350.

132. Case C-346/06 *Dirk Rüffert v. Land Niedersachsen*, EU:C:2008:189.



Any discussion of the Court's case law on the PWD has to begin with *Laval*,<sup>133</sup> a reference from the Swedish Labour Court issued by the Grand Chamber as a Christmas surprise on 18 December 2007. It is a case that has come to symbolise the free movement of services versus labour rights conundrum and when, ultimately, liberalised services won out, it led to demands to strengthen the PWD that continue to reverberate to this day.

*Laval* is mainly known, along with *Viking*,<sup>134</sup> its sister case on freedom of establishment, for its restrictive approach to the rights of trade unions to engage in collective action to resist the posting of workers on lower terms and conditions of employment than workers of the home Member State and other forms of social dumping.<sup>135</sup> For the purposes of this chapter, however, the main focus is on the extent to which national norms, including those derived from collective agreements, can be used to minimise differences between posted workers and workers of the host Member State or even to equalise labour standards.

*Laval* is a textbook case on the complex challenges of regulating the law on posted workers in the context of strongly contested single market rules on opening up public works' contracts for building work. It pitted the laws and industrial relations traditions of Sweden, a Member State mainly receiving posted workers, against the laws of Latvia, a mainly posting Member State that had recently joined the Union.<sup>136</sup> Swedish legislation implementing the Directive did not fix minimum rates of pay for posted workers and had no express provisions concerning the application of the terms and conditions in collective agreements in respect of building work. This approach reflected the Swedish and wider Nordic model of labour law in which as much autonomy as possible is left to management and labour to negotiate their own legally binding agreements.

*Laval* was a Latvian company that posted workers to Sweden to work on building sites operated by a Swedish company. *Laval* had signed a collective agreement with a Latvian construction union setting, *inter alia*, levels of pay. The posted workers were paid about 40% less than comparable Swedish workers who were covered by the national collective agreement for the construction sector.<sup>137</sup> Over a six-month period, *Laval* was responsible for a contract to build a school. The Swedish trade unions sought to extend the domestic collective agreement to *Laval*'s workers. This collective agreement included not only rates of pay but also, *inter alia*, a 'special building supplement' to pay for insurance. One of the Swedish unions, *Byggettan*, threatened industrial action directed against *Laval* if they did not agree to a wage level for the workers based

---

133. Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

134. Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, EU:C:2007:772.

135. Such as the reflagging of ships in *Viking*, *ibid.*

136. Latvia joined the EU on 1 May 2004. Sweden had joined the EU nearly a decade earlier in 1995.

137. See Barnard, *supra* n. 17, at 223.

on Byggettan's estimate of average wages in the sector. When these negotiations were unsuccessful, the unions instigated a blockade of the building site that, when followed by sympathy action, made it impossible for Laval to perform the contract. The police would not intervene, as the industrial action was lawful under Swedish law. Eventually the workers returned to Latvia. Laval brought an action before the Swedish Labour Court seeking compensation directly from the unions for the damage suffered.

The central question referred to the Court was whether it is compatible with the freedom to provide services and the PWD for trade unions to attempt, by means of collective action, to force a foreign provider of services to sign a collective agreement in the host country with respect to terms and conditions of employment. In its reply, the Court emphasised that Member States have discretion to freely define the content of the 'hard core' of mandatory rules so long as their rules are compatible with EU law.<sup>138</sup> In the case of Sweden, the requirements in Article 3(1) regarding minimum rates of pay for posted workers were not laid down either by national law or an applicable collective agreement, and yet the dispute revolved around a requirement imposed on Laval to negotiate with trade unions on wage levels and to sign a collective agreement. Referring to Article 3(8), concerning collective agreements, the Court noted that it is possible for national rules in the construction sector to be based on rules that are 'generally applicable' to all similar undertakings in the industry concerned, covering the matters listed in Article 3(1), but this approach must be based on equality of treatment between national undertakings and undertakings that post workers from abroad.<sup>139</sup> The position was, therefore, quite different in Sweden from certain other Member States that have national laws or universally applicable collective agreements that guarantee such equality of treatment. In the absence of such provisions, the Court reasoned, Swedish law might still comply with the PWD so long as it did not hinder the provision of services between Member States.<sup>140</sup> Article 3(1), however, only refers to minimum rates of pay, but what the trade unions were seeking to impose was the whole framework of the Swedish system for pay in the sector. Because the minimum rates of pay were not determined by Swedish law, and the attempt to extend the collective agreement was applicable only to Laval and not to other undertakings in the construction sector, the Court concluded that Articles 3(1) and 3(8) did not entitle Sweden to impose wage negotiations on individual undertakings.<sup>141</sup>

Next the Court turned to the general aim of the Directive to provide for a 'climate of fair competition' between national undertakings and undertakings that provide services transnationally. According to the Court, the rules in Article 3(1), in relation to terms and conditions of employment, prevent service providers that post workers from other Member States from competing unfairly

---

138. *Laval*, para. 60.

139. *Laval*, paras 65–66.

140. *Laval*, para. 68.

141. *Laval*, para. 71.

against undertakings of the host Member State if the level of social protection in the host Member State is higher.<sup>142</sup> The workers concerned can then enjoy those better terms and conditions in the host Member State. However, the Court ruled that the provision in Article 3(7) allowing for ‘more favourable’ terms cannot be interpreted as allowing the host Member 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’ in Article 3(1).<sup>143</sup> The Court proceeded to crystallise a new test that effectively boxes in Article 3(1) and (7) to protect service providers as follows:<sup>144</sup>

the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in [Article 3(1)(a)-(g)], unless, pursuant to the law or collective agreements *in the Member State of origin*, those workers already enjoy more favourable terms and conditions of employment as regards the matters referred to in that provision.

Article 3(7) is not, therefore, a weapon that can be used to prevent social dumping. Moreover, the public policy exception in Article 3(10) could not be called in aid either. Sweden had not had recourse to it in its implementing legislation and therefore it was not possible to include matters such as the insurance supplement because it had chosen to leave this to management and labour. The social partners are not bodies governed by public law and hence the trade unions could not avail themselves of that provision by citing grounds of public policy in order to maintain collective action.<sup>145</sup>

The Court proceeded to address collective action from the perspective of EU single market law. Emphasising that the free movement of services guarantee is one of the fundamental principles of EU law, the Court held that collective action by trade unions was a restriction on free movement that could only be warranted if it pursues a legitimate objective compatible with the treaties and is justified by overriding reasons of public interest.<sup>146</sup> The Court recognised that the right to take collective action for the protection of host State workers against ‘possible social dumping may constitute an overriding reason of public interest’, namely the protection of the interests of workers, which, if exercised proportionately, was capable of justifying a restriction on the free movement of services.<sup>147</sup> However, having adopted a restrictive approach to the scope of Article 3(1), the Court concluded that the collective action, specifically the blockade, had been taken for the purpose of forcing a provider of services established in another Member State to enter into negotiations with the Swedish union on rates of pay for posted workers and to sign a collective agreement, the terms of which laid

---

142. *Laval*, para. 75.

143. *Laval*, para. 80.

144. *Laval*, para. 81.

145. *Laval*, paras 82–84.

146. *Laval*, para. 101.

147. *Laval*, para. 105.

down more favourable conditions than those resulting from the relevant legislative provisions, while other terms, such as the insurance supplement, related to matters not referred to in Article 3(1). Also, Sweden had not activated Article 3(10) to extend the scope of protection. The Court held that, even though the trade unions were private parties, the form of collective action they had taken was precluded by both Article 56 TFEU and the PWD and could not be objectively justified.<sup>148</sup> Bizarrely the trade union could be held responsible for the impact of their collective action on free movement of services as though they were akin to a public body but, for the purposes of Article 3(10), as outlined above, they could not make ‘public policy’ even in a system that granted them autonomy to negotiate legally binding norms.

In its ruling in *Laval*, the Court took an extremely restrictive and, in many ways, unbalanced view of the protective provisions of the PWD vis-à-vis free movement of services. As a coordination rather than harmonisation measure, the PWD leaves considerable flexibility for host Member States to apply the ‘hard core’ rules in a fashion that fits with their own system of labour law and industrial relations with a view to ‘guaranteeing respect for the rights of workers’.<sup>149</sup> Sweden, in accordance with the traditions of its system, had abstained from detailed regulation in order to allow for collective bargaining and, subject to certain restrictions, collective action was lawful. In this regard, the Court’s restrictive approach to Article 3(7) and (10), provisions that might allow for stronger and wider protective employment measures, is problematic. Undoubtedly, the method of collective action in *Laval*, its impact on the enterprise and the workers concerned, and the breadth of equal treatment that the trade union was seeking, made this a hard case for the Court, which had, as its main reference point, the Union’s fundamental economic freedoms. It would have been open for the Court to uphold the Swedish method of flexible implementation of the PWD and interpret Article 3 more broadly so as to avoid interfering with its labour law system, but still find that the method chosen by the unions was a disproportionate exercise of their members’ right to take collective action.<sup>150</sup> Instead, as Catherine Barnard observes, the Court ‘came close to making Article 3(1) not a floor but a ceiling’.<sup>151</sup> So long as the ‘hard core’ of mandatory rules’ is applied by the host Member State there is deemed to be no unfair competition. Hence, as Jonas Malmberg notes, ‘the idea of equal treatment of domestic and foreign service providers has been rejected in favour of a principle of minimum protection’.<sup>152</sup>

Before *Laval* it would perhaps seem obvious for a Member State to simply extend its domestic labour laws or applicable collective agreements to posted workers *en bloc* so as to cover the areas included in Article 3(1) and other

---

148. *Laval*, para. 111.

149. Directive 96/71, recital 5.

150. Charter of the Fundamental Rights of the EU, Art. 28.

151. Barnard, *supra* n. 17, at 224.

152. Malmberg, *supra* n. 99, at 8.

'matters' concerning terms and conditions of employment under the first indent of Article 3(10), as 'public policy provisions' on the basis that if such measures are compatible with EU law and ensure equality of treatment between home and host Member State undertakings, those other 'matters' are not precluded.<sup>153</sup> An all-embracing approach would provide consistency for all service providers and workers based on comprehensive equal treatment under labour law and would prevent social dumping. This was essentially the method of implementation adopted by Luxembourg, which relied primarily on Article 3(10),<sup>154</sup> as the basis for extending the whole body of its labour law, including collective agreements, to posted workers as 'mandatory provisions falling under national public policy'.<sup>155</sup> However, this broad method of implementation was contested by the Commission in an infringement action, *Commission v. Luxembourg*,<sup>156</sup> seeking to have the Luxembourg law declared invalid on the grounds that it went beyond the mandatory rules for 'minimum protection' in Article 3(1) and would, in practice, put service providers from other Member States, who would be unfamiliar with Luxembourg law, at a disadvantage, amounting to a discriminatory restriction on the free movement of services. Luxembourg contended that its labour laws were, collectively, provisions of 'public policy' that ensured equality of treatment between undertakings falling within the exception permitted by Article 3(10). The Commission countered that the notion of public policy could not be used by a Member State to unilaterally impose all mandatory provisions of its employment law.

In its judgment the Court went even further than it had in *Laval* in its strict approach to the scope of Article 3(1) by proclaiming that it 'sets out an exhaustive list of the matters in respect of which the Member States may give priority to the rules in force in the host Member State'.<sup>157</sup> This is somewhat incongruous given the reference in Article 3(10), first indent, to Member States not being precluded from adopting laws based on equality of treatment between undertakings, concerning terms and conditions of employment 'on matters other than those' referred to in Article 3(1) 'in the case of public policy provisions', which, in the light of the context of the PWD, relate to the protection of workers' interests. Luxembourg's case was that the body of its national labour law was 'public policy' by reference to what is now Article 9(2) of the Rome I Regulation,

---

153. Luxembourg's case was not helped by additional rules requiring a prior notification procedure for certain types of posting and also requiring documents necessary for monitoring purposes to be retained by an ad hoc agent registered in Luxembourg. It was inevitable that such a rule would be found likely to inhibit service providers from other Member States and be contrary to TFEU Art. 56. See Case C-319/06 *Commission v. Luxembourg*, EU:C:2008:350, paras 75–84.

154. Luxembourg also declared laws resulting from collective agreements to be universally applicable under Art. 1 of the Law of 20 December 2002, *Commission v. Luxembourg*, para. 4.

155. *Commission v. Luxembourg*, para. 4.

156. *Commission v. Luxembourg*, para. 4.

157. *Commission v. Luxembourg*, para. 26.

which authorises ‘overriding mandatory provisions’ of national law superseding the contract law of the home Member State.<sup>158</sup> The term ‘overriding mandatory provisions’ is defined in Article 9(1) of that Regulation as ‘provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope’.<sup>159</sup>

This argument did not help Luxembourg. The Court interpreted the first indent of Article 3(10) and the derogation in Article 9(2) of the Regulation as having an essentially identical application. This was not surprising as the Court’s own previous case law in *Arblade*,<sup>160</sup> on the meaning of the ‘public policy’ exception to free movement of services,<sup>161</sup> was the basis for the text of Article 9(1) of the revised Regulation.<sup>162</sup> The Court applied *Arblade* directly by recalling its dictum that ‘public-order legislation’ applies to ‘national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State’.<sup>163</sup> According to the Court, it followed that the term ‘public policy’, located in an EU legislative act within the framework of the provision of services, was ‘a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly, the scope of which cannot be determined unilaterally by the Member States’.<sup>164</sup> In light of the above, as the first indent of Article 3(10) is a derogation from the principle that the matters to be covered by laws and/or applicable collective agreements in the Member States are set out in the exhaustive list in Article 3(1), it must be interpreted strictly.<sup>165</sup>

In support of this interpretation the Court made express reference to Declaration No 10 on Article 3(10) of the Directive, which was recorded in the minutes of the Council of the EU as follows:<sup>166</sup>

The Council and Commission stated: ‘the expression ‘public policy provisions’ should be construed as covering those mandatory rules from which there can be no derogation and which, by their nature and objective, meet the

---

158. *See supra* n. 102.

159. *Ibid.*

160. Case C-369/96 *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL* and Case C-376/96 *Bernard Leloup, Serge Leloup and Sofrage SARL*, EU:C:1999:575.

161. TFEU Arts 62 and 52(1).

162. *See* Barnard, *supra* n. 17, at 230.

163. *Commission v. Luxembourg*, para. 29, applying *Arblade*, *supra* n. 160, at para. 30.

164. *Commission v. Luxembourg*, para. 30, applying Case C-503/03 *Commission v. Spain* [2006] ECR I-1097.

165. *Commission v. Luxembourg*, para. 31. The Court also found, at para. 65, that, to the extent that Art. 3(10) could be applied, provisions concerning collective agreements could fall under the definition of ‘public policy’.

166. *Commission v. Luxembourg*, para. 31.

imperative requirements of the public interest. These may include, in particular the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions.

This Declaration has no formal legal status and was not published in the EU's Official Journal. As a unilateral declaration of intent, it is best described as a *travaux préparatoires* given formal recognition by these institutions at the final legislative stage.<sup>167</sup> In recent years, *travaux préparatoires* have become an increasingly important part of the Court's approach to interpretation, in particular in cases where the documentation is publicly accessible and there is a clear statement of intent.<sup>168</sup> With regard to a declaration of this kind, the Court has previously held that such declarations can be excluded where no reference is made to the content of the declaration in the wording of the provision in question.<sup>169</sup> Nevertheless, the Advocate General observed that, in his opinion, notwithstanding the lack of a reference to the Declaration in the text of the Directive, it is 'in conformity with the case-law developed by the Court on the inherent limits on the fundamental freedoms which are also applicable to cases of transnational posting of workers'<sup>170</sup> and, on this basis, it was admissible as an aid to interpretation. It is submitted that, in the absence of publication and express reference, this is an extremely shaky basis for such strong reliance by the Court and it has the potential to further shrink the scope for application of the first indent of Article 3(10). Moreover, the Court made no reference to recital 34 of the Rome I Regulation which makes express reference to the overriding mandatory provisions of the country to which workers are posted in the context of the PWD.<sup>171</sup> This implies that labour law provisions should be capable of falling within the scope of 'public policy' under the first indent of Article 3(10) indicating, at the very least, that the provision should be interpreted on a case by case basis and recital 34 should be taken into account.

Next the Court addressed a requirement in Luxembourg law relating to the automatic adjustment of rates of remuneration to the cost of living. Increasing the minimum wage by the cost of living fell squarely within 'minimum rates of pay' in Article 3(1)(c) but the indexation concerned all wages including those

---

167. See Eur-Lex, 'Preparatory acts': <http://eur-lex.europa.eu/collection/eu-law/pre-acts.html>

168. Koen Lenaerts, José A. Gutiérrez-Fons, *To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice*, AEL 2013/9, Working Paper (Academy of European Law, European University Institute) 19–24: [http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL\\_2013\\_09\\_DL.pdf](http://cadmus.eui.eu/bitstream/handle/1814/28339/AEL_2013_09_DL.pdf)

169. *Commission v. Luxembourg*, Opinion of Advocate General Trstenjak, EU:C:2007:516, para. 45, citing: Case 429/85 *Commission v. Italy* [1988] ECR 843, para. 9; Case C-292/89 *Antonissen* [1991] ECR I-745, para. 18; Case C-329/95 *VAG Sverige* [1997] ECR I-2675, para. 23; and Case C-368/96 *Generics (UK) and Others* [1998] ECR I-7967, paras 25 to 28.

170. *Commission v. Luxembourg*, judgment, para. 45.

171. The recital states that: 'The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71'. See further, Barnard (n. 17) 232.

above the minimum wage.<sup>172</sup> Once again the Court's reading was very strict. It found that the intention of the EU legislature was to limit intervention of Member States on the minimum rates of pay. It followed that the automatic adjustment of rates of pay other than the minimum wage fell outside the scope of Article 3(1)(c). The Court was not prepared to countenance any intention on the part of the Member States to allow for an interpretation of 'minimum rates of pay' that did not equate with the national or sectoral 'minimum wage', effectively lowering the ceiling further on Article 3(1). In a similar vein the Court found separately that rules governing equal treatment for part-time and fixed-term workers did not fall within Article 3(1) as these matters were not specifically listed therein, notwithstanding that there is a reference in Article 3(1)(g) to 'other provisions on non-discrimination'.<sup>173</sup>

Also, the wage indexation or living wage requirement could not be saved as a 'public policy' provision under the first indent of Article 3(10). Luxembourg had sought to justify it as aimed at ensuring 'good labour relations' and, on that basis, constituting a public policy imperative by protecting workers from the effects of inflation.<sup>174</sup> However, the Court took an even narrower view of 'public policy' noting that while Member States are, in principle, 'free to determine the requirements of public policy in the light of national needs, the notion of public policy in the [EU] context ... may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.<sup>175</sup> As Catherine Barnard has observed, this test is based on case law on justifications for deporting EU citizens 'transplanted ... to the very different context of labour law'.<sup>176</sup> Such an 'extraordinarily high standard', she adds, would perhaps only cover laws against slavery, referred to in Declaration No 10, and would be likely to exclude laws on, *inter alia*, freedom of association and collective bargaining, data protection and possibly even elimination of exploitative forms of child labour and forced labour.<sup>177</sup>

Moreover, the reasons invoked by a Member State to justify utilising the public policy exception must be accompanied by appropriate evidence or analysis of the expediency and proportionality of the measure in question and precise evidence to substantiate its position.<sup>178</sup> In this case, the Court found that Luxembourg had put forward generalised justifications, 'without adducing any evidence to enable the necessity for and the proportionality of the measures adopted to be evaluated'.<sup>179</sup> The Court held that this defence was insufficient to satisfy the strict requirements of the public policy exception.<sup>180</sup>

---

172. *Commission v. Luxembourg*, para. 45.

173. *Commission v. Luxembourg*, paras 54–55. See Barnard's critique, *supra* n. 17, at 233.

174. *Commission v. Luxembourg*, para. 48.

175. *Commission v. Luxembourg*, para. 50.

176. Barnard, *supra* n. 17, at 232.

177. *Ibid.* 232–233.

178. *Commission v. Luxembourg*, paras 50–51.

179. *Commission v. Luxembourg*, para. 53.

180. *Commission v. Luxembourg*, para. 55.



Finally, the Court addressed the use of collective agreements as ‘public policy provisions’ under the first indent of Article 3(10). The Court found that Luxembourg’s approach was too wide-ranging. Although provisions in collective agreements could fall under this provision, it could not be used to apply the body of national collective agreements in their entirety.<sup>181</sup> Also, Luxembourg could not rely on the second indent of Article 3(10) as an alternative because this only applied to collective agreements that were ‘universally applicable’ which means, under Article 3(8), that they must be observed by all undertakings in all sectors,<sup>182</sup> which was not the case.<sup>183</sup>

The next case, *Rüffert*,<sup>184</sup> was the first of several challenges to social clauses contained in public procurement laws of German states and cities. The dispute arose when Lower Saxony awarded a contract to build a prison to Objekt und Bauregie (OuB) subject to a requirement in the tender that they must pay at least the minimum wage to construction workers pursuant to the collective agreement in force in the building and public works sector. OuB used a subcontractor based in Poland to carry out the work. After an investigation, the contract was terminated on the grounds that OuB had failed to fulfil its contractual obligation to comply with the collective agreement on the grounds that fifty-three posted workers on the building site were being paid less than 50% of the minimum wage laid down in the collective agreement.

The single question before the Court was, in essence, whether the requirement, when submitting tenders for building contracts, to pay at least the remuneration prescribed by the collective agreement in force at the place where those services were performed, amounted to an unjustified restriction on the freedom to provide services contrary to Article 56 TFEU?<sup>185</sup>

Even though the question was silent on the subject of posted workers, the Court decided that it was necessary to take the PWD into consideration because the subject matter fell within the scope of Article 1(3)(a) concerning the posting of workers, who are in an employment relationship with an undertaking, to a host Member State directly under a contract concluded between that undertaking and the party for whom the services are intended.<sup>186</sup> The fact that Lower Saxony’s legislation was not intended to govern the posting of workers did not preclude a situation coming within the scope of the PWD.<sup>187</sup> Having established the locus of the case under the PWD, the next issue was to determine the status of the collective agreement, which was the means used to ‘fix’ the ‘minimum rates of pay’ as a guaranteed term and condition applicable to the posted

---

181. *Commission v. Luxembourg*, paras 64–65.

182. *See supra* n. 116.

183. *Commission v. Luxembourg*, para. 67.

184. Case C-346/06 *Dirk Rüffert v. Land Niedersachsen*, EU:C:2008:189.

185. *Rüffert*, para. 16.

186. *Rüffert*, paras 18–19.

187. *Rüffert*, para. 20.

workers.<sup>188</sup> In accordance with the second indent of Article 3(1), which concerns activities in the building work sector, it was necessary for this purpose for the collective agreement to be declared ‘universally applicable’ as defined in Article 3(8).

As the Court noted, there are two means by which a collective agreement can be regarded as ‘universally applicable’ under Article 3(8). Under the first subparagraph, ‘universally applicable’ collective agreements or arbitration awards are those that must be observed by all undertakings in the geographical area and in the profession or industry concerned.<sup>189</sup> Under the second subparagraph, in the absence of a system for declaring collective agreements to be of universal application, the possibility exists to base them on collective agreements or arbitration awards that are ‘generally applicable’ to all similar undertakings in the profession or industry concerned or agreements that have been concluded by the most representative employers’ and labour organisations at the national level and are applied throughout the national territory.<sup>190</sup>

It was therefore necessary to establish whether the rates of pay had been fixed in accordance with one of these procedures. In relation to the first procedure, the national law implementing the PWD extended the application of provisions on minimum wages in collective agreements, which had been declared universally applicable, to employers established in other Member States which had posted workers to Germany. However, the collective agreement referring to Lower Saxony’s law had neither been declared universally applicable, nor was their evidence that it was capable of being treated as such.<sup>191</sup> With regard to the second procedure, the Court held that it applies only where there is no system for declaring collective agreements to be of universal application, which was not the case in Germany.<sup>192</sup> In any event it would not have fallen within that procedure because it was not ‘generally applicable’, because its binding effect covered only part of the construction sector falling within the geographical area of the agreement as it only applied to public contracts.<sup>193</sup> As the collective agreement did not meet either of these requirements it could not be used to impose the rate of minimum pay on undertakings established in other Member States.<sup>194</sup>

With Article 3(1) precluded, the only fall back appeared to be Article 3(7), allowing for ‘terms and conditions of employment which are more favourable for workers’. This was a possibility instantly rejected by the Court, which explained that, having already found the rate of pay set under the collective

---

188. *Rüffert*, para. 21. The Court also noted, at para. 24, that the regional legislation on the award of public contracts did not, of itself, fix the minimum rates of pay and therefore it was not a ‘law’ within the meaning of the first indent of Directive 96/71, Art. 3(1).

189. *Rüffert*, para. 21.

190. *Rüffert*, para. 22.

191. *Rüffert*, paras 25–27.

192. *Rüffert*, para. 28.

193. *Rüffert*, para. 29.

194. *Rüffert*, paras 30–31.

agreement to be outside Article 3(1), the ‘more favourable’ clause could not be used to impose it as a condition on providers of services from other Member States.<sup>195</sup> The host Member State is not ‘entitled’ to require undertakings to observe a degree of protection for workers beyond the matters listed in Article 3(1).<sup>196</sup> It would be different, however, if undertakings established in another Member State were to sign, of their own accord, a collective agreement in a host Member State the terms of which were more favourable.<sup>197</sup>

Making reference again to the ceiling imposed in *Laval*, the Court reiterated that, with the exception of the unusual instance of more favourable provisions emanating from the home Member State, there was no prospect ‘in principle’ of using Article 3(7) to enhance the minimum protection offered by Article 3(1)(a)–(g).<sup>198</sup> The point of ‘principle’ being economic – the rights of transnational services providers to unencumbered market access – ahead of the social, protection of the interests of workers both posted and domestic. Indeed, the Court went further, stating that the law of Lower Saxony was so restrictive on service providers from Member States where levels of pay were lower, that it ‘may impose ... an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State’. It followed that ‘it cannot be considered to be justified by the objective of ensuring the protection of workers’. In these few words the Court in *Rüffert*, far from preventing social dumping, has effectively endorsed it, in the form of levelling down wages, as a price worth paying for opening of public work contracts and liberalising the market.

Finally, the Court took a direct swipe at the whole concept of ethical clauses in public works contracts citing a lack of evidence to support a policy applying such clauses solely to public contracts.<sup>199</sup> It made no mention of the EU public procurement rules because, on the facts, the situation was confined to the posting of workers.<sup>200</sup> It also found that such a restrictive measure could not be supported by the arguments put forward by Lower Saxony based on, firstly, protecting independence in the organisation of working life by trade unions, and secondly, ensuring the financial balance of social security systems, which are dependent on the level of wages, as an overriding interest.<sup>201</sup>

*Rüffert*, along with *Laval* and *Commission v. Luxembourg*, represent, collectively, an unwarranted intrusion into the autonomy of domestic labour law systems that have evolved as part of the social consensus in Member States at

---

195. *Rüffert*, para. 35.

196. *Rüffert*, para. 33, applying *Laval* para. 80.

197. *Rüffert*, para. 34.

198. *Rüffert*, para. 34, applying *Laval*, para. 81.

199. *Rüffert*, para. 40.

200. Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* Introduction, 6 (Cambridge 2009). For further analysis on this point, see Aristeia Koukiadaki, *The Far-Reaching Implications of the Laval Quartet: The Case of the UK living Wage* (2014) 43 *International Law of Journal* 91, 101.

201. *Rüffert*, paras 41–42.

national, regional and sectoral levels. It is remarkable, and perhaps ironic, that whereas the social policy provisions in the Treaty on the Functioning of the European Union (TFEU) require that EU measures must ‘take account of the diverse form of national practices, in particular in the field of contractual relations’,<sup>202</sup> the free movement of services provisions, as the source of the Directive, have been applied as a blunt instrument by the Court, supported by the Commission, to Europeanise those social policy practices and relations that are regarded as restrictive. This logic applies even in cases where the measures are introduced for social reasons, such as guaranteeing the minimum wage, but the impact on posted workers is incidental. In its response to *Rüffert*, the European Trade Union Confederation (ETUC) remarked that the judgment was an ‘open invitation for social dumping, which will not only threaten workers’ rights and working conditions but also the capacity of local (small and medium) enterprises to compete on a level playing field with foreign (sub)contractors’.<sup>203</sup>

*Rüffert* has had a significant impact on the system of public procurement favoured by many federal states in Germany and more widely throughout the Union.<sup>204</sup> The extent to which it is a problem depends on the national system. For example, in Finland, the national law on employment contracts, which is declared as ‘universally applicable’, places an obligation on employers to observe the provisions of a national collective agreement considered representative in the sector in question on the terms and conditions of the employment relationship including a minimum wage to be paid to posted workers. In the subsequent Finnish case, *ESA*,<sup>205</sup> the relevant collective agreement for construction workers in the electricity sector, which included a minimum wage for posted workers, was found by the Court to be ‘universally applicable’ within the meaning of the second indent of Article 3(1) and Article 3(8), and therefore *Rüffert* could be distinguished.

The Finnish approach does not fit with the German constitutional system, which favours decentralisation to the federal state level. Detlef Sack points to three reforming responses in Germany.<sup>206</sup> First, several federal states have abolished state-specific contract compliance laws. Second, other federal states, including Lower Saxony, have amended their laws, in line with the Court’s jurisprudence, to ensure that these laws are consistent with the ‘hard core’ of protection in the PWD. Third, certain federal states have repackaged their

---

202. TFEU, Art. 151.

203. ETUC, ‘*Rüffert* case: ETUC warns that ECJ’s judgement is destructive and damaging’ (Press Release, 3 April 2008): <https://www.etuc.org/press/rueffert-case-etuc-warns-ecj-s-judgement-destructive-and-damaging>.

204. See Detlef Sack, ‘Europeanization Through Law, Compliance, and Party Differences – The ECJ’s ‘*Rüffert*’ Judgment (C-346/06) and Amendments to Public Procurement Laws in German Federal States’ (2012) 34/3 *European Integration* 241.

205. Case C-396/13 *Sähköalojen ammattiliitto ry v. Elektrobudowa Spolka Akcyjna (ESA)*, EU:C:2015:86.

206. Sack, *supra* n. 204, at 253.

contract compliance requirements to fit with the regime of EU public procurement. It is to the third of these responses that I shall now turn with reference to two recent cases referred from German courts that highlight the interplay between the laws on posted workers and public procurement.

### **12.3.2.2 Bundesruckerei and RegioPost: Posted Workers and Public Procurement – Tilting the Balance Towards the Social?**

Public procurement as a concept encompasses ‘the purchasing by government from private sector contractors, usually on the basis of competitive bidding, of goods and services that government needs’.<sup>207</sup> The EU public procurement regime provides minimum harmonised rules for the purchase of services, works and supplies by public authorities whose monetary value exceeds a specified European-level threshold in order to create a level playing field for all enterprises across the Union.<sup>208</sup> By means of the public procurement rules, the EU seeks, *inter alia*, to facilitate better use of public procurement through strategic use of public contracts and promote participation of small and medium-sized enterprises. It therefore recognises the important contribution of public authorities in driving forward the single market programme. The relevant instrument applicable at the time of the two cases discussed in this section was Directive 2004/18 on the coordination of procedures for the award of public work contracts, public supply contracts and public service contracts.<sup>209</sup> Directive 2004/18 has now been repealed and replaced by Directive 2014/24.<sup>210</sup> Under Article 1 of Directive 2004/18 contracting authorities ‘shall treat economic operators equally and non-discriminatorily and shall act in a transparent way’. Article 26 provides that:

Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with [Union] law and are indicated in the contract notice or in the specifications. The

---

207. Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* 3 (Oxford 2007). In EU law, ‘public procurement’ is defined as ‘the acquisition by means of a public contract of works, supplies or services by one or more contracting authorities from economic operators chosen by those contracting authorities, whether or not the works, supplies or services are intended for a public purpose’: Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242, Art. 1(2).

208. European Commission, ‘Public Procurement’: [https://ec.europa.eu/growth/single-market/public-procurement\\_en](https://ec.europa.eu/growth/single-market/public-procurement_en). See further, Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law* (Cambridge 2009).

209. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts OJ L 134, 30.4.2004, 114–240. For detailed analysis, see Catherine Barnard, *Using Procurement Law to Enforce Labour Standards* in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law*, 256 (Oxford 2011).

210. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242.

conditions governing the performance of a contract may, in particular, concern social and environmental considerations.

This provision has now been replaced by Article 70 of Directive 2014/24 which has been amended to specifically include, *inter alia*, ‘employment related considerations’ in the final sentence. As Éric Van den Abeele has noted, Article 26 (now Article 70) is part of a framework designed ‘to integrate strong social and environmental dimensions and include provisions favourable to employment in the public procurement rules’.<sup>211</sup> Article 26 was relied on by German public authorities in two cases: *Bundesruckerei*<sup>212</sup> and *RegioPost*.<sup>213</sup>

The context of *Bundesruckerei* was as follows. In 2012, the Land of North Rhine-Westphalia introduced a law on compliance with collective agreements, social norms and fair competition in the award of public contracts. This law fell within the third category of responses to *Rüffert* identified by Sack, above.<sup>214</sup> It distinguished between, *inter alia*, those public service contracts within the scope of the application of the law on posted workers, which essentially replicated the ‘hard core’ terms and conditions in the PWD, and other public contracts, not covered by the posted workers law, which could only be awarded to undertakings which, at the time of submission of the tender, had agreed in writing to pay their workers EUR 8.62 as a minimum hourly wage for the performance of the service. The Land Rhine-Westphalian law, specifically the minimum wage rate, was applied by the City of Dortmund as a condition in a call for tenders for a public contract relating to data services for urban planning. The value of the contract, at EUR 300,000, brought the tender within the scope of Directive 2004/18 which covers higher value contracts. This means that under the EU public procurement regime, the tender must be advertised throughout the EU so as to guarantee that economic operators in the EU and the European Economic Area will be given genuine and equal opportunities to take part.<sup>215</sup>

*Bundesruckerei*, a German company, informed the City of Dortmund that, if it was awarded the contract, it would use a wholly owned subsidiary established in Poland as subcontractor. It would pay a lower wage to the workers in Poland in the light of the standard of living in that Member State. It was therefore seeking an assurance that the stipulated minimum wage would not apply to its subcontractor. The City of Dortmund was unable to give this assurance because it was bound by the Rhine-Westphalian law. *Bundesruckerei* brought a legal challenge against the City of Dortmund claiming that the

---

211. Éric Van den Abeele, *Integrating social and environmental dimensions in public procurement: one small step for the internal market, one giant leap for the EU?* European Trade Union Institute Working Paper 2014.08.

212. Case C-549/13 *Bundesruckerei GmbH v. Stadt Dortmund*, EU:C:2014:2235.

213. Case C-115/14 *RegioPost GmbH & Co KG v. Stadt Landau in der Pfalz*, EU:C:2015:760.

214. Sack, *supra* n. 204.

215. Kerstin Ahlberg and Niklas Bruun, *Public Procurement and Labour Law – Friends or Foes?* in Mia Rönnmar (ed.), *Labour Law, Fundamental Rights and Social Europe*, 89, 91–92 (Hart 2011).

tendering rules constituted an unjustified restriction on its freedom to provide services under Article 56 TFEU.<sup>216</sup> The City of Dortmund's defence was three-fold. Firstly, the tender was compatible with *Rüffert*, as the requirement to pay the minimum wage was in a law consistent with the first indent of Article 3(1) of the PWD, secondly, the legislation was laid down as a 'special condition' relating to the performance of the contract in accordance with Article 26 of Directive 2004/18, cited above, and, thirdly, the statutory obligation was justified because it ensured that a reasonable wage was paid to the employees engaged for the performance of public works, which also reduced the burden on the social security system.<sup>217</sup>

The Court gave its judgment in September 2014. In essence, the national court had asked whether the application of the Rhine-Westphalian law to a subcontractor established in another Member State, having recourse exclusively to workers employed in that State, was precluded by Article 56 TFEU. If so, the minimum wage condition would be inapplicable.<sup>218</sup> It also asked about the application of the PWD but, because *Bundesruckerei* did not intend to perform the contract by posting the employees of its Polish subcontractor in German territory, the Court found that it was not a situation covered by one of the three transnational measures referred to in Article 1(3) of the PWD and therefore the Directive was not applicable.<sup>219</sup>

Turning to Article 26 of Directive 2004/18, the Court emphasised that, with reference to the language in that provision, any 'social considerations' relating to the performance of the contract could only be imposed as requirements, within the meaning of that provision, if they were 'compatible' with EU law. Once again, as EU public procurement law is based on single market objectives, the main reference point is free movement of services under Article 56 TFEU and also competition law.

The Court treated the situation as analogous to *Rüffert*. Applying the test laid down in that case, as the tenderer intended to carry out the work using subcontractors established in a Member State other than that to which the contracting authority belongs and in which minimum rates of pay were lower, this requirement 'constituted an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State' and was, therefore, a restriction within the meaning of Article 56 TFEU.<sup>220</sup> Likewise, although such a measure might be justified in principle by the objective of protecting employees and also avoiding social dumping, the legislation of Land Rhine-Westphalia, applicable solely to public contracts, was not backed up by information 'to suggest that employees in the private sector are not in need of the same wage protection as those working in the context of public

---

216. *Bundesruckerei*, para. 13.

217. *Bundesruckerei*, para. 14.

218. *Bundesruckerei*, para. 29.

219. *Bundesruckerei*, para. 27.

220. *Bundesruckerei*, para. 30, applying *Rüffert* (n. 184), para. 37.

contracts'.<sup>221</sup> Also, in so far as the scope of the national legislation could extend to this situation, in which the contract was being performed in another Member State, the fact that wages were lower than in Poland, made the minimum wage requirement disproportionate.<sup>222</sup> It bore no relation to the cost of living in Poland and therefore prevented subcontractors established there 'from deriving a competitive advantage from the differences between the respective rates of pay, that national legislation goes beyond what is necessary to ensure that the objective of employee protection is attained'.<sup>223</sup> Finally, the objective of stability of social security systems could not be used to justify the minimum wage requirement because, again analogous to *Rüffert*, if the Polish workers did not receive a reasonable wage and needed to have recourse to social security, 'it would be to the Polish social assistance that they would have a right', which would not affect the German social security system.<sup>224</sup> It followed that the requirement in the tender was precluded by Article 56 TFEU<sup>225</sup> and, therefore, as it was incompatible with Union law, Article 26 of Directive 2004/18 was inapplicable.

*Bundesruckerei* is a case of posting in reverse with consequences that are in many respects even more negative for labour law than *Rüffert*. Labour, under the type of outsourcing proposed by the tenderers, is deterritorialised not by posting, in this instance, but by use of a subsidiary established in another Member State to shift the workspace to a national regulatory regime with lower wages. As a result, the contract compliance provisions have the reverse effect to that intended by national law. Rival tenderers proposing to use workers based in the national territory of the public procuring authority, are placed at a competitive disadvantage as they are bound by the minimum wage requirement under national law and therefore have higher costs. As the core principle of awarding contracts under Directive 2004/18 was to 'treat economic operators equally and non-discriminatorily and ... act in a transparent way',<sup>226</sup> it was extremely difficult for those rival tenderers to compete unless they too decided to use subcontractors established in Member States with lower costs. The effect is a kind of circular dumping of labour standards that leads to a general levelling down of wages and other terms and conditions of employment. *Rüffert* and *Bundesruckerei*, left unchecked, would create a climate of unfair competition wholly contrary to the social objectives of the EU directives under discussion. There is no doubt that this case law was influential in persuading the EU institutions to amend the principles of awarding contracts in Directive 2014/24, discussed below.

---

221. *Bundesruckerei*, paras 31–32, applying *Rüffert* (n. 184), paras 38–40.

222. *Bundesruckerei*, para. 33.

223. *Bundesruckerei*, para. 34.

224. *Bundesruckerei*, para. 35, applying, by analogy, *Rüffert* (n184), para. 42.

225. *Bundesruckerei*, para. 36.

226. Directive 2014/24, Art. 18(1).



The most recent case, *RegioPost*,<sup>227</sup> decided just over twelve months later, in November 2015, is an antidote to *Rüffert* and *Bundesruckerei*, and represents a significant shift in the Court's jurisprudence. The dispute arose after the town of Landau, situated in the Land of Rhineland-Palatinate, launched an EU-wide call for tenders for a public procurement contract for postal services in the municipality. Tenderers had to comply with a Rhineland-Palatinate law requiring them to guarantee a minimum wage of EUR 8.70 per hour when awarding public contracts. Specifically, when submitting the tender documents, enterprises were expected to present declarations that they and their subcontractors would pay the stipulated minimum wage. Unless the declarations were submitted the tender would be excluded from the evaluation. *RegioPost* did not submit a declaration with its tender, even after a reminder, but declarations by its subcontractors were submitted. When Landau refused to evaluate its tender for want of the declaration, *RegioPost* challenged the decision leading ultimately to a judicial referral to the Court.

In essence, the main question for the Court was whether, in a procedure for the award of a public procurement contract, tenderers and their subcontractors could be lawfully required to undertake to pay the statutory minimum hourly wage to the personnel who would be performing the work under that contract?<sup>228</sup> Reference was made to both Article 56 TFEU and the PWD, and also the fact that there was neither a national minimum wage, at the time of the case, nor a universally applicable collective agreement. The Court also asked whether, if the condition to pay the minimum wage met the requirements of Article 26 of Directive 2004/18, and was compatible with EU law, the tenderers would automatically be bound to pay that minimum wage rendering the declarations superfluous. Although the case might appear, at face value, to be fully covered by the *Rüffert*, *Bundesruckerei* line of case law, the referring court referred to the lively academic debate in Germany, which focused on the restrictive approach of the Court in those cases and the possibilities for refining the law at federal state level in a fashion that required payment of the applicable minimum wage as a condition for tendering to perform public contracts, in line with Article 26, and in conformity with 'hard core' of the PWD. In effect the Court was being asked to think again.

The Court found, as an initial point, that the case was admissible even though all the tenderers were established in Germany. The fact that Directive 2004/18 was applicable to the tender in this case meant that a question of interpretation of Article 26 was admissible. There was a cross-border interest because the value of the contract exceeded the threshold for the application of Directive 2004/18. An undertaking established in another Member State might have been deterred from submitting a tender by the requirement to undertake to

---

227. Case C-115/14 *RegioPost GmbH & Co KG v. Stadt Landau in der Pfalz*, EU:C:2015:760.

228. *RegioPost*, Opinion of Advocate General Mengozzi, EU:C:2015:566, para. 1.

pay the minimum wage set by the Land Rhineland-Palatinate because of lower prevailing wage levels in that Member State.<sup>229</sup>

Addressing the main question, the Court found that the minimum wage requirement was a 'special condition' concerning 'social considerations' for the purposes of Article 26 and its publication satisfied the procedural condition of transparency.<sup>230</sup> It was also neither directly or indirectly discriminatory.<sup>231</sup> In an important shift from its approach in *Bundesruckerei*, where the Court had considered Article 26 mainly in isolation from Directive 2004/18 as a whole, the Court ruled that where a national measure falls within a field 'exhaustively harmonised at EU level', in line with settled-case law, it 'must be assessed ... in the light of the provisions of that harmonising measure and not in the light of the primary law of the European Union'.<sup>232</sup> However, because under Article 26 'special conditions' must be 'compatible' with EU law, the rules relating to that provision were not exhaustively enumerated and it was necessary also to consider the compatibility of the measure with primary law and other EU measures.<sup>233</sup> In particular, the measure had to be compatible with the minimum conditions laid down in the PWD, a requirement drawn from recital 34 of the preamble of Directive 2004/18,<sup>234</sup> directly linking the two provisions. Because, hypothetically, an undertaking established in another Member State, with a lower standard of living and a lower minimum wage in the sector, may have been interested in submitting a tender for the contract and envisaged posting workers to Germany, and such an undertaking might have been deterred by the minimum wage requirement, it was necessary to examine the national measure in the light of Article 3(1) of the PWD.<sup>235</sup>

With regard to the PWD, the Court distinguished *Rüffert* on the facts. Firstly, unlike the Law of Lower Saxony in that case, the Law of Rhineland-Palatinate laid down the minimum rate of pay bringing it within the first indent of Article 3(1) and also Article 3(1)(c), and secondly, at the time of the case, which was before Germany had introduced a national minimum wage law, national legislation did not impose a lower rate for the postal services sector.<sup>236</sup> Another important point of distinction was that the second indent concerning the requirement for collective agreements to be universally applicable was not relevant because this was not a contract for building works falling within that indent. As this condition did not apply, Article 3(8) was not relevant and categorisation of the Rhineland-Palatinate law under the first indent 'cannot be called into question on the basis that [it applied] to public contracts and not to

---

229. *RegioPost*, para. 51.

230. *RegioPost*, paras 54–55.

231. *RegioPost*, para. 56, referencing recital 33 of the preamble of Directive 2004/18.

232. *RegioPost*, para. 57, and the cases cited therein.

233. *RegioPost*, paras 58–59.

234. *RegioPost*, para. 60.

235. *RegioPost*, para. 61, cf Advocate General Paolo Mengozzi's Opinion, paras 51–59.

236. *RegioPost*, para. 62.

private contracts'.<sup>237</sup> Moreover, once again linking the PWD with Article 26 of Directive 2004/18, the Court added that, the national measure fell within the latter provision, 'which permits, subject to certain conditions, the imposition of a minimum wage in public contracts [and] that measure cannot be required to extend beyond that specified field by applying generally to all contracts, including private contracts'.<sup>238</sup> The Court concisely drove home the point by adding that the limitation of the scope of the measure to public contracts was 'the simple consequence of the fact that there are rules of EU law specific to that field, in this case, those laid down in Directive 2004/18'. In one bound, by firstly identifying this vital linkage between the directives and, secondly, giving precedence to the public procurement rules, based on the facts of the case, the Court was able to break free from the straightjacket it had imposed on itself in *Rüffert*.

The effect is to turn *Rüffert* on its head in cases where Article 26 (now Article 70 of Directive 2014/24) applies, thus.<sup>239</sup>

It follows that Article 26 of Directive 2004/18, read in conjunction with Directive 96/71, permits the host Member State to lay down, in the context of the award of a public contract, a mandatory rule for minimum protection referred to in point (c) of the first subparagraph of Article 3(1) of that directive, such as that at issue in the main proceedings, which requires undertakings established in other Member States to comply with an obligation in respect of a minimum rate of pay for the benefit of their workers posted to the territory of the host Member State in order to perform that public contract. Such a rule is part of the level of protection which must be guaranteed to those workers.

Most significantly, in complete contrast to *Laval*, *Commission v. Luxembourg*, *Rüffert* and *Bundesruckerei*, in this specific instance, the rule prohibiting restrictions on the freedom to provide services in Article 56 TFEU, so often a negative from a labour law perspective, becomes more of a neutral factor. As the Court explains, Article 26 is to be read in the light of Article 56 TFEU 'since that directive [seeks] in particular to bring about the freedom to provide services'.<sup>240</sup> Viewed through this prism, although a minimum wage requirement in the context of an EU-level public procurement contract is 'capable' of constituting a restriction on the freedom to provide services, such a measure may, in principle, be justified by the objective of protecting workers.<sup>241</sup> Again, *Rüffert* could be distinguished. Even though *Rüffert* had appeared to rule out minimum wage rules relating solely to public contracts,<sup>242</sup> in that case what was at issue was a collective agreement applying solely to the construction sector that had not been

---

237. *RegioPost*, para. 63.

238. *RegioPost*, para. 64.

239. *RegioPost*, para. 66, also applying language from *Laval* (n. 133), paras 74, 80 and 81.

240. *RegioPost*, para. 67.

241. *RegioPost*, paras 69–70.

242. *RegioPost*, para. 71, referring to *Rüffert* (n. 184), paras 38–40, discussed in the previous section.

declared universally applicable.<sup>243</sup> By contrast, in *RegioPost*, the Rhineland-Palatinate law on the minimum wage was ‘a mandatory rule for minimum protection’ that applied irrespective of the sector concerned and no other legislation, at the time, imposed a lower minimum wage for the postal sector. This was sufficient, in the context of the application of Article 26, to justify the measure.<sup>244</sup>

In briefly answering the second question in the reference, concerning the lawfulness of the declaration that Regiopost was required to sign, the Court found that such a requirement was not precluded in the light of its answer to the previous question.<sup>245</sup> Once again the Court turned a possible negative into a positive from a labour law perspective. Exclusion from the evaluation for failing to supply the declaration was not a penalty, it was simply a failure to meet a requirement. Moreover, such a method was formulated ‘in a particularly transparent manner’ in the contract notice so as ‘to emphasise, from the outset, the importance of compliance with a mandatory rule for minimum protection expressly authorised by Article 26 of Directive 2004/18’.<sup>246</sup> It followed that Article 26 permitted such an exclusion which was appropriate and proportionate.<sup>247</sup>

After so many setbacks, *Regiopost* has been heralded as a belated stance by the Court against social dumping.<sup>248</sup> Albert Sanchez-Graells observes that the Court has ‘back-tracked’ from its restrictive line of case law on the use of public procurement for social policy purposes but expresses concern that the judgment amounts to ‘economic protectionism’ and facilitates ‘the politicised use of public procurement’.<sup>249</sup> In my view, however, the Court has merely addressed an imbalance between the economic and the social dimensions of EU single market law. In certain, strictly circumscribed, situations it is possible to justify minimum wage requirements and other terms and conditions of employment in the tendering of higher value public contracts falling within the scope of the EU’s public procurement regime so long as requirements applicable to posted workers are compatible with the PWD. *Rüffert* remains in place and continues to limit

---

243. *RegioPost*, para. 73.

244. *RegioPost*, paras 75–77.

245. *RegioPost*, para. 79.

246. *RegioPost*, para. 83.

247. *RegioPost*, paras 84–5 and 87–88, with reference to recital 34 in the preamble of Directive 2004/18 which allows for exclusion in such circumstances. The Court added, at para. 86, that the declaration imposed a ‘negligible’ burden on tenderers and their subcontractors.

248. See Daniel William Carter, ‘CJEU (finally) takes stance against social dumping’, Leiden Law Blog, 19 February 2016: <http://leidenlawblog.nl/articles/cjeu-finally-takes-stance-against-social-dumping>.

249. Albert Sanchez-Graells, *CJEU clarifies and minimises Rüffert, and expands the scope for minimum wage requirements in public procurement (C-115/14)*, How to Crack a Nut: A Blog on EU Economic law, 17 November 2015: <http://www.howtocrackanut.com/blog/2015/11/cjeu-clarifies-and-minimises-ruffert.html>.

measures that have an impact on posted workers in situations where either the public procurement rules are not applicable or laws or collective agreements do not satisfy the requirements in the Directive. In particular, the Court's test for universal applicability of collective agreements remains intact and would have rendered the type of minimum wage requirement relied on in *RegioPost* unlawful if the town had applied it to a construction contract.

### 12.3.3 Ways Forward

As the case law analysis has shown, the orientation of law on posted workers is single market law ahead of labour law, and the purpose of EU regulation is to coordinate rather than harmonise national laws. From the outset, therefore, any measure of national labour law seeking to regulate the posting of workers, or potentially impacting on them, must not infringe the principle of free movement of services. In practice this has led to a case by case rear guard action to defend the core principles and methodology of national labour laws that form part of the fabric of European social solidarity. The terms and conditions of employment in the PWD are perceived by the Court not as a reference point for upwards harmonisation, as would be the norm for social policy directives, but, instead, as an exhaustive list of rules providing a ceiling of minimum protection for posted workers who, outside of the free movement of workers' regime,<sup>250</sup> are only deserving of more favourable provisions in the host Member State when they already enjoy higher standards of employment protection in their *home* Member State. Preventing social dumping, which was the driving force for many Member States supporting the PWD, has been, in practice, a largely unsuccessful basis for objective justification of national rules, with the exception of *RegioPost*,<sup>251</sup> where the EU public procurement regime was the point of reference.

*Laval*,<sup>252</sup> *Commission v. Luxembourg*,<sup>253</sup> *Rüffert*,<sup>254</sup> and *Bundesruckerei*<sup>255</sup> highlight the extent of the squeeze placed by the Court on some of basic tenets of labour law in this context, including the right to take collective action, policies to ensure equality of treatment in employment contracts, and social clauses in public works contracts. Following *Rüffert*, and in response to widespread concern about the need to promote socially responsible public procurement,<sup>256</sup>

---

250. TFEU, Art. 45.

251. Case C-115/14 *RegioPost GmbH & Co KG v. Stadt Landau in der Pfalz*, EU:C:2015:760.

252. Case C-341/05 *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet*, EU:C:2007:809.

253. Case C-319/06 *Commission v. Luxembourg*, EU:C:2008:350.

254. Case C-346/06 *Dirk Rüffert v. Land Niedersachsen*, EU:C:2008:189.

255. Case C-549/13 *Bundesruckerei GmbH v. Stadt Dortmund*, EU:C:2014:2235.

256. See European Commission, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement*, Staff Working Paper (SEC)2010 1258 final, 7. For discussion see Koukiadaki, *supra* n. 200, at 92.

the rules have been strengthened in Directive 2014/24.<sup>257</sup> In particular, environmental, social and labour considerations now form part of the principles of public procurement, as follows:<sup>258</sup>

Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

This provision, Article 18(2), has the effect of introducing a general obligation to comply with national, EU and international labour law. Annex X refers to the fundamental labour law conventions of the International Labour Organisation (ILO).<sup>259</sup> This is an important reference point as the ILO has been at the forefront of fostering the incorporation of social objectives into public procurement by seeking respect for minimum labour standards and seeking 'to ensure that public contracts do not exert a downward pressure on wages and working conditions'.<sup>260</sup>

Two paragraphs in the recitals add teeth to this provision. First, Recital 37 states, in reference to the scope of Article 18(2), and in the context of the PWD, as follows:

With a view to an appropriate integration of environmental, social and labour requirements into public procurement procedures it is of particular importance that Member States and contracting authorities take relevant measures to ensure compliance with obligations in the fields of environmental, social and labour law that apply at the place where the works are executed or the services provided and result from laws, regulations, decrees and decisions, at both national and Union level, as well as from collective agreements, provided that such rules, and their application, comply with Union law. Equally, obligations stemming from international agreements ratified by all Member States and listed in Annex X should apply during contract performance. However, this should in no way prevent the application of terms and conditions of employment which are more favourable to workers.

The relevant measures should be applied in conformity with the basic principles of Union law, in particular with a view to ensuring equal treatment. Such relevant measures should be applied in accordance with Directive 96/71/EC of the European Parliament and of the Council and in a way that ensures equal treatment and does not discriminate directly or indirectly against economic operators and workers from other Member States.

---

257. Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L 94, 28.3.2014, 65–242.

258. *Ibid.* Art. 18(2).

259. *Ibid.* Annex X lists the eight fundamental ILO Conventions: <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

260. ILO, *Labour Clauses in Public Contracts: Integrating the Social Dimension into Procurement Policies and Practices* (ILO 2008). See ILO Convention No. 94 of 1949 on Labour Clauses (Public Contracts). For discussion see Koukiadaki, *supra* n. 200, at 92.

This recital provides clarification of the application of the obligation in Article 18(2) at both national and Union level. However, where the PWD is the main frame of reference, as in *Rüffert*,<sup>261</sup> it is doubtful whether it will lead to any fundamental change in the law.

Also, Recital 39 provides a strong statement on the status of collective agreements as follows:

It should also be possible to include clauses ensuring compliance with collective agreements in compliance with Union law in public contracts. Non-compliance with the relevant obligations could be considered to be grave misconduct on the part of the economic operator concerned, liable to exclusion of that economic operator from the procedure for the award of a public contract.

This clause adds weight to the interpretation of the previous Directive, 2004/18, in *RegioPost*.<sup>262</sup> Once again, however, it does not completely rule out a situation, such as in *Rüffert*,<sup>263</sup> where a restrictive interpretation of the PWD is the overriding issue on the facts. However, if both the PWD and Directive 2014/24 are in play, it is submitted that *RegioPost* is reinforced and is the preferred case to follow.

In response to widespread concerns about the inadequacy of the PWD as a mechanism to combat social dumping, and a growing awareness that the law needs to be improved,<sup>264</sup> the Commission published a ‘targeted revision’ of the Directive in March 2016.<sup>265</sup> One factor driving reform is an increase in postings in the EU. In 2014 there were over 1.9 million workers posted to perform service contracts amounting to 0.7% of the total EU labour force, representing increases of 10.3% on 2013 and 44.4% from 2010.

The Commission notes that some improvements will be achieved by means of the Enforcement Directive, 2014/67,<sup>266</sup> which reached its transposition date in June 2016. The Enforcement Directive is mainly concerned with improved administrative cooperation between national authorities in charge of posting and strengthening monitoring mechanisms at national level. It only addresses problems relating to the implementation of existing rules. It does, however, highlight the issue of so-called ‘letter-box’ companies that are created in Member

---

261. Case C-346/06 *Dirk Rüffert v. Land Niedersachsen*, EU:C:2008:189.

262. Case C-115/14 *RegioPost GmbH & Co KG v. Stadt Landau in der Pfalz*, EU:C:2015:760.

263. Case C-346/06 *Dirk Rüffert v. Land Niedersachsen*, EU:C:2008:189.

264. European Parliament, *supra* n. 115, at 9.

265. European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services’, COM(2016) 128 final, 8 March 2016.

266. Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System (‘the IMI Regulation’), OJ L 159, 28.5.2014, 11–31.

States where labour costs are low.<sup>267</sup> Once established, these companies carry out little or no activity in their home country, because their main purpose is to post workers to other Member States and pay less in social security contributions. Under Article 4(2) of the Enforcement Directive, a series of factors can be used to determine whether an undertaking genuinely performs substantial activities, other than purely internal management and/or administrative activities. For example, this can be done by identifying: the place where the undertaking performs its substantial business activity and where it employs administrative staff; and the number of contracts performed and the size of the turnover.

The revision of the PWD would maintain its orientation as a single market measure and does not harmonise labour costs.<sup>268</sup> The main proposed changes are as follows:

- when the anticipated or effective duration of the posting exceeds twenty-four months, the host Member State will be deemed to be the country where the work is habitually carried out. The law of the host Member State will apply to the employment contract of these long-term posted workers if no other choice of law was made by the parties;<sup>269</sup>
- it removes the Annex concerning building work. This has the effect of making collective agreements capable of being ‘universally applicable’ to posted workers in all sectors of the economy;<sup>270</sup>
- it replaces the reference to ‘minimum rates of pay’ with ‘remuneration’. It is left to all Member States to apply rules on remuneration in accordance with their national law and practice;<sup>271</sup>
- a new subparagraph is added to the listing of the mandatory rules placing an obligation on Member States to publish information on the constituent elements of remuneration;<sup>272</sup>
- a new provision concerning subcontracting chains. Member States will be permitted, subject to the principle of proportionality, to oblige undertakings to subcontract only to undertakings that grant workers certain conditions on remuneration applicable to the contractor, including those resulting from non-universally applicable collective agreements.<sup>273</sup> The same obligations must be imposed on all national subcontractors;

---

267. European Parliament, *supra* n. 115, at 39.

268. COM(2016) 128, 4.

269. *Ibid.* Art. 2a(1). Under Art. 2a(2): ‘in case of replacement of posted workers performing the same task at the same place, the cumulative duration of the posting periods of the workers shall be taken into account, with regard to workers that are posted for an effective duration of at least six months’.

270. *Ibid.* first indent of Art. 3(a)(1). The term ‘universally applicable’ continues to be interpreted in line with Art. 3(8).

271. *Ibid.* Art. 3(a)(1)(c).

272. *Ibid.* Art. 3(a), second subparagraph.

273. *Ibid.* Art. 3(b).



- temporary posted workers are guaranteed the terms and conditions provided for in the Temporary Agency Work Directive, 2008/104.<sup>274</sup>

These proposals, if implemented, would amount to a significant improvement in the law concerning posted workers. The proposed Directive would effectively provide for equality of treatment under national law for long-term posted workers. However, these long-term posted workers will continue to be in a rather anomalous position as service providers rather than ‘workers’ with full EU citizenship rights. Further strengthening of protection would come with the provisions on subcontracting and temporary posted workers, although there is a danger that, where it is feasible, more enterprises will resort to carrying out the performance of the service contract in the home Member State of the workers and thereby avoid the PWD, as in *Bundesruckerei*.<sup>275</sup>

Most contentious is the amendment to change ‘minimum rates of pay’ to ‘remuneration’ in the mandatory rules. ‘Remuneration’ is defined as ‘all the elements of remuneration rendered mandatory by national law’. It is broadly in line with *ESA*,<sup>276</sup> the Finnish case, briefly discussed above, where a collective agreement with detailed rules on remuneration was found to be universally applicable and, therefore, within the scope of the PWD.<sup>277</sup>

The prospects for agreement on the revised PWD, on the basis of the content proposed by the Commission, do not look promising. In the Explanatory Memorandum accompanying the proposal, it is made evident that there is a clear split between countries receiving posted workers – seven Member States in northern Europe,<sup>278</sup> supporting ‘modernisation’ of the PWD; and countries exporting posted workers – nine Member States in central and Eastern Europe,<sup>279</sup> who argue that a review of the PWD is premature.<sup>280</sup> In the summer of 2016, the Commission was required to reconsider its proposal after receiving objections in reasoned opinions from parliaments in eleven Member States.<sup>281</sup> Under the so-called ‘yellow card’ procedure,<sup>282</sup> the Commission has been warned that, in the reasoned opinion of this group of national parliaments, the proposal is not compatible with the principle of subsidiarity,<sup>283</sup> as action can be

---

274. *Ibid.* Art. 3(c). See Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work, OJ L 327, 5.12.2008, 9–14, Art. 5.

275. Case C-549/13 *Bundesruckerei GmbH v. Stadt Dortmund*, EU:C:2014:2235.

276. Case C-396/13 *Sähköalojen ammattiliitto ry v. Elektrobudowa Spolka Akcyjna (ESA)*, EU:C:2015:86.

277. For further analysis of Directive 2014/24, see Van den Abeele, *supra* n. 211.

278. Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Sweden.

279. Bulgaria, Czech Republic, Estonia, Hungary, Lithuania, Latvia, Poland, Slovakia and Romania.

280. European Commission (n. 265) 4–5.

281. In addition to several of the countries referred to above, n. 279, the list of objectors included the parliaments of Denmark and Croatia. See European Commission, COM(2016) 505 final.

282. Protocol 2 annexed to the treaties.

283. TEU, Art. 5(3).

taken at Member State level to secure the EU's objectives. Having analysed all of the objections, the Commission has resolutely concluded that action at Union level is necessary.<sup>284</sup> It will proceed with the proposal but it faces a difficult hurdle to secure sufficient support in the Council of the EU where a qualified majority vote is required among the Member States for the measure to be adopted.

#### 12.4 CONCLUDING REMARKS

Analysis of the Court's case law on collective redundancies, posted workers and public procurement has demonstrated that EU labour law and social provisions in single market law, originally designed to provide a modicum of protection to workers in specific employment situations, including in contexts such as transnational restructuring and subcontracting, is no longer effective in securing those objectives. EU legislation, enacted in the twentieth century, has been interpreted inflexibly by the Court, in its desire to preserve an autonomous EU interpretation of core concepts, in twenty-first century cases involving complex transnational restructuring, major insolvencies, and 'downsizing' by closing smaller units of the enterprise. Moreover, EU single market law has accelerated the pace of globalisation, especially in services, opening up opportunities for enterprises to deterritorialise their activities, by establishing subsidiaries, subcontracting, outsourcing and posting workers to perform service contracts in other Member States. In turn, this has brought about institutional changes in transnational workspaces,<sup>285</sup> leading to an increasing fragmentation of labour, and gaps in employment and social protection.

As the EU has expanded territorially, inequalities in both labour conditions and social security between Member States have widened rather than closed, reviving the problem of social dumping that EU social policy was designed to cure by means of partial harmonisation, where necessary, to achieve a 'gradual coalescence of social policies' as a consequence of market integration.<sup>286</sup> The challenge for the EU is to reform the law to adapt to regulatory competition and transformational changes in the organisation of enterprises in the single market because, as Simon Deakin has observed 'outcomes are critically dependent on the way in which the rules of the game are designed'.<sup>287</sup>

---

284. European Commission, COM(2016) 505 final.

285. See Wagner, *supra* n. 4.

286. See Otto Kahn-Freund, *Labour Law and Social Security*, in E. Stein and T. L. Nicholson (eds), *American Enterprise in the European Common Market. A Legal Profile*, 297, 299 (University of Michigan Press 1960). Kahn-Freund was discussing the 'Spaak Report': High Authority of the European Community for Coal and Steel, 'The Brussels Report on the General Common Market', June 1956 [http://aei.pitt.edu/995/1/Spaak\\_report.pdf](http://aei.pitt.edu/995/1/Spaak_report.pdf). See further, Stefano Giubboni, *Social Rights and Market Freedom in the European Constitution: A Labour Law Perspective*, 45–49 (Cambridge 2006).

287. S. Deakin, *supra* n. 5, at 1.

