E U R O P E A N E C O N O M I C A R E A

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DRAFT REPORT

on

Labour Market Issues in the EEA: Posted Workers and the Freedom to Provide Services

Co-rapporteurs: Mr Steinar GULLVÅG (Labour Party, Norway)
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The deadline for tabling amendments to the draft resolution has been set for:

Tuesday 24 March 2009, at 17.00

Amendments shall be tabled in English only and sent to the EEA JPC secretariat:

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Executive Summary

1. This report examines the situation of posted workers in the European Economic Area (EEA), paying particular attention to legislation affecting them through EC Treaty provisions and the EEA Agreement[1], Directives and European Court of Justice (ECJ) case law. It points to conflicting principles within these, notably with respect to the freedom to provide services, equality of treatment and non-discrimination while also addressing the risk of social dumping.

Legislation applicable to posted workers

2. Part II sets out the main EC Treaty and EEA Agreement articles and Directives affecting posted workers. The EC Treaty articles set out the principles of the freedom of movement of workers (Article 39) and to provide services across national Member State (MS) borders (Article 49), and the aim of improving living and working conditions within the EU (Article 136). With regard to the EEA EFTA States, Iceland, Liechtenstein and Norway, the principles of free movement of workers are laid down in Article 28 of the EEA Agreement; free movement of workers contained in Article 28 and Annex V; freedom of establishment contained in Articles 31 to 35 and Annex VIII; and freedom to provide services contained in Articles 36 to 39, and the aim of improving working and living conditions in Article 66.

3. The Posting of Workers Directive (PWD) attempts to remove legal uncertainties surrounding the terms and conditions of employment of posted workers while balancing the freedom to provide cross-border services against the risk of social dumping through the undermining of local labour conditions. In order to protect posted workers, it requires EU/EEA EFTA States to ensure that the minimum standards of employment conditions that prevail in the host country are applied to them, notably with respect to pay and working time. The Services Directive aims to eliminate obstacles to the freedom of establishment for service providers but does not affect labour law or the terms and conditions of employment that apply to posted workers, other than to impose the application of terms and conditions laid down by the law or collective agreements in the country where the service is provided. Temporary work agencies are not covered by the text, but the Temporary Agency Work (TAW) Directive establishes the principle of equal treatment between temporary agency workers and the workers directly recruited by user companies from day one of their assignment. Finally, the proposed revision of the Working Time Directive will affect posted workers in that those working for less than ten weeks for the same employer will not be covered by some of the new proposed protections applying to the opt out from the 48-hour week, such as the explicit upper limit of 60 hours.

ECJ rulings affecting posted workers

4. Part III gives an overview of the main rulings of the ECJ which affect posted workers and divides these into two categories: those removing MSs legal and administrative barriers to the freedom to provide services across borders and those clarifying the terms and conditions of employment applicable to posted workers. ECJ case law has removed administrative impediments to the right of companies to provide services in a MS in which they are not established, such as the need to have a branch in the host country, requirements

[1] EEA Agreement on the European Economic Area (OJ No L 1, 3.1.1994)

for work permits and qualifying periods of employment, and requirements to pay into holiday/bad weather funds where comparable arrangements exist in the home country. As far as terms and conditions of employment are concerned, service providers can be forced to respect host-country rules on minimum pay, although in the absence of legislation or a collective agreement declared to be universally applicable, this cannot be enforced. In effect, the freedom to provide services can only be restricted by measures justified by overriding public interest and which are proportional to the achievement of that interest. Collective action to force foreign service providers to respect collective agreements in the host country has been deemed illegal as not meeting these criteria. It could be argued that the effect has been to move from a 'non-discrimination approach' to a 'market access approach' to the treatment of service providers and posted workers in which the freedom to provide services takes precedence over the principle of equal treatment of all workers within a given territory.

The issues at stake

5. Part IV gives an overview of the issues at stake due to what appear to be contradictory stipulations arsing out of the above. These are summarised below.

- **Fair competition:** ECJ rulings allow foreign service providers not to comply with collective agreements as they could be seen as disadvantageous to foreign service providers. However, it could be argued that this represents a competitive disadvantage to service providers in the host country who do have to comply with such agreements.
- **Equality:** ECJ rulings allow posted workers to be paid less than their colleagues from the host country and for national labour laws to apply to those in the host country's labour market, but not to posted workers. Under the TAW Directive, those sent to user undertakings by temporary work agencies in the same MS will benefit from the principle of equal treatment from day one of their assignment, whereas those sent by a temporary work agency from another MS may only benefit from those protections listed in the PWD. Under proposed changes to the Working Time Directive, those on contracts of under ten weeks could be pushed into working longer hours than those on longer contracts. These differences in treatment could lead to discrimination along the lines of nationality.
- **Social dumping:** ECJ rulings mean that competition on the basis of cheaper wages and inferior terms and conditions is not precluded by the PWD, while the ability of trade unions to defend workforces against the threat of such undercutting has been severely curtailed. Proposed changes to the Working Time Directive could also see posted workers used to undercut locally applied terms and conditions through the use of short-term contracts that would enable locally imposed rules on working time to be circumvented.
- **National collective bargaining systems and social models:** Collective agreements that are not universally applicable do not need to be adhered to by companies posting workers if legislation is in place setting out minimum standards for posted workers, even if such legislation is less favourable than the collective agreement in place. This undermines the ability of the social partners to conclude and enforce agreements, if necessary by strike action, in order to set terms and conditions of employment.
- **Abusive use of posted workers:** There is a risk that so-called 'letter-box companies' could establish purely administrative headquarters, without carrying out any commercial activity, in one EEA State in order to supply labour to another EEA State with higher labour standards, thereby circumventing more favourable labour legislation and collective agreements concerning terms and conditions of employment.

6. In sum, in the resolution text attached to this report the co-rapporteurs advocate three main points:

- The PWD should be reviewed, with the general principle being equal treatment of workers. Collective action to enforce this should be recognised as legal.
- Information concerning contracts for posted workers should be available to EEA States' authorities and social partners, including at workplace level, to assist in the monitoring of the use of posted workers.
- Administrative co-operation and exchange of information between EEA States should be improved to ensure that the EEA States are correctly implementing the PWD. Where this is not the case, infringement proceedings should be initiated where necessary.

I. INTRODUCTION

7. A posted worker is a worker who, for a limited period of time, carries out his or her work in an EEA State other than the State in which he or she normally works. This definition does not apply to individuals who seek employment in another EEA State of their own accord, the self-employed, or sea-going personnel in the merchant navy. The Commission estimated, in 2005, that there were one million posted workers, constituting 0.4% of the EU's working age population, although precise up-to-date data is unavailable.

8. Posted workers are common in the construction industry, but are also important in transport, telecommunications, entertainment, repairs, maintenance and servicing industries. They can be posted to another EEA State either by a contract between a user company and a company for which they work directly or through a temporary work agency operating transnationally. User companies employ posted workers to access skills that are in short supply or not available on their own labour markets and/or to access labour at a cheaper rate than would be possible if they recruited workers from their own country. All other things being equal, the 2004 and 2007 enlargements to the east could be expected to increase the number of workers posted from the newer EU MSs to high-wage economies in the EEA. Indeed, many newer EU MSs have seen a rapid increase in the number of temporary work agencies operating on their territory (Eurofound), although figures are unavailable for how many of these operate across borders. Although the present financial crisis and difficult economic conditions may put a brake on this development in the short-to-medium term, in particular through their impact on the construction sector, it seems highly likely that in the longer term the phenomenon of posted workers will increase in importance, especially after the 2009 deadline for the implementation of the 2006 Services Directive, which guarantees the freedom of establishment for service providers and the movement of services between MSs.

9. Issues concerning posted workers are at the heart of some fundamental questions concerning the good functioning of the internal market and point to some contradictions which need to be addressed. On the one hand, the mobility of labour and the freedom to provide services within the internal market constitute two of the fundamental freedoms of the European Economic Area, and contribute to economic competitiveness and development. On the other, if such economic freedoms result in the use of posted workers to undercut the national legislation and collective agreements that govern terms and conditions of employment in force within an EEA State, the risk of social dumping and a downwards pressure on living and working conditions is a real and serious one. Such concerns are not

only related to the future development of posted workers. Indeed, during the 2005 French referendum campaign on the Constitutional Treaty the emblematic figure of the 'Polish plumber' undercutting French wages and conditions of employment became a symbol of the threat to the 'French social model' posed by an integration process that was seen as threatening social and labour market protections, and such concerns were determinant in the victory of the 'No' campaign.

10. Achieving the right balance between economic freedoms and the protection of national employment systems, as well as of posted workers, is thus a crucial aspect of the posted worker question, affecting the very legitimacy of the European project in the eyes of significant parts of the EU and EEA EFTA population. This report therefore focuses on this issue, outlining the legislation applicable to posted workers, the European Court of Justice (ECJ) interpretation of that legislation and the questions that this raises concerning the freedom to provide services, the protection of national employment systems and workers, and the equal treatment of all EEA workers.

II. LEGISLATION APPLICABLE TO POSTED WORKERS

1. Most relevant EC Treaty provisions

11. **Article 39**[2] states that 'freedom of movement (for workers) shall entail the abolition of any discrimination based on nationality between workers of the MSs as regards employment, remuneration and other conditions of work and employment'.

12. With regard to the EEA EFTA States, the principles of free movement of workers are laid down in Article 28 of the EEA Agreement. Freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the EEA States as regards employment, remuneration and other conditions of work and employment. This includes the right to accept offers of employment actually made, to move freely within the territory of an EEA State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State, and to remain on the territory of an EEA State after having been employed there.

13. **Article 49**[3] states that 'restrictions on freedom to provide services within the Community shall be prohibited in respect of nationals of MSs who are established in a State of the Community other than that of the person for whom the services are intended'. Not only is discrimination on the grounds of nationality in the provision of services contrary to EU law, but any restriction, even if it applies indiscriminately to domestic and foreign service providers, is to be eliminated if it prevents, hampers or makes less attractive the provision of services within a MS by companies established in another MS.

14. With regard to the EEA EFTA States, the basic principle of the free provision of services is laid down in Part III, Chapter 3 of the EEA Agreement. Article 36 of the EEA Agreement states that: "Within the framework of the provisions of this Agreement, there shall be no restrictions on freedom to provide services within the territory of the Contracting Parties in respect of nationals of EC Member States and EFTA States who are established in

[2] Article 28 EEA Agreement
[3] Article 36 EEA Agreement

an EC Member State or an EFTA State other than that of the person for whom the services are intended."

15. **Article 136**[4] states that 'The Community and the MSs (…) shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.'

16. With regard to the EEA EFTA States, Part V of the EEA Agreement contain provisions on social policy. Article 66 states that the Contracting Parties agree upon the need to promote improved working conditions and an improved standard of living for workers. In Article 68, it is stated that in the field of labour law, the Contracting Parties shall introduce the measures necessary to ensure the good functioning of the Agreement.

17. Since the entry into force of the EEA Agreement in 1994, all EEA relevant labour law acquis is continuously incorporated into Annex XVIII on Health and Safety at Work, Labour Law and Equal Treatment for Men and Women, including the Posting of Workers Directive which entered into force in the EEA EFTA States in July1999.

18. It could also be noted that the EEA Agreement emphasises the importance of the development of the social dimension in the EEA and the objective of ensuring economic and social progress and promoting conditions of full employment, an improved standard of living and improved working conditions within the EEA. The Governments of the EFTA States, by a Joint Declaration comprised in the Final Act to the EEA Agreement, committed themselves to support and to promote the social principles and basic rights laid down in the Community Charter of the Fundamental Social Rights of Workers (Social Charter). These primarily relate to employment, living and working conditions, social protection, social dialogue, equal opportunities, and the combating of exclusion. The Governments noted that, in the implementation of such rights, due regard must be given to the diversity of national practices, especially as regards the role of the social partners and of collective agreements.

2. The Posting of Workers Directive (96/71/EC)[5]

19. The Posting of Workers Directive (PWD defines a posted worker as 'a worker, who for a limited period of time, carries out his work in the territory of an EEA State other than the State in which he normally works' (Art. 2(1)). This definition is not applied to those that seek employment in another EEA State of their own accord, or to seagoing personnel in the merchant navy, or to the self-employed. It is thus restricted to those sent by enterprises to work temporarily in another EEA State in the framework of the provision of services.

20. The aim of the Directive was to remove legal uncertainties surrounding the terms and conditions of employment of such workers, and in particular the question of whether the terms and conditions of employment in the enterprise's, and worker's home country should

[4] Article 66 EEA Agreement

[5] EEA Joint Committee Decision No 37/98, incorporated into Annex XVIII of the EEA Agreement (OJ No L 310, 19.11.1998, p. 25 and EEA Supplement No 48, 19.11.1998, p. 260), entry into force 1.7.1999.

apply or whether those of the host country, where the work is performed, should be applicable. Essentially, the issue was one of the conditions under which the free cross-border provision of services and mobility of workers could take place versus the risk of social dumping through the undermining of local labour conditions by the application of lower standards in force in the worker's home country.

21. In order to offer the posted worker protection, the Directive requires EU/EEA EFTA States to ensure that undertakings guarantee the minimum standards of employment conditions that prevail in the host country to any posted worker where these have been decided by law and/or, for certain activities, mainly in the construction industry, universally applicable collective agreement (Article 3(1)). In the absence of a system of declaring collective agreements to be universally applicable, EEA States may base themselves on collective agreements which are generally applicable to all similar undertakings and/or those concluded by the most representative employer and labour organisations at national level. The terms and conditions covered include:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates (excluding supplementary occupational retirement pension schemes);
- the conditions of hiring-out of workers, in particular the supply of workers by temporary employment agencies;
- health, safety and hygiene at work;
- protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people; and
- equality of treatment between men and women and other provisions on non-discrimination.

3. Directive 2006/123/EU on Services in the Internal Market (The Services Directive[6])

22. The Services Directive was approved by the European Parliament on 15 November 2006 and will have to be implemented by MSs before 28 December 2009. The aim is to provide a legal framework that would eliminate obstacles to the freedom of establishment for service providers and the movement of services between MSs. In debates leading up to the adoption of the Directive, industrial relations and workers' rights were contentious issues. Eventually the 'country of origin' principle in such matters was replaced by the 'freedom to provide services' principle for fear that the former would lead to an undercutting of labour standards. The Directive does not, therefore, affect labour law in any MS and does not affect the terms and conditions of employment that apply to posted workers, other than to impose the application of terms and conditions laid down by the law or collective agreements in the MS where the service is provided. Temporary work agencies are not covered by the adopted text.

4. Directive 2008/104/EC on Temporary Agency Work[7]

[6] An EEA Joint Committee Decision on the incorporation of the Services Directive into the EEA Agreement is currently pending.

23. After years of stalemate, following the European Commission's adoption, in March 2002, of a proposal to create a level playing field for temporary agency workers across the EU, Directive 2008/104/EC on temporary agency work (TAW Directive) was finally adopted on 5 December 2008. MSs now have three years from that date to implement the Directive.

24. Temporary agency work is typically accompanied by inferior working conditions in terms of pay, maternity leave, holiday entitlement, training and career development opportunities. The legislation aims to bring an end to this inequality through the principle of equal treatment between temporary agency workers and the workers directly recruited by user companies from day one of their assignment. In addition, they will benefit from: being informed about permanent employment opportunities in the user enterprise; equal access to collective facilities (canteen, childcare facilities, transport services); and improved access to training and childcare facilities in periods between their assignments so to increase their employability. The Directive allows scope for derogation from the principle of equal treatment by means of collective agreement or – under specific conditions – by agreement between the national social partners. Such arrangements may include a qualifying period for equal treatment. Exemption from the rules applicable in the user undertaking are also permitted in the case of workers who have a permanent contract with a temporary work agency due to the protection that such a contract offers. The general rule, however, is of equal treatment from day one of the assignment of a temporary agency worker to a user undertaking. It should be noted, however, that the Directive is to be implemented without prejudice to the PWD. It does not, therefore, cover workers of temporary employment agencies established in one MS sent to work in another as these would be covered by the PWD.

5. Directive 2003/88/EC on certain aspects of the organisation of working time (The Working Time Directive[8])

25. The Council of the EU's Common Position on the proposed revision of the Working Time Directive, which was formally adopted on 15 September 2008, will affect posted workers in that those working for less than ten weeks for the same employer will not be covered by some of the new proposed protections applying to individuals agreeing to opt out from the 48-hour week, particularly the explicit upper limit of 60 hours (or 65 if inactive on-call time is included). The European Parliament refused to approve the common position in a second reading of the proposed revision on 17 December 2008, voting for a phasing out of the opt out within three years of the implementation of the revised Directive. Without any compromise through the co-decision procedure between the Council and the European Parliament, the present Directive will remain in force, with no explicit upper limit on working time in the event of an individual opting out.

III. ECJ CASE LAW AFFECTING POSTED WORKERS

26. Provisions for the free movement of services across borders within the EU are enshrined in Article 49[9] of the Treaty of the European Union and legislated for via the

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[7] The Temporary Agency Work Directive is currently under consideration in the EEA EFTA States.

[8] EEA Joint Committee Decision No 42/96 (OJ No L 291, 14.11.1996, p. 32 and EEA Supplement No 51, 14.11.1996 incorporating Directive 2003/88/EC into annex XVIII of the EEA Agreement

Services Directive, which aims to create the conditions for the freedom to provide services in a MS other then that in which an undertaking is established. However, conditions imposed by the host country for receiving staff from abroad may affect a company's ability to provide services in another MS. A second area of contention has been the terms and conditions of employment applicable to posted workers. ECJ rulings have addressed both these issues[10].

27. As regards the applicability of ECJ Court rulings to the EEA EFTA States, the obligation under Article 6 of the EEA Agreement, to interpret EEA law in conformity with EC law, only concerns case law *prior* to the date of the signature of the EEA Agreement. However, the established principle and aim of ***homogeneity of the internal market*** would be difficult to achieve if the EEA EFTA States were not to take into account ECJ case law on a continous basis. Therefore Article 3(2) SCA[11] states that the EFTA Court and the EFTA Surveillance Authority shall pay due account to the principles laid down by the relevant rulings of the ECJ, and which concern the interpretation of the EEA Agreement or of such rules of the EC Treaty in so far as they are identical in substance to the provisions of the EEA Agreement. In practice, the EFTA Court therefore refers to the most recent case law of the ECJ and has hitherto not found reason to distinguish between case law before and after the signature of the EEA Agreement[12].

1. Removing obstacles to the posting of workers

28. In **Case C-113/89 Rush Portuguesa Ldª v Office national d'immigration** the ECJ held that "Community law does not preclude MSs from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established." However, the authorities of the MS in whose territory the works are to be carried out may not impose on the supplier of services conditions relating to the recruitment of manpower in situ or the obtaining of work permits for the foreign work-force as this imposes discriminatory conditions against companies from other MSs as compared with their competitors in the host country. This was extended to cover non-EU workers in **Case C-49/93 Vander Elst v Office des Migrations Internationales** if the non-EU worker is lawfully resident in the same MS as his employer, is lawfully and habitually employed by that employer and if the cross-border service is temporary in nature. This decision was reinforced by the ECJ ruling in **Case 244/04 Commission v Germany** which declared that a simple declaration of non-EU workers to be posted and not prior authorisation was sufficient under Article 49 EC. A requirement that such workers be employed for at least a year by the posting undertaking was also declared illegal.

29. Further clarification of the incompatibility of such restrictions on the free movement of workers with national obligations under Article 49 EC was also given in **Case C-445/03 Commission v Luxembourg** and **Case C-490/04 Commission v Germany.** In the first case, the ECJ again rejected the need for work permits for posted workers and for the need for six months employment with the undertaking of origin prior to deployment. It also rejected the requirement of a bank guarantee from the service provider. In the second case, the ECJ ruled that the Federal Republic of Germany had failed to fulfil its obligations under Article 49 EC

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[9] Article 36 EEA Agreement.
[10] There is no EFTA Court Case law directly applicable to the issue of posted workers.
[11] Agreement between the EFTA States on the establishement of a Surveillance Authority and a Court of Justice.
[12] Supplement 24 of the International Encyclopedia of Laws, European Free Trade Association (EFTA) and European Economic Area (EEA), Kluwer Law International 2005.

by requiring foreign temporary employment agencies to declare, not only the placement of a worker with a user of his services in Germany, but also any change relating to the place of employment of that worker,.

30. Two rulings have also rejected the requirement for foreign undertakings to have establishments on a MS's territory in order to be able to post workers to that MS. Such were the conclusions of **Case 493/99 Commission v Germany.** In **Case C-279/00 Commission v Italy**, the ECJ added that, by requiring undertakings engaged in the provision of temporary labour which are established in other MSs to lodge a guarantee of ITL 700 million with a credit institution having its registered office or a branch office on Italian territory, the Italian Republic had failed to fulfil its obligations under Articles 49 EC and 56 EC.

31. Lastly, on 19 June 2008 the ECJ ruled in **Case 319/06 Commission v Luxembourg** that Luxembourg had contravened EC Treaty Article 49 and failed to properly implement the PWD in setting certain requirements when a non-Luxembourg employer had workers within the Duchy, such as the requirements for a written contract of indefinite duration, for compliance with collective agreements, for the automatic indexation of wages to the cost of living, for the provision of certain extensive and detailed information to the Luxembourg authorities, and for an agent to be in place within Luxembourg to ensure compliance. Such 'public order' legislation, applicable to all companies established in Luxembourg, was deemed excessive for the protection of posted workers and imposed an additional burden for undertakings established in another MS which went beyond the Directive's requirements and dissuaded them from providing services. The above rulings aimed to remove impediments arising from public labour, immigration and company law to the free movement of services and workers across borders within the EEA, and as such have aimed to protect the interests of posted workers through upholding the principle of the free movement of labour.

2. Clarifying the terms and conditions of employment of posted workers

32. A second set of judgements have attempted to clarify the terms and conditions of employment applicable to posted workers. The blanket permission, given in Rush Portuguesa, to MSs to extend legislation or collective agreements to cover all persons employed on its territory, even temporarily, and irrespective of the country in which the employer is established, has been gradually qualified.

33. In **Case C-272/94 Guiot** the ECJ ruled that Articles 59 and 60 of the EC Treaty preclude a MS from requiring an undertaking established in another MS and temporarily carrying out works in the first-mentioned MS to pay employer 's contributions in respect of loyalty and bad-weather stamps with respect to workers assigned to carry out those works, where that undertaking is already liable for comparable contributions, with respect to the same workers and for the same period of work, in the State where it is established. Here, the imposition of a double payment was effectively seen as a restriction of the freedom to provide services, engendering as it would a competitive disadvantage compared to local firms.

34. In **Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 Finalarte** the ECJ ruled that Articles 49 and 50 of the EC Treaty do not preclude a MS from imposing national rules guaranteeing entitlement to paid leave for posted workers on the two-fold condition that: (i) the workers do not enjoy an essentially similar level of protection under the law of the MS where their employer is established, so that the application of the national rules of the first MS confers a genuine benefit on the workers concerned, which

significantly adds to their social protection, and (ii) the application of those rules by the first MS is proportionate to the public interest objective pursued. This does not exclude the possibility of providing for a longer period of paid leave than that provided for by the Working Time Directive to posted workers during the period of the posting. However, a MS's scheme for paid leave cannot be applied to all businesses established in other MSs providing services to the construction industry in the first MS where businesses established in the first MS, only part of whose activities are carried out in that industry, are not all subject to that scheme in respect of their workers engaged in that industry.

35. Remuneration has been one of the most controversial aspects of ECJ rulings on posted workers. In **Joined Cases Arblade and Leloup: C-369/96 and 376/96** the ECJ ruled that MSs could impose the payment of the minimum wage fixed by collective agreement in that MS for posted workers. Reiterating the Guiot judgement, however, it also ruled that payments to employers' organisations or other administrative requirements designed to protect workers could not be imposed where comparable obligations exist in the MS in which the posting undertaking is established. **Case C-165/98 Mazzoleni** reiterated that Articles 49 and 50 of the EC Treaty do not preclude a MS from requiring an undertaking established in another MS to pay its workers the minimum remuneration fixed by the national rules of that State when posting workers to it. The ruling went on to say, however, that the application of such rules might prove to be disproportionate where the workers involved are employees of an undertaking established in a frontier region who are required to carry out, on a part-time basis and for brief periods, a part of their work in the territory of one, or even several, MSs other than that in which the undertaking is established. It is consequently for the competent authorities of the host MS to establish whether, and if so to what extent, the application of national rules imposing a minimum wage on such an undertaking is necessary and proportionate in order to ensure the protection of the workers concerned. These decisions were undermined, however, by **Case 164/99 Portugaia Construcoes** when the ECJ ruled that it is for the national authorities or, as the case may be, the national courts to determine whether minimum wage legislation provides for the protection of posted workers. Furthermore, the Court decided that if in concluding a collective agreement specific to one undertaking, a domestic employer can pay wages lower than the minimum wage laid down in a collective agreement declared to be generally applicable, whilst an employer established in another MS cannot do so, this would constitute an unjustified restriction on the freedom to provide services. According to the judgement in **Case C-60/03 Wolff and Muller**, however, Article 5 of the PWD, interpreted in the light of Article 49 EC, does not preclude a building contractor from being liable to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means net pay after tax and social insurance deductions, if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective.

36. Most recently, in Case C-346/06 Rüffert, the Court ruled that the PWD, interpreted in the light of Article 49 EC and in the absence of a collective agreement declared to be universally applicable, precludes an authority of a MS from requiring the contracting authority to designate as contractors for public works contracts only those undertakings which, when submitting their tenders, agree in writing to pay their employees at least the minimum wage prescribed by the collective agreement in force at the place where those services are performed.

37. While not dealing specifically with the issue of posted workers, **Case 438/05 Viking** has potentially important implications of regulation in this area. The case concerned the threat

of industrial action from the International Transport Workers' Federation and the Finnish Seamen's Union over Viking Lines' plans to reflag one of its Finnish vessels to Estonia and replace the crew with cheaper workers from that country. Essentially the ECJ had to adjudicate between the company's freedom of establishment in any MS and the right of workers to take collective action to defend their interests. The Court ruled that such action could amount to an unjustified restriction on the freedom of establishment if it were to deter the company from exercising this right. This was considered to be the case as the strike action was aimed at forcing Viking to conclude a collective agreement that would deter the company from exercising its freedom of establishment by inducing the company to apply the terms of an agreement signed with the trade unions of the MS in which it has its registered office to the employees of a subsidiary established in another MS. However, strike action may be legitimate if it aims to protect workers' jobs or working conditions and if all other ways of resolving the conflict have been exhausted as that restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective (the proportionality principle).

38. Referring more specifically to posted workers, in **Case 341/05 Laval** the ECJ ruled that**,** in the absence of a collective agreement declared to be universally applicable**,** it is illegal for a trade union to blockade a building site in order to force a provider of services established in another MS to enter into negotiations with it on the rates of pay for posted workers and to sign a collective agreement with more favourable conditions than those resulting from the relevant legislative provisions (in this case legislation providing minimum conditions for posted workers through the implementation of the PWD). This is considered an unjustified restriction on the freedom to provide services as it would make it less attractive, or more difficult, for the service provider to carry out work in the host MS. The Court emphasised that the PWD does not impose an obligation on foreign service providers to respect working standards beyond the minima set out in the Directive, which therefore become exhaustive rather than minima. However, such companies may be forced to respect MS rules on minimum pay. Again, collective action such as that in this case may be legal if it serves an overriding reason of public interest and is proportional to that interest.

39. Thus EU case law has clearly removed administrative impediments to the right of companies to provide services in a MS in which they are not established, such as the need to have a branch in the host country, requirements for work permits and qualifying periods of employment, and requirements to pay into holiday/bad weather funds where comparable arrangements exist in the home country. Elsewhere, case law is less clear, and could lead to some confusion for posting and user companies. For example, service providers can be forced to respect host country rules on minimum pay, although in the absence of legislation or a collective agreement declared to be universally applicable, this cannot be enforced. In effect, the freedom to provide services can only be restricted by measures justified by overriding public interest and which are proportional to the achievement of that interest. Collective action to protect local terms and conditions of employment, however, has been deemed illegal as not meeting these criteria. It could be argued that the effect has been to move from a 'non-discrimination approach' to a 'market access approach' to the treatment of service providers and posted workers in which the freedom to provide services takes precedence over the principle of equal treatment of all workers within a given territory (Barnard).

IV. THE ISSUES AT STAKE

40. The PWD and ECJ rulings have attempted to balance the interests and rights of four sets of actors in the case of posted workers: the rights of contractors in the host state and service providers in the home state to enter into commercial arrangements across borders under the most competitive terms possible; the rights of posted workers to decent rates of pay and employment protection; and the rights of host state workers to defend their terms and conditions of employment. These interests may, at times, be contradictory. In essence the issue is one of the freedom to provide services and the mobility of labour in the internal market versus the risk of social dumping, but issues such as equality of treatment, the maintenance of different national social systems and the role of trade unions and collective bargaining in labour market regulation cannot be ignored either.

1. Fair and unfair competition

41. In interpreting the PWD, the ECJ has upheld the principle of the freedom of establishment through the removal of legal and/or administrative barriers to the posting of workers which can be seen as disadvantageous to foreign service providers. However, it is questionable whether judgements such as those in the Laval and Ruffert cases uphold the principle of fair competition. Indeed, it could be argued that by allowing foreign service providers not to comply with collective agreements in force in a particular work site, they present a competitive disadvantage to service providers in the host country who do have to comply with such agreements. Fair competition and equality of treatment would suggest that all service providers on a particular site should comply with the same agreements or none should be forced to. In the latter case, collective bargaining and national models of labour market regulation are effectively dismantled, contrary to the principles of the EU (see 4, below).

2. Equality of treatment

42. In allowing, in circumstances such as the Laval and Ruffert cases, posted workers to be paid less than their colleagues from the host country, ECJ rulings are at odds with the principles of equal treatment and equal pay for work of equal value. The 2008 Luxembourg ruling goes further, rendering the list of protections contained in Article 3 of the PWD 'exhaustive' despite the provisions contained in Article 10 which do not preclude MSs from applying public policy provisions, over and above the mandatory protections, to posted workers. National labour laws may therefore apply to those in the host MS's labour market, but not to posted workers. The TAW Directive could create another set of inequalities in that those sent to user undertakings by temporary work agencies in the same MS would benefit from the principle of equal treatment from day one of their assignment whereas those sent by a temporary work agency from another MS may only benefit from the protections listed in Article 3 of the PWD. Proposed changes to the Working Time Directive could also create further inequalities between those on short-term contracts and those on contracts of over ten weeks in that the former could be pushed into working longer hours despite mounting evidence as to the deleterious impact of a long working week on a worker's health. All of the above inequalities could be seen as a form of discrimination along the lines of nationality (of the worker or of the temporary work agency).

3. Social dumping

43. The PWD has conc1entrated upon the protection of the rights of posted workers by stipulating minimum requirements that must be respected as far as their employment situation is concerned. In allowing MSs to force service providers from other MSs to adhere to national legislation or universally applicable collective agreements, it also offers protection to host country labour forces which may fear being undercut by cheaper labour. However, ECJ judgements have undermined the intentions of the legislator in this domain by allowing companies posting workers abroad to not comply with collective agreements in force in worksites under certain conditions. Competition on the basis of cheaper wages and inferior terms and conditions is not therefore precluded by the PWD, particularly in those MSs that do not have provisions for the extension *erga omnes* of collective agreements. ECJ judgements in the Viking and Laval cases, although accepting the right to take collective action as a fundamental right in the EU, reject the argument that action in these cases could be justified by overriding reasons of public interest. It could therefore be argued that they have thereby severely curtailed the ability of trade unions to defend host nation workforces against the threat of such undercutting. Were the use of posted workers as a cheap alternative to local labour to increase, this could threaten national social models and standards of living and working. It is therefore arguable that an overriding public interest is at stake at the MS level. At the EU level, ECJ case law and the use of posted workers in the manner seen in the Laval case, for example, are at odds with the aim of the Union to promote improvements and an upwards harmonization of living and working conditions across the EU as stated in Article 136 EC. Again, proposed changes to the Working Time Directive could also see posted workers used to undercut locally applied terms and conditions through the use short-term contracts that would enable locally imposed rules on working time to be circumvented.

4. National collective bargaining systems and social models

44. Rulings such as th1ose in the Laval and Ruffert cases pose a serious challenge to national systems of collective bargaining and social dialogue despite recognition by the Commission of their importance for development and for the protection of workers. Collective agreements that are not universally applicable do not need to be adhered to by companies posting workers if legislation is in place setting out minimum standards for posted workers, even if such legislation is less favourable than the collective agreement in place. Those countries with decentralised systems of collective bargaining are most vulnerable here, but it can also affect those with fairly centralised bargaining systems (e.g. Germany), as can be seen in the Ruffert case, or without systems for declaring agreements universally applicable (e.g. Sweden). Moreover, the decentralisation of collective bargaining is a common feature of all EU industrial relations systems. Even where bargaining has remained fairly centralised, flexibility is offered to individual companies through 'opt out' clauses (Parsons and Pochet), undermining the very notion of universal application. Challenges to collective agreements on these grounds cannot be discounted (see, for example, the Portugaia Construcoes case above), undermining the ability of the social partners to conclude and enforce agreements in order to set the terms and conditions of employment in their company or sector, thereby opening the door to competition on the basis of cheap labour.

5. Abusive use of posted workers

45. There is a risk that so-called 'letter-box companies' could establish purely administrative headquarters, without carrying out any commercial activity, in one EEA State in order to supply labour to another EEA State with higher labour standards, thereby circumventing more favourable labour legislation and collective agreements concerning

terms and conditions of employment. Such companies contribute greatly to the threat of social dumping. While the ECJ has ruled that administrative requirements imposed by MSs on service providers established in other MSs should not be so excessive as to dissuade them from providing services, administrative controls are necessary to prevent such abuse, and indeed any other forms of unfair competition based upon less favourable conditions for posted workers that could pose a threat to MSs'and EEA EFTA States social models.

V. DRAFT RESOLUTION

on

LABOUR MARKET ISSUES IN THE EEA: POSTED WORKERS AND THE FREEDOM TO PROVIDE SERVICES

The European Economic Area Joint Parliamentary Committee:

A. Mindful of the need to protect local workforces and host service providers from social dumping while at the same time not infringing the freedom to provide services or the mobility of labour,

B. mindful of the importance of that within a given territory, competition shall take place under the same terms and conditions for all service providers irrespective of which EEA State they operate in, thereby contributing towards the aims of the Lisbon Agenda and of the upwards harmonisation of living and working conditions, which would also ensure that discrimination along the lines of nationality is overcome,

1. urges that the Posting of Workers Directive (PWD) should be reviewed with a view to bringing it into line with the Temporary Agency Work (TAW) Directive, with the general principle being equal treatment from day one of the assignment,

2. underlines that terms and conditions of employment should be governed by the legislation or collective agreement – national, sectoral or company – in force at the place of work; and where no collective agreement or legislation applies, the user company should be under obligation to supply details of terms and conditions of employment in force in the company to the service provider,

3. emphasises that the protection of wages and conditions of employment for local workforces against competition form cheap labour from abroad shall be recognised as constituting an 'overriding reason of public interest' with respect to collective action if the abovementioned principles are not adhered to,

4. urges that user companies shall be under an obligation to inform the service provider of the terms and conditions of employment in force at the place of work of posted workers in good time prior to the commencement of the posting; emphasises that posted workers should be informed of these; and underlines that these terms and conditions should be written into the contract between the user and the service provider along with details of the work to be done and the duration of the posting,

5. emphasises that copies of contracts should be kept by both companies and provided to the workers to be posted, and that records of timesheets should be kept at the place of work of posted workers, combined these

can form the basis of documentation that can be made available to the national authorities of the host state for monitoring purposes to ensure compliance with national employment legislation and collective agreements in force,

6. recommends that to assist in the monitoring of the use of posted workers, trade unions and/or employee representation bodies present in the workplace to which workers are posted shall be informed of the use of any posted workers in their workplace, and of the terms and conditions of their employment, including the number used and the duration of their employment,

7. underlines that the European social partners' agreement to establish a European observatory on cross-border temporary agency worker activities shall be broadened to include all posted workers in order to facilitate an exchange of information that would help protect posted workers and combat any abusive recourse to them by user companies.

8. urges that EU social partner, national and workplace monitoring of posted workers shall form the basis of reports to the Commission and facilitate better administrative co-operation and exchange of information between EEA States, as outlined in the Commission's 2008 Draft Recommendation, to ensure that EEA States are correctly implementing the PWD; and recommends that where this is not the case, infringement proceedings should be initiated where necessary.