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UK Industrial Action and Free Movement
of Services in EU Law

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British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law

Claire Kilpatrick*

Abstract: The European Court of Justice's new approach to posting of workers is explored in light of recent UK industrial action. Four doctrinal positions are identified and probed: the host-state standards posted workers can enjoy, the role of collective standards and action to set and enforce host-state standards for posted workers, the liability of unions and employers under Article 49 EC, and demarcation of the boundaries between free movement of services and other Treaty personal freedoms. While the inspiration informing the new approach, adapting to enlargement and encouraging cross-border trade, is appropriate, the UK disputes help powerfully to illustrate how the doctrinal positions thus inspired create, especially in certain combinations, outcomes which are doctrinally dubious, socially and politically undesirable, and potentially highly socially inflammable. In many respects, the new approach is the wrong approach.

FREE MOVEMENT OF SERVICES IN THE EU AND SOCIAL CONFLICT

The free movement of services has in the new millennium become the focus of high-profile and frontline controversy. This has happened for three reasons: new legal doctrine, new political geography, and 'new protectionism', all of which have recently come together in a particularly potent combination. Two linked UK disputes involving widespread industrial action provide a laboratory within which this controversy and the reasons underpinning it can be productively explored.

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The first reason, and my primary focus, concerns new legal doctrine: the intense and fairly recent development of the freedom to provide services, in particular its detailed application to disputes about posting of workers. Under Article 49 EC, the Treaty freedom to provide services, businesses can move cross-border with their workforces in order to carry out projects. Workers who move cross-border with their employers under Article 49 EC are called ‘posted workers’, emphasising that their base remains that of the state they have come from (the home state) rather than the state where they are carrying out the project (the host state). This raises a choice as to which employment standards should be applied to posted workers: those of the home state, those of the host state, or some combination of the two. A directive from 1996, the Posted Workers’ Directive (hereafter PWD or the Directive),¹ is intended to give some answers about how this choice should be exercised.

A central point I wish to make is that from its decision in late 2007 in *Laval* onwards, the European Court of Justice (hereafter the Court) significantly altered its interpretation of the law applicable to posted workers, ushering in what amounts to a new approach to posted workers.² Using the UK disputes as a case-study facilitates a much fuller exploration of the implications of the Court’s new approach to the posting of workers. This paper identifies and probes a set of new and interlinked doctrinal positions on four issues: the host-state standards posted workers can enjoy, the role of collective standards and action to set and enforce host-state standards for posted workers, the liability of unions and employers under Article 49, and the definition of the situations in which free movement of services is deemed appropriate rather than the other personal Treaty freedoms of workers and establishment. These doctrinal positions need to be considered against the frame of the other two reasons sparking controversy in this area.

The second reason is new political geography -- the new context for EU politics provided by the extensive Eastern European enlargements in 2004 and 2007. Free movement of persons is at the heart of these changed politics. The line-up of Member States before the Court of Justice in the contested *Laval* line of cases showed a clear and strongly-felt divide between those urging a stronger free movement line and those urging protection of posted workers and domestic workers in those industries.³ The Court’s new approach to posted workers can indeed be read in part as a response to the new political geography of the EU, with victory being awarded to new Europe ‘exporting’ posted workers over old Europe ‘importing’ posted workers. This controversy over freedom to provide services

¹ Directive 96/71/EC, OJ 1997, L 18/1.

² C-341/05 *Laval* [2007] ECR I-11767; C-246/06 *Rüffert*, judgment 3 April 2008; C-319/06 *Commission v Luxembourg*, judgment 19 June 2008. A sister case on freedom of establishment, C-438/05 *Viking* [2007] ECR I-10779, will also be referred to where relevant.

³ 15 Member States, as well as Iceland and Norway, participated in *Laval*. For a good example of the split in positions, see AG Mengozzi’s Opinion in *Laval*, *ibid*, paras 167 and 169, arguing for a generous interpretation of the Directive (Article 3(8)): the Austrian, Danish, Finnish, French, German, Icelandic, Norwegian, and Spanish governments; for a restrictive interpretation: the Estonian, Latvian, Lithuanian, Polish, and Czech governments.

places the inter-institutional relations of the EU under pressure. Should the Court of Justice, for example, 'back down' under pressure from sections of the European public and the European Parliament? The European Parliament and unions (at EU and national level) have actively interacted to condemn the Court's new approach to posted workers.⁴ Moreover, this is not simply a matter of elite-diplomacy. The perceptions of European publics are currently especially important for precisely those EU elites. A second referendum on the Lisbon Treaty is scheduled to take place in Ireland in Autumn 2009, while the Czech Republic and Poland have still not completed ratification of the Lisbon Treaty.⁵ No doubt EU elites are acutely aware that the Westward-bound 'Polish plumber' played a noteworthy role in the death by referendum of the EU Constitutional Treaty, the Lisbon Treaty's predecessor. There is also the spectre of the mass disputes about the 'Bolkestein' draft of the directive on services liberalisation, with one of the key flashpoints of protest being posted workers.⁶

The third and final reason is the distinctive political configuration created by the extensive deterioration of the 'real' economy as a result of the global financial crisis. Such deterioration has raised the spectre of 'new protectionism' threatening the post-war moves to open markets across country borders in goods, services, capital, and people. In the case of posting of workers, as we shall see further, this is not disconnected from doctrinal developments. When times are tough, and jobs are scarce, it turns out that a high social and political value can attach to a clear, coherent, and sustainable legal position on the free movement of persons in the EU. This is especially the case for workers moving in the context of free movement of services where the base-line position is that home-state rather than host-state labour standards should apply. That is to say the starting point is the opposite of what one normally expects -- that normal position being that the labour standards applicable are those of the state where the work is carried out. For those who work or wish to work in the host-state, whether as posted workers or because that is where they are based, such a position needs careful explanation and appropriate delimitation. A satisfactory answer must be given to the reasonable question of why the labour standards of the state where the work is carried out should only apply in certain circumstances to posted workers.

The article first outlines the UK disputes before turning to consider the four interlinked doctrinal positions identified above. It is certainly possible to read these doctrinal positions as a successful tale of doctrinal coherence, underpinned by a judicial desire to expand the reach of free movement of services in an enlarged EU. Yet, using in particular the UK case-study, I shall attempt to demonstrate that the very factors inspiring these doctrinal moves create a series of

⁴ Of numerous examples, we can cite the UK union UNITE's petition, n 9 below.

⁵ *Irish Times*, 16 March 2009 'State must focus on workers' rights in lead-up to second Lisbon referendum'

⁶ In March 2005 (Brussels) and February 2006 (Strasbourg), large demonstrations took place aimed in particular at the 'country of origin' principle contained in the Bolkestein draft. On 30 May 2005, the French rejected the EU Constitutional Treaty in a referendum, followed a few days later by the Dutch.

positions which, especially in certain combinations, are doctrinally dubious, socially and politically undesirable, and potentially highly socially inflammable.

THE UK DISPUTES: OUTLINE AND CONTEXT

It is rare for judgments of the Court of Justice to be prominently placed in British public life. Yet that Court's judgments in *Laval* and *Viking*, as well as two judgments on posted workers in 2008 building on *Laval*,⁷ found themselves thrust into the UK limelight in early 2009. As well as receiving extensive media attention, they were cited by the British Prime Minister in Prime Minister's Questions.⁸ All four cases are also the target of a major campaigning petition by the UK's largest union, UNITE, to reverse their effects.⁹

The reason for this flurry of interest was an extensive wave of geographically widespread strike activity. This strike activity was highly unusual, certainly in recent memory, in that it involved widespread solidarity action from workers not directly connected with the workplaces at the heart of the disputes. The strikes comprehensively failed to comply with the multitude of rules and conditions, both in UK statute and common-law, which, when met, protect industrial action from being civil wrongs. Yet the powerful legal weapons possessed by the employers to combat the unlawful industrial action went unused.¹⁰ Moreover, it appears to be the first time that industrial action in the UK has provoked an extensive and rapid response from the EU institutions. Members of the European Parliament issued a Written Declaration.¹¹ Vladimír Špidla, the EU Commissioner for Employment and Social Affairs, issued a statement responding to the strike.¹²

Two distinct, though connected, disputes will be our primary focus, although further industrial action linked to these disputes continues to occur. Both disputes

⁷ n 2 above.

⁸ HC Debs Col 842 4 February 2009.

⁹ See the homepage of UNITE's website where visitors can click on a box with the following text to sign a petition, '*Laval, Viking, Riffert, Luxembourg*. Fight against Social Dumping', at www.amicustheunion.org. This will be passed to the European Parliament's Petition Committee should 1 million signatures be obtained, in order in turn to ask the European Commission to take action.

¹⁰ Hence, the strikes were unlawful under UK law because they failed for instance to comply with the balloting and notice requirements as well as flouting the restrictions on secondary action. However, they were not, contrary to all public statements on the strikes, *unofficial*, as this requires repudiation of the strike by the union leaders: see sections 20 and 21 Trade Union and Labour Relations Consolidation Act (TULRCA) 1992. The unions did not repudiate because the employers preferred to negotiate with the unions rather than ad hoc striking workers. As a *quid pro quo* for having effective interlocutors, the employers therefore engaged not to pursue legal action against GMB and UNITE in relation to the unlawful strike activity.

¹¹ Written Declaration pursuant to Rule 116 of the Rules of Procedure by Glyn Ford, Caroline Lucas, Stephen Hughes, Luisa Morgantini, Elizabeth Schroedter, on the detrimental impact of the European Court of Justice rulings in the *Viking*, *Laval*, and other cases, now being used by Racist and Xenophobic Parties to undermine workers rights across the EU (3 February 2009).

¹² Vladimír Špidla, 'Statement in response to the strikes in the UK' Brussels' (4 February 2009).

involved sub-contracting arrangements in which UK contracts were awarded to businesses from other EU Member States.

The Total dispute centred on a contract made to expand the Lindsey oil refinery, owned by Total, in North Lincolnshire. The contract was awarded to an Italian (Sicilian) firm, IREM. This firm already had its own workforce of Italian and Portuguese workers, housed in barges in Grimsby harbour for the contract's duration. In the wake of IREM being awarded the contract, on Wednesday, 28 January 2009, the workers decided to take industrial action, and a strike by workers began at the Lindsey refinery. On that day and over the days that followed, several thousand workers at more than a dozen oil refineries, gas terminals, and power stations at various sites in Scotland, Wales, and England, went on strike in sympathy with the Lindsey dispute. Following talks mediated by ACAS¹³ between union officials from GMB and UNITE and the relevant employers, the strikers voted to accept a deal on Thursday, 5 February 2009. The terms of the deal were that 102 skilled engineering jobs (just under half of the not yet filled posts of this kind on the expansion project) would be reserved for British nationals. ACAS was also required to produce a report to ascertain certain disputed facts.¹⁴

The Alstom dispute, which started in Autumn 2008 and has still not been resolved, concerns a company (Alstom) which has been contracted to find subcontractors to build two new power-stations: Staythorpe power-station for RWE in Nottinghamshire and Grain power-station for EON in Kent. In Staythorpe, Alstom awarded contracts to two Spanish companies, Montpressa and FMM. Neither had direct employees, but stated that they planned to supply workers directly from abroad. In Kent, too, the successful Polish contractors, Remak, and ZRE, were not going to use UK labour. All ultimately supplied their labour from outside the UK.

The Total dispute in particular was the subject of extensive media attention in the UK and across the EU.¹⁵ Some focused on possible doctrinal changes as a spark for conflict, while others presented the UK disputes as part of a 'new protectionism' with xenophobic overtones. The striking workers carried banners with the slogan, 'British jobs for British workers', words taken from Gordon Brown's first speech as Prime Minister to the Labour Party conference in Autumn 2007. Those opposed to what they saw as manifestations of 'new protectionism' argued that it must be combated by an unwavering and spirited defence of free movement of goods, services, and persons, such as that enshrined in the EU

¹³ Advisory Conciliation and Arbitration Service: the specialised alternative dispute resolution body for labour disputes in the UK.

¹⁴ *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute* (ACAS, 16 February 2009). The report was commissioned under powers contained in section 214 TULRCA 1992.

¹⁵ For non-UK coverage, see eg *Le Monde*, 3 February 2009 'Gordon Brown pris au piège par les grèves contre l'emploi des travailleurs étrangers'; *La Repubblica*, 5 February 2009 'La Total assume cento operai britannici svolta nella raffineria, gli italiani al lavoro'.

Treaty.¹⁶ This is perhaps most forcefully expressed by Professor Willem Buiter, writing in the *Financial Times*:

British workers are demonstrating against workers from elsewhere in the EU – Italian and Portuguese workers are currently at the centre of a rather disgusting set of altercations at UK oil refineries, gas terminals and power stations. [...] Under British law, conforming to EU Treaty obligations, there are no jobs earmarked for British workers in Britain [...] so Italian and Portuguese workers can be brought in to complete a contract in the UK if this makes commercial sense to the contractor, just as British workers can compete, individually or as part of a team of workers, under the excellent Posted Workers Directive, for jobs and projects in the rest of the EU.¹⁷

The unions, however, supported by the European Parliament, argued that painting their action as protectionist was wrongly to condemn it through cheap caricature. The disputes argued not against free movement of persons, but against the inappropriate balance currently being struck between business and workers and between the social and economic dimensions of the EU project. What is most interesting is how doctrinal positions are absolutely central to the range of positions being taken in relation to these disputes.¹⁸ I turn more closely to explore the four key doctrinal positions at issue: the host-state standards posted workers can enjoy, the role of collective standards and action to set and enforce host-state standards for posted workers, the liability of unions and employers under Article 49, and the definition of the situations in which free movement of services is deemed appropriate rather than the other personal Treaty freedoms of workers and establishment.

WHICH HOST-STATE STANDARDS TO APPLY? THE ECJ'S NEW APPROACH TO POSTED WORKERS¹⁹

My argument here is that it is possible to discern three distinctive approaches taken by the Court to the posting of workers: from strong to weak approaches

¹⁶ An excellent example is Lord Mandelson's (currently UK Secretary of State for Business, Enterprise and Regulatory Reform, formerly EU Trade Commissioner) response to the UK disputes. See his statement on the disputes and the subsequent debates in the House of Lords, HL Cols 473-480 2 February 2009.

¹⁷ *Financial Times*, 1 February 2009.

¹⁸ Hence, the view reported in the *Financial Times* in its Q&A on the strikes (3 February 2009) that, 'Carline Carter, partner at Ashurst, a law firm, says that with few new points of law to have appeared, the resurgence in protectionist sentiment is the most likely reason behind the current crisis' is in my view not borne out by legal analysis.

¹⁹ This section develops extensively arguments first outlined in part of my article, 'The ECJ and labour law: a 2008 retrospective' (2009) 38 ILJ 180.

based on worker protection to the new approach based on freedom to provide services. Each approach takes its substance from the relationship constructed between the Directive and Article 49 EC. The starting point is that imposing host-State rules, including employment rules, on cross-border service-providers, such as employers of posted workers, is a restriction on their freedom to provide services under Article 49 EC, which must be justified. The stricter the approach taken to justification, the less room there will be for host-state standards to apply to posted workers and the more room left for application of the home-state standards of the employer and its posted workforce. In my view, what distinguishes the approaches is their construction of justification.²⁰ In the strong worker protection approach,²¹ the Court constructed Article 49 EC as a high justification ceiling and the Directive (from its entry into force) as a floor of minimum rights for posted workers. In the diluted worker protection approach, the Court increasingly used Article 49 EC to place limits on the worker protection justification, but retained the traditional relationship between the Directive and Article 49 EC (that is, keeping the PWD floor, but lowering the Article 49 EC ceiling). In the new approach, the aim is to curtail as much as possible the space accorded to the worker protection justification. This aim has been achieved by repositioning the Directive as an exhaustive statement of the Article 49 EC justification for posted workers as well as by tightening considerably the applicability of the Directive (lowering the Article 49 EC ceiling to floor-level as well as lowering the floor). Importantly, therefore, in my analysis, the new approach constitutes a transformation of the Court's previous approaches to posted workers.

The main bones of the Directive around which these approaches have been constructed are as follows: Article 3(1) PWD provides a floor of protection for posted workers, a nucleus of mandatory rules for minimum protection on matters including minimum pay, rest, and holidays. In relation to these matters, host-state rules will apply to posted workers. Article 3(7) PWD provides that this floor 'shall not prevent application of terms and conditions of employment which are more favourable to workers'. In addition, Article 3(10) PWD provides two options for additional host-state standards, provided this is on a basis of equality of treatment between foreign and national undertakings. First, it permits application of terms and conditions of employment beyond the minimum for 'public policy

²⁰ Compare the rationales discussed by P. Davies, 'The Posted Workers' Directive and the EC Treaty' (2002) 31 ILJ 298, 300, 305. Unlike the approach adopted here, he argues that the more 'worker protective' approaches by the Court placed in question the legality of the legal base of the PWD (that base being to promote freedom to provide services). Alternatively, again unlike the approach adopted here, for an analysis broadly questioning the application of Article 49 EC to the posting of workers, see S. Deakin, 'Regulatory Competition After *Laval*' (2007-8) 10 CYELS 581.

²¹ Although it is possible to envisage an additional 'very strong worker protection' approach in which Article 49 EC is instead considered *a priori* non-applicable. This is paralleled in the competition law context by C-67/96 *Albany* [1999] ECR I-5751. However, it remains to determine the precise circumstances in which Article 49 EC is *a priori* inapplicable; much turns on whether these boundaries are tightly or widely drawn and the rationale underpinning its inapplicability – see also A. Davies, 'One step forward, two steps back? *Laval* and *Viking* at the ECJ' (2008) 37 ILJ 126, 139-141.

provisions²². Second, host-state standards agreed upon in certain kinds of broadly applicable collective agreements can be applied to posted workers.

The construction sector receives additional attention in the Directive as a central sector using posted workers. Indeed, practically all the cases on posted workers concern construction. The UK disputes are no exception. The most important addition is that the minimum rules in the construction sector can also derive from certain kinds of collective agreements detailed in Article 3(8) PWD and not just legislative or executive action as is otherwise the case. One kind is universally applicable collective agreements; this kind of collective agreement does not exist in a large number of Member States, including the UK. Where a State has no facility for declaring collective agreements universally applicable, Article 3(8) allows certain other broadly applicable (national, territorial, industry-wide) collective agreements to set the minimum host-state standards applicable to posted workers.

These approaches are doctrinal reconstructions, aimed to make what I consider to be the best fit out of the available sources even when some pieces are missing. It is important to point out which pieces are missing in assessing whether this exercise in doctrinal reconstruction is persuasive. Most centrally, although the Court has decided a significant number of cases on posted workers,²² it did not decide a case using the Directive until 2004.²³ Indeed, pre-*Laval*, the Court only either considered or applied the Directive in three cases.²⁴ This has three significant implications: First, some central earlier cases involved using Article 49 to assess the legality of applying minimum statutory host-state wages to posted workers,²⁵ an issue which is straightforward post-Directive in all three approaches I identify. Second, the Court did not have the occasion to rule on many of the key aspects of the PWD, such as the significance of Article 3(7), Article 3(8), or Article 3(10) until the *Laval* line of cases. Third, given the paucity of case-law applying the Directive prior to *Laval*, it is right to ask whether it is possible plausibly to reconstruct the relationship between Article 49 and the Directive in the earlier case-law.

Even with these caveats, at least four sources make this reconstruction the best fit of the Court's body of case-law on posted workers: First, the cases themselves -- given the importance of Article 49 EC in reading the Directive, even pre-PWD cases give us a very strong steer as to how it would have been read had it been in force at the relevant time. Second, Advocate General Opinions pre-*Laval*, including the Opinion in *Laval* itself, gives a reading of the Court's case-law which fits snugly with the first two approaches outlined here. Third, we can draw on academic commentaries on the Directive and Article 49 EC pre-*Laval*, all of

²² 19 to date by my calculations.

²³ C-60/03 *Wolff and Müller* [2004] ECR I-9553.

²⁴ The other two being C-341/02 *Commission v Germany* [2005] ECR I-2733; C-490/04 *Commission v Germany* [2007] ECR I-6095.

²⁵ See especially C-376/96 *Arblade* [1999] ECR I-8453; C-165/98 *Mazzoleni* [2001] ECR I-2189 (below Approach 2).

which place it firmly within the first or second approaches, and none of which anticipate the new approach. Fourth, the text of the Directive itself provides certain readings which are more persuasive than others. The approaches are broadly, though not straightforwardly, chronological – although the first approach largely precedes the second approach, the Court was not always consistent in the approach it adopted. Hence, one of the key cases illustrating the first approach (*Wolff and Müller*²⁶) post-dates a clump of cases illustrative of the second approach. From *Laval* onwards, all the cases decided follow the new approach set out in that case. Using these four sources to convincingly construct our three approaches, the departure which the new approach represents can clearly be demonstrated.

APPROACH 1: STRONG WORKER PROTECTION

The tone for this approach was set by the Court's statement in a central early case on posted workers, *Rush Portuguesa*,²⁷ that:

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

This was a strong indication from the Court that the free movement of services presumption supplied by Article 49 EC (that home-state rules should apply to posted workers) is easy to displace by showing that host-state rules supply additional worker protection.

The importance of this statement resides less in the number of cases it was used to decide than in the strong assumptions it created surrounding the adoption and meaning of the Directive. The Directive, on this approach, provides a supranationally co-ordinated set of *non-exhaustive minimum rules* for host-states and service-providers. Article 3(1) PWD provides the minimum rules. These minimum rules are non-exhaustive because of both Article 3(7) PWD and Article 3(10) PWD, both allowing application of higher host-state standards.

²⁶ C-60/03, [2004] ECR I-9553. This concerned a German law making main contractors liable alongside subcontractor employers as minimum wage guarantors for posted workers. The Court stated that although Member States needed to comply with Article 49 EC, they nonetheless had a 'wide margin of appreciation' in that regard. The Court strongly indicated that justification for host-state worker protection measures was not difficult: preventing unfair competition (against host-state enterprises) and protecting posted workers could both legitimately justify restrictions on freedom to provide services under Article 49 EC. It also found that the challenged law did confer a genuine benefit on posted workers and, with that encouragement, left it to the national court to determine whether the rule did not go beyond what was necessary to achieve that objective.

²⁷ C-113/89, [1990] ECR I-1417. See also the Opinion of AG Mischo in Joined Cases C-49/98, 50/98, 52-54/98, and 68-71/98 *Finalarte* [2001] ECR I-7831.

Most certainly, under this approach, Article 49 EC stays in place as an important backstop to be used to set some outer limits on justification. Hence, protection for posted workers higher than the minimum, though saved by Articles 3(7) or 3(10) PWD, will be tested for compatibility with Article 49 EC. However, the understanding is that Treaty freedoms must not be applied so as to undermine important social goods such as cross-border worker protection. Scrutiny of worker protection for posted workers will not therefore be intense.²⁸ An excellent case to illustrate this approach is *Wolff and Müller*.²⁹ It is the low level of scrutiny of host-state labour laws under both the Directive and Article 49 EC which is the hallmark of this approach. This means that posted workers will often be able to benefit from host-state worker protection measures.³⁰

APPROACH 2: DILUTING WORKER PROTECTION BY LOWERING THE ARTICLE 49 EC CEILING

The second approach dilutes host-state worker protection by lowering the Article 49 EC ceiling. The textbook example of the ceiling for justification under Article 49 EC being lowered is *Mazzoleni*.³¹ This concerned security guards being posted from France to Belgium. Their employer was prosecuted for failing to pay them the Belgian (host-state) minimum wage rather than the (lower) French minimum wage. The facts arose before entry into force of the Directive. The Court again noted that restrictions on freedom to provide services, such as application of the host-state minimum wage, could be justified by protection of workers, which is an overriding reason of public interest. Critically, however, it then stated, ‘However, there may be circumstances in which the application of such rules would be neither necessary nor proportionate to the objective pursued, namely the protection of the workers concerned.’ This ushered in a very extensive set of instructions for the national court to engage in searching scrutiny of the necessity to apply the host-state minimum wage law.³² This more demanding

²⁸ See centrally the analysis by P. Davies, ‘Posted Workers: Single Market or Protection of National Labour Law systems?’ (1997) 34 CMLRev 571, which suggests that the PWD, read in the context of *Rush Portuguesa*, fits within what I identify here as the first approach: ‘The Directive appears heavily to qualify one of the fundamental commercial freedoms created by the Treaty in favour of upholding national labour regulation’ (598); ‘[...] it will be suggested that a large part of the explanation for the pro-domestic regulation stance of the Directive is to be found in the comments of the European Court, notably in the case of *Rush Portuguesa*, to the effect that the application to posted workers of the basic protections of national labour laws could normally be justified, despite their chilling effect on cross-border service providers’ (586).

²⁹ C-60/03, [2004] ECR I-9553, n 26 above.

³⁰ See V. Hatzopoulos and T. U. Do, ‘Free Movement Of Services 2000-2005’ (2006) 43 CMLRev 923 describing what is here identified as ‘first approach’ case law as permitting ‘the full and automatic application of the host state’s legislation’ (977).

³¹ C-165/98, [2001] ECR I-2189. See also Joined Cases C-49/98, 50/98, 52-54/98, and 68-71/98 *Finalarte* [2001] ECR I-7831; C-164/99 *Portugaia Construções* [2002] ECR I-787.

³² The Court indicated that the fact that the posting took place in a frontier region could make the administrative burden of applying the host-State minimum wage disproportionate and gave the national court detailed instructions for a wide-ranging evaluation of this issue. In addition, the Court instructed the national court to consider the overall wage, benefit, and tax situation in Belgium and France in order

proportionality analysis under Article 49 EC is the key feature of the second approach to posted workers. It means that host-state worker protection rules beyond the Article 3(1) PWD minimum floor will have to much more convincingly demonstrate their added value to home-state rules in order to be allowed under Article 49 EC. The shift in the Court's approach did not go unnoticed. Commentators noted that the Court began 'the process of bringing its *Rush* dictum more into line with its general jurisprudence on the fundamental commercial freedoms'.³³

THE NEW APPROACH: MAKING THE DIRECTIVE AN EXHAUSTIVE AND RESTRICTIVELY INTERPRETED STATEMENT OF JUSTIFICATION FOR HOST-STATE LABOUR LAW APPLICATION UNDER ARTICLE 49 EC

When the Latvian company *Laval* posted 35 construction workers to Sweden, it faced industrial action as a result of its refusal to enter into a collective agreement which would pave the way to further negotiations to set wages for the posted workers. It argued successfully that such action by the Swedish unions breached Article 49 EC. *Laval*, even more clearly in retrospect, signalled the introduction of a new approach by the Court to posted workers.

Under this new approach, the Directive serves the function of facilitating the freedom to provide services under Article 49 EC. Again, it is accepted that although host-state labour laws constitute restrictions on the freedom to provide services, some justificatory space must be given to 'worker protection'. However, promoting freedom to provide services requires tightly delimiting and curtailing the space to be given to worker protection. In this approach, that is precisely the function of the Directive. *Laval* signalled the Court's turn towards this new approach. In *Rüffer*³⁴ and *Commission v Luxembourg*³⁵, the Court developed this approach. The suggestion in *Laval* that the Directive might act as a ceiling on posted worker protection has been considerably firmed up in the latter cases.

The new approach is achieved in a number of steps. Step 1 – restrictive interpretation of Article 3(1) – has the effect of lowering the floor of protection. To give one example, in *Commission v Luxembourg*, although the 'floor' in Article 3(1) PWD includes 'equality of treatment between men and women and other provisions on non-discrimination', this was found not to include measures implementing the Part-time and Fixed-term Work Agreements and Directive, though non-discrimination clauses are a core part of their content.³⁶ While not a wholly indefensible interpretation by the Court, it is most certainly a restrictive one.

to decide whether application of the Belgian rules were necessary to protect the posted workers. If *overall*, protection in both countries was equivalent, such application would not be necessary.

³³ Davies, n 20 above, 301.

³⁴ n 2 above.

³⁵ n 2 above.

³⁶ See further C. Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' (2009) 38 ILJ 122.

The second step³⁷ – restricting when collective agreements can be used to set minimum standards – was taken in *Laval*. This is an issue deserving separate consideration and is the subject of the next section.

The third and most significant step is making the minimum floor in the Directive a ceiling. In the new approach, the Court refers to Article 3(1) as ‘an exhaustive list’.³⁸ The position under the first two approaches is that under the Directive host-States can apply other and higher standards to posted workers, primarily because Article 3(7) PWD states that that minimum floor ‘shall not prevent application of terms and conditions of employment which are more favourable to workers’.³⁹ Under the new approach, the Court had to find a way to re-interpret Article 3(7) so as to preclude its authorising host-states applying other and higher standards to posted workers. In the new approach, Article 3(7) PWD is interpreted to permit more favourable *home* state rules to apply to posted workers, as well as allowing service-providers in host-states to voluntarily provide more favourable terms for posted workers.⁴⁰

With Article 3(7) disposed of as a means for imposing host-state rules, host-States wishing to apply more than the Article 3(1) minimum list to posted workers on their territory needed to look elsewhere. One obvious place was the first of the two options in Article 3(10) PWD, permitting host-state ‘public policy provisions’ to be applied.⁴¹ In *Commission v Luxembourg*, this route for applying other and higher host-state standards was all but closed by the Court. Luxembourg, in national legislation implementing the Directive, had designated a set of national law measures as pertaining to ‘mandatory public policy’ and therefore as applying to posted workers on its territory. The Court stated that Article 3(10), derogating from Article 49 EC, had to be interpreted strictly. ‘Strictly’ meant, drawing in particular on the Court’s case-law in relation to deporting undesirable migrants, that ‘public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society’.⁴² It is difficult to imagine the host-state labour law rules typically at stake in posted workers’ cases falling under such a definition. Certainly, none of the challenged Luxembourg measures met this standard. Given this stance, it seems highly unlikely that a generous interpretation will be given to the second option in Article 3(10) PWD, which

³⁷ This was a prominent issue in the UK disputes. See in much greater detail the next section.

³⁸ *Commission v Luxembourg*, n 2 above, para 26.

³⁹ For textbook examples of this understanding of Article 3(7) (underlining the change in approach), see AG Mengozzi in *Laval*, n 2 above, and AG Bot in *Rijffert*, n 2 above, the latter given before judgment in *Laval*. However, this understanding of Article 3(7) was not universally shared: see eg Paul Davies who saw Article 3(10) as the pivotal provision giving host-states a very free hand to apply their labour standards to posted workers, whilst Article 3(7) had the role of disapplying host-state laws only when home-state laws were more favourable to the worker (Davies, n 27 above, 298-299, 303).

⁴⁰ Paras 80-81; *Laval*, n 2 above, para 33; *Rijffert*, n 2 above.

⁴¹ In *Laval*, the potential of the first option in Article 3(10) PWD to permit higher host-state standards on ‘public policy’ grounds was kept alive (para 82) (though not applicable here because Sweden had not explicitly had recourse to it (para 84)).

⁴² See further Barnard, n 36 above, 129.

permits host-state standards beyond the minimum floor contained in certain kinds of broadly applicable collective agreements to be applied to posted workers.

The final step concerns the place of Article 49 EC. Although in the new approach, Article 49 has been given the important role of explicitly driving the new restrictive interpretation of each of the key provisions of the Directive considered here, a corollary of the new approach is that its key function under the worker protective approaches – to determine the ceiling of host-state protection – is now essentially redundant. As Paul Davies notes, this is reflected in the paucity of discussion as to whether the measure challenged in *Rijffert* also breached Article 49 EC.⁴³ In fact, there is no longer any need for such discussion as in the new approach, *only* measures falling within the newly restrictively interpreted Directive are Article 49 compliant.⁴⁴

I hope to have shown that the new approach differs significantly from its predecessors in leaving exceptionally little space for the application of anything other than a restrictively defined set of minimum host-state standards to posted workers. The corresponding emphasis this places on home-state standards places the new approach closer to the ‘country-of-origin’ principle abandoned by the EU legislature in attempts to introduce a general services directive in part because of public protest⁴⁵ than to the Court’s general approach to justification in the services field.⁴⁶ The Court has made a clear choice that only the core set of minimum host-state standards defined in the Directive should be applied to posted workers. Beyond that, posted workers should almost always simply be subject to the labour standards of their home-state. Although there are strong arguments of principle against this position, respectable arguments can also be made in its favour. I return to this in my concluding remarks.

For now, I turn to examine how the new approach to applying host-state standards played out in the UK disputes. A key concern sparking the disputes was that the use of foreign labour leads to an erosion of wages and conditions for all concerned because posted workers can be paid less than UK workers. One of the central issues ACAS was asked by the Government to ascertain in the Total dispute was the veracity of the posted workers’ employer’s assertion that, in this case, the posted workers were in fact being paid at the same rates as their UK equivalents under the collective agreement in force for UK workers.⁴⁷ In both disputes, what fed the suspicions of the striking workers and their unions was the perception that the applicable EU law permitted the employer of the posted workers to pay them less.

⁴³ P. Davies, ‘Case-note on *Rijffert*’ (2008) 37 ILJ 293.

⁴⁴ In *Laval*, the possibility of a higher ceiling being set by Article 49 EC was maintained (para 68), though significantly reduced in scope (para 108). This scope was further reduced by *Rijffert* (n 2 above)

⁴⁵ On public protest against the country-of-origin principle, see n 6 above.

⁴⁶ For which the second approach provides a good example.

⁴⁷ The ACAS report, para 11, n 14 above, found that the Total subcontractor had in fact committed to pay their posted workers the UK collectively agreed rates. In Alstom, UNITE has found that one of the subcontractors is paying its posted workers £10.01 per hour, whilst the collectively agreed rate applicable to equivalent UK workers is £14.00 per hour (UNITE Press Release, 13 March 2009, ‘Isle of Grain Power Station: UK workers excluded, EU workers exploited’).

There can be no doubt that these suspicions were entirely well-founded under the Court's new approach. EU contractors are only required to respect the minimum host-state rights set out in Article 3(1) PWD. Beyond that, EU contractors are fully legally entitled to offer posted workers inferior terms and conditions. In other words, the minimum floor of host-state standards in Article 3(1) PWD constitutes, save *in extremis*, an exhaustive statement of the Article 49 EC 'worker protection' justification. It is particularly this aspect of the new approach to posted workers which has led to UNITE's claim that the judgments allow social dumping.⁴⁸ Post-*Laval*, Article 3(10) is very restrictively interpreted, and Article 3(7) is interpreted so that posted workers can only get higher than minimum host-state standards if the *home-state* standards are higher or if the employer *voluntarily* adheres to a higher host-state standard.⁴⁹ This, in turn, raises two important questions about EU law-compliant methods of standard-setting and enforcement which I turn to next. Can minimum host-state standards be set collectively? What methods can be used to elicit voluntary adherence by foreign service-providers to higher-than-minimum standards for their posted workers? In particular, under EU law can any collective worker pressure be brought to bear on the employer of the posted workers?

COLLECTIVE STANDARDS AND ACTION TO SET AND ENFORCE HOST-STATE STANDARDS FOR POSTED WORKERS

One important step in the new approach to host-state standards was restricting when collective agreements can be used to set minimum standards. As noted, the Directive allows the minimum floor in the construction sector to derive from certain kinds of collective agreements detailed in Article 3(8) PWD. For States where collective agreements are not universally applicable (including the UK and Sweden), the spotlight is on the second option in Article 3(8), which provides that Member States with no system for declaring collective agreements universally applicable may, *if they so decide*, base themselves on two other kinds of collective agreements, provided home-state and host-state undertakings are treated equally. The first are collective agreements which are generally applicable to all similar undertakings within a geographical area and in the industry concerned. The second are collective agreements which have been concluded by the most representative employers' and labour organizations at the national level and which are applied throughout national territory. Despite Sweden's reliance on collective agreements to set wages, the Court in *Laval* found that it could not rely on Article 3(8) PWD

⁴⁸ See n 9 above. It is highly relevant to note in this regard that in a pre-election agreement between the unions and the Labour Party in 2004 (the Warwick Agreement), the latter committed to *inter alia*, 'an assurance that the Posted Workers Directive will not lead to undercutting'.

⁴⁹ Reinforced by the restrictive interpretation of Article 3(10) PWD – see n 40-41 above accompanying text.

as it had no system for declaring collective agreements universally applicable and had deprived itself of the option to allow other broadly applicable collective agreements to set standards by failing explicitly to make use of that option. Moreover, the collective action undertaken in *Laval* was found not to be aimed at setting a minimum wage. This raises two linked issues: the acceptance of collectively set standards as applicable host-state standards for posted workers and the use of collective action to set and enforce host-state standards. In relation to both issues, reading *Laval* in the light of the UK disputes is highly instructive.

COLLECTIVE STANDARD-SETTING IN THE HOST-STATE

The question of whether ‘minimum pay’ standards in UK collective agreements could be applied to posted workers formed an important part of the UK disputes. The main argument advanced by one of the two unions involved in the disputes, the GMB, was that the problems in Total and Alstom stemmed from the UK’s ‘botched implementation’ of Article 3(8) PWD.⁵⁰ What is meant by this claim? GMB’s argument was that the UK had failed to opt-in to the Article 3(8) system, leaving employers of posted workers in the UK free to ignore the standards, including pay standards, laid down in such collective agreements.

This argument is correct, but somewhat misleading for three reasons: *First*, it is only after *Laval* that it became clear that Member States had to explicitly ‘opt-in’ to relying on collective agreements to set minimum standards for construction workers.⁵¹ Even accepting that express opting-in is required by the words ‘if they so decide’ in Article 3(8), it is difficult to view Article 3(8) PWD as exhausting Member States’ possibilities to use collective agreements to set minimum rates of pay.⁵² *Second*, and much more importantly, even had the UK ‘opted-in’ to Article 3(8) (or should it now choose to), thereby allowing collective agreements to set minimum rates of pay, in *Laval*, the Court demonstrated a strong reluctance to allowing the pay determined in collective agreements to be considered as a ‘minimum’ rather than simply the going rate for the job. In cases decided before the ‘new approach’ to posted workers, the Court unproblematically accepted the

⁵⁰ See eg GMB Press Release, 2 February 2009, ‘Peter Mandelson in Denial About UK Workers Being Discriminated Against on UK Projects says GMB’, at www.gmb.org.uk, which states, ‘The facts are that the manner in which the EU 1996 Posted Workers Directive was applied into UK law in 1999 was botched. The Labour Party recognised this in 2004 at Warwick and made a commitment to apply Article 3(8) properly into UK law. That commitment, which was repeated at Warwick in 2008, has not been honoured’. On Warwick, see n 48 above.

⁵¹ Moreover, given the freedom the pre-*Laval* approaches had given to host-states to apply higher standards to posted workers (see previous section), subject to the Article 49 EC ceiling, Member States, including the UK and Sweden, can be forgiven for thinking there was no real need to invoke Article 3(8). It is only after *Laval* that that need became critical for those Member States wishing to allow collective agreements to set standards.

⁵² See especially points 179-184, 196 in AG Mengozzi’s Opinion, n 2 above, where Sweden’s collective method of posted worker wage-setting was found to be fully compliant with the PWD. However, in part, this finding relied on the AG being relaxed about the level at which wages were set because of his view (not followed by the Court) that Article 3(7) PWD permitted Member States to apply wages higher than the minimum. The non-exhaustion argument *was* accepted by the Court (para 68), but more as a theoretical possibility than a realizable option in the Swedish system.

setting of minimum wages for posted workers by collective agreements.⁵³ In Sweden, the legislature deliberately refrained from setting a minimum wage for posted workers under Article 3(1) PWD because wage-setting is reserved for collective bargaining. The Swedish construction industry had a national agreement, but wages were set through local negotiation. The national agreement contained a ‘fall-back’ wage clause (equivalent to around 12 EUR per hour). But this was only to be turned to if local negotiations failed, followed by failure at the national level to resolve the local failure. The local union in *Laval* had proposed a wage equivalent to 16 EUR per hour. When this was rejected, they proposed signing a local agreement which would open the way to fresh wage negotiations. When this was rejected, collective action ensued. The Court rejected Sweden’s argument that its system of collective wage-setting fulfilled the requirements of Article 3(1) PWD:

As regards the requirements as to pay which can be imposed on foreign service providers, it should be recalled that the first subparagraph of Article 3(1) of Directive 96/71 relates only to minimum rates of pay. Therefore, that provision cannot be relied on to justify an obligation on such service providers to comply with rates of pay such as those which the trade unions seek in this case to impose in the framework of the Swedish system, which do not constitute minimum wages and are not, moreover, laid down in accordance with the means set out in that regard in Article 3(1) and (8) of the directive (para. 70).⁵⁴

To consider the similar difficulties with UK collective agreements setting ‘minimum’ wages, we need look no further than the collective agreement at issue in the UK disputes -- the National Agreement for the Engineering Construction Industry (the ‘NAECI’/ ‘Blue Book’).⁵⁵ While the agreement sets rates of pay, it makes provision for local agreements to supplement this with ‘incentive bonus arrangements to reward and encourage improvements in working practices and/or the achievement of specific targets or objectives.’ According to the National Joint Council for the Engineering and Construction Industry, which operates the agreement, these rates are supplemented by local incentive agreements for ‘many projects’.⁵⁶ These contrasting examples from the collective agreements applicable to the Swedish and UK construction industry demonstrate that problems with establishing the ‘minimum’ where collective agreements are concerned are

⁵³ In Germany (C-164/99 *Portugaia Construções* [2002] ECR I-787, C-341/02 *Commission v Germany* [2005] ECR I-2733); in Belgium (where importantly a statutory minimum wage also exists) C-376/96 *Arblade* [1999] ECR I-8453. Later cases will demonstrate whether the Court will continue to accept these as setting the minimum wage for the purposes of Article 3(1). That would require the Court distinguishing between appropriate and inappropriate (Sweden) methods of collective wage setting for the purpose of Article 3(1).

⁵⁴ See also the earlier paras 24 and 26 which prepared the ground for this conclusion.

⁵⁵ The current version is agreed for the 2007-10 period.

⁵⁶ NJC, Communique No 5/2008, 3 December 2008.

common rather than exceptional. To fit inside the Court's interpretation of what counts as a 'minimum' would require a radical restructuring of collective bargaining in Member States.⁵⁷

Third, these conclusions on minimum wage-setting in Sweden need to be translated to the UK context. One key difference is the existence of a statutory national minimum wage in the UK. This raises the issue of whether it is possible to have more than one minimum. If it is, where there are two or more candidate minima, which one counts for the purposes of Article 3(1) PWD? Post-*Laval*, this is a problem which needs urgent resolution.⁵⁸ At the time of the disputes, the UK adult minimum wage (hourly) was £5.73 (6.3 EUR). Under the NAECI, the National Guaranteed Provision day-work hourly rate for a Grade 1 (the lowest grade) adult was £7.94 (8.75 EUR).⁵⁹ The question must be asked whether restructuring collective agreements to provide PWD-compliant 'minimum' wages may prove futile in Member States with a statutory minimum wage (that is, the overwhelming majority).⁶⁰ This is because the tenor of the new approach, if continued, indicates that the Court might well decide that the statutory minimum wage is the only relevant minimum for posted workers in the UK. In other words, where a statutory minimum is in place, the Court may find that no space exists for a second and higher minimum pay rate set collectively. That is to say, EU contractors will be legally entitled to pay posted workers no more than the UK minimum wage. This finding about the minimum needs to be viewed against what we have already identified as the most critical finding in the new approach -- that the minimum host-state rights in the Directive are also the maximum to which posted workers are entitled.

A final important question mark hangs over the issue of collective standard-setting. The Directive (Article 3(10)) provides not only for minimum standards to be set by collective agreements in the construction industry, but also permits host-states to apply higher host-state collective standards (agreed in the same ways as those in Article 3(8)) to any posted worker. This provision fits extremely poorly, indeed not at all, with the Court's new approach and will therefore doubtless be subject to the narrowest possible interpretation should it be litigated. Nonetheless, interpreting this broad permission given by the Directive to host-states to apply collective labour standards in line with the new approach will certainly be a textual challenge for the Court of Justice. It raises questions about its 'fit' with the provisions of the Directive. Overall, the new approach is extremely unreceptive to collective standard-setting.

⁵⁷ Moreover, even 'minimum standards' in UK collective agreements could certainly not be applied in their totality to posted workers – a scaled-down version of a UK agreement covering only those matters listed in Article 3(1) PWD would have to be identified.

⁵⁸ Only six Member States do *not* set a statutory national minimum wage, relying instead on collective wage setting. Those Member States are Austria, Denmark, Germany, Finland, Italy, and Sweden.

⁵⁹ There are six grades. For each grade, there are additional basic rates for eg night work, different shift work patterns, and so on (NAECI A12.2). The agreement is available at <http://www.njceci.co.uk>. See also n 47 above concerning the pay-rates in the Alstom dispute.

⁶⁰ See n 58 above.

COLLECTIVE ACTION IN THE HOST-STATE

Can host-state workers, more specifically those participating in the UK disputes, take industrial action in relation to the employment conditions being applied to posted workers? We confine our analysis to the position under EU law.⁶¹ Not being a matter addressed by the Directive, this is considered under Article 49 EC. In *Laval*, the Court identified the right to take collective action as a fundamental right which forms an integral part of the general principles of Community law.⁶² In line with a well-established approach, protection of fundamental rights may justify restriction of a fundamental freedom under the EC Treaty, such as freedom to provide services, but only if the exercise of that fundamental right can be reconciled with the fundamental freedom and does not go beyond what is necessary to protect that fundamental right by being proportionate. In considering compatibility with the fundamental freedoms, the Court in the two industrial action cases (*Laval*, *Viking*) went through a standard order of questions which can also be applied to the UK disputes.

First, is the collective action a restriction on the freedom to provide services?⁶³ The Court has made it clear that collective action will be a restriction on the freedom to provide services if it is liable to make it less attractive or more difficult for foreign undertakings to carry out construction work in the UK. In *Laval*, collective action to ‘force’ an employer to sign a local agreement or to enter into wage negotiations both fell into this category. In the UK, the collective action aimed to require employers to give posted workers the same collective rights as UK workers and to require employers to consider hiring British labour. Both aims clearly restrict foreign undertakings’ ability to provide services in the UK.

Second, is there a potential justification for that restriction? Given the Court’s earlier recognition of collective action as a fundamental right, unsurprisingly the answer here is yes. The right to take collective action for the protection of posted workers and the protection of workers of the host state against possible social dumping may constitute overriding reasons of public interest within the meaning of the case-law of the Court, which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.⁶⁴

Third, is that potential justification applicable on the facts before the Court? As with the Swedish disputes, the UK disputes would also fall at this hurdle; neither is Article 49-compliant. In *Laval*, in so far as the collective action aimed to protect posted workers is more than the minimum floor in the Directive, the Court was clear that it could not be justified in terms of worker protection. This is consistent with the rest of the Court’s reasoning: if the maximum protection consistent with the ‘worker protection’ justification in Article 49 EC is the

⁶¹ The issue of Article 49 being directly effective against trade unions is dealt with in the next section.

⁶² *Laval*, n 2 above, para 90. See also *Viking*, n 2 above, para 44.

⁶³ *Viking*, n 2 above: freedom of establishment.

⁶⁴ *Laval*, n 2 above, para 103.

minimum PWD floor, collective action to obtain higher protection cannot be justified. But what then of collective action aimed at making employers comply with the minimum PWD floor? Once again, the Court clearly demonstrated its unease with collective routes to wage-setting. Hence, the Swedish collective action could not be justified because the negotiating context made it impossible for the employer to ascertain what its minimum wage obligations were.⁶⁵ Moreover, the Court prefaced this by stating that Member States (unions were notably not mentioned) were entitled to require employers of posted workers to comply with minimum wage obligations ‘by appropriate means’.⁶⁶ It seems likely that collective action to enforce statutory minimum wages would be found disproportionate and therefore unjustified if other enforcement routes were available (which inevitably they are).

We can stand back and consider when the Court considers that the ‘fundamental right’ to take collective action can actually be used. It is clear that it cannot straightforwardly be used to bring employers to the bargaining table to set a minimum wage;⁶⁷ it cannot be used to obtain the same collectively agreed pay for posted workers as for home-state workers; and it cannot be used to ensure compliance with a statutory minimum wage. By a process of exclusion, it appears that collective action may (only) be justified as an enforcement method of last resort to enforce a collectively agreed minimum wage (though, again, note the Court’s significant reluctance identified above to find wages set in collective agreements to be a ‘minimum’). It is hard to deny that the fundamental rights rhetoric rings particularly hollow in *Laval*. It contrasts sharply with the approach taken in the very cases cited by the Court to support its reasoning in *Laval* and *Viking*.⁶⁸

⁶⁵ *ibid*, para 110.

⁶⁶ *ibid*, para 109.

⁶⁷ *ibid*, para 100: ‘The same [ie finding of a restriction] is all the more true of the fact that in order to ascertain the minimum wage rates to be paid to their posted workers those undertakings may be forced, by way of collective action, into negotiations with the trade unions of unspecified duration at the place at which the services in question are to be provided.’ It may be possible to shape ‘minimum’ wage negotiations in a way the Court would find ultimately Article-49 compliant; it seems, however, likely that any such shape would disadvantage the workers’ side and would, moreover, require an unusual amount of judicial control.

⁶⁸ C-112/00 *Schmidberger* [2003] ECR I-5659; C-36/02 *Omega* [2004] ECR I-9609. In *Schmidberger*, the Court held that the state enjoyed a ‘wide margin of discretion’ (para 89) in protecting the fundamental rights at stake (freedom of assembly and expression). In *Omega*, the Court classified the fundamental right at stake (human dignity) as falling within the Treaty-defined ‘public policy’ derogation. Such classification in particular allowed diversity between Member States for the conception of how the fundamental right restricting free movement of services should be protected. In *Laval*, the Court refused so to classify the fundamental right at stake (paras 118-119). In addition, unlike *Omega* and *Schmidberger*, it was the unions, not the State whose regulation and actions were under scrutiny due to the extension of horizontal direct effect in *Laval* and *Viking*. It is the pernicious cumulative effect of applying *strict proportionality* to the exercise of a ‘fundamental right’ by a *private party* that is fatal to that fundamental right’s adequate protection.

THE NEW APPROACH FAILS TO RESPECT COLLECTIVE AUTONOMY

In its haste to impose its new approach on host-state standards considered in detail in the previous section, the Court has ridden roughshod over a swathe of basic issues in the organisation of collective autonomy in its Member States. In the construction sector, the Posted Workers' Directive dedicates a special place to collective agreements in setting minimum host-state standards for posted workers. The new approach has placed huge question marks over when collective agreements can actually be deployed to set these minimum standards. Outside the construction sector, under the new approach (in stark contrast to the two other approaches adopted by the Court), it is hard to discern any situation in which host-state collective agreements can be applied to posted workers. Given that the minimum standards must be set by law, and that the new approach allows no further host-state standards to be applied to posted workers,⁶⁹ it seems it is only when an EU employer of posted workers voluntarily abides by a host-state collective agreement (without any industrial pressure being applied), that posted workers can benefit from its provisions.

Turning to collective action, the Court provided that countervailing workers' power to shape employers' decision-making in relation to posted workers will be subject to exceptionally strict surveillance before it is lawful. In short, when labour standards built on collective autonomy met the freedom to provide services, they were emasculated by the Court. They were collateral damage of the Court's insistence on a well-defined minimum floor constituting the ceiling for posted worker protection in host-states. In these cases, the Court has not shown any genuine understanding or respect for the diversity of Member States' industrial relations systems, for the values underpinning the joint regulation of employment by employers and unions, or for the immense day-to-day practical difficulties good faith attempts by states, employers, and unions to find ways to comply with these judgments will present.⁷⁰ Collective autonomy was compared unfavourably (too messy, too uncertain, too disruptive) with judicially enforced legislation as a means of setting and protecting standards for posted workers.⁷¹ The Court's reputation has not been enhanced by its position on collective rights in *Laval*.

⁶⁹ Save in extremis 'public policy' situations under Article 3(10); moreover, *Laval* expressly reserves the use of Article 3(10) to states, unions cannot invoke it. Again, as noted above, this leaves the (little commented on) puzzle of the meaning the Court could possibly now give to the second limb of Article 3(10), which allows higher standards to be set by collective agreements; however, the Court's determination to avoid higher host-state standards being applied to posted workers is clear and would drive its interpretation.

⁷⁰ On how Sweden is trying to respond to *Laval*, see M. Rönmar, 'Free Movement of Services versus National Labour Law and Industrial Relations Systems: Understanding the *Laval* Case from a Swedish and Nordic Perspective' (2007-8) 10 CYELS 493; more broadly, see S. Sciarra, '*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU' (2007-8) 10 CYELS 563.

⁷¹ See also L. Azoulai, 'The Court of Justice and the Social Market Economy: The Emergence of an Ideal and the Conditions for its Realization' (2008) 45 CMLR 1335, commenting on *Laval* and *Viking* that '[...] the result of these two cases seems to be to imprison the system of social relations in a framework of representation (legislative, universally applicable collective agreements) and under the supervision of the courts (the ECJ, national courts)' (1350).

LIABILITY OF UNIONS AND EMPLOYERS UNDER ARTICLE 49 EC

It is well known that in *Laval* and *Viking*, the Court for the first time extended the horizontal direct effect of Articles 49 and 43 to encompass trade unions. The UK disputes, contrasted with those two cases, show what a Pandora's box this promises to be for unions, for employers, and for courts.

AN ADDITIONAL DANGER FOR UNIONS

An important matter concerning the potential liability of unions for breaches of fundamental market freedoms under EU law is defining the legal scope of their responsibility for industrial action. UK law, for example, makes unions responsible for an exceptionally wide range of strike activity even when the strike has not been initiated by the union.⁷² The answer under EU law is as yet unknown, beyond the straightforward fact scenarios in *Laval* and *Viking*, where the unions clearly instigated the industrial action being challenged under EU free movement rules. The UK disputes demonstrate *par excellence* the grave difficulties and uncertainties which arise when the application of free movement rules to unions is to be ascertained for actions undertaken (in part at least) by workers who are members of that union, even where the union has not itself been instrumental in organising the industrial action. As unions are the largest voluntary associations in the Member States of the EU, union members will often be involved in public protest. The involvement of unions can range from chief organiser to *post hoc* involvement in resolving disputes and protests. The Total dispute in particular was at the latter end of this spectrum. The UK disputes clearly raise the question whether unions will be held responsible under Article 49 for spontaneous industrial action *not organised by the union* in protest against the actions of foreign service-providers.⁷³ Beyond unions, this new doctrinal development presents a broader threat to public protest in the EU.

A DANGEROUS SUPPLEMENT FOR EMPLOYERS

In the wake of the finding in *Laval* and *Viking* that the fundamental freedoms relating to services and establishment could be horizontally directly effective against unions, the focus has largely been on the implications of this finding for unions. However, the UK disputes highlight how this finding on horizontal direct effect could also have far-reaching consequences for employers. If one core issue could be singled out as the central grievance of the demonstrating workers in the UK, it was this: why were they not free to apply for jobs in the UK under contracts being carried out by EU contractors? In the words of UNITE's joint

⁷² See n 10 above.

⁷³ The case law in which states were found responsible under the fundamental freedoms for diffuse public protest (*Schmidberger*, n 68 above; C-265/95 *Commission v France* (strawberries) [1997] ECR I-6959) are possibly dangerous precedents for unions.

general secretary, Derek Simpson, ‘No European worker should be barred from applying for a British job, and absolutely no British worker should be barred from applying for a British job.’⁷⁴ Without *Laval*, the British workers would not have an EU law leg to stand on; before *Laval* there was little doubt that as private parties, EU contractors could not have Article 49 of the Treaty applied against them. However, interpreting this aspect of *Laval* raises further doctrinal hurdles when it comes to working out whether and when EU private contractors are required not to discriminate on grounds of nationality. The UK disputes provide us with a perfect spectrum of different fact-scenarios to test the limits of Article 49 EC and how employers might be affected by the new position on its horizontal direct effect set out in *Laval*. In *Total*, the Italian employer moved with an already constituted workforce from Italy and Portugal. In *Alstom*, by contrast, the EU contractors had no workforce and stated that they had no intention of employing any British workers. In a final twist, in the resolution of the *Total* dispute, mediated by ACAS, the Italian employer promised to reserve 102 of the next swathe of 198 engineering jobs for British workers. Which, if any, of these situations breaches EU law and why? I suggest that, in answering this question, we find that the further one departs from the classic posted worker scenario, frequently evoked by the Court in its posted workers’ case-law, the more difficult it becomes to shield employers from liability.

The classic posted workers scenario: the EU contractor moves with its workforce

In *Total*, it was undisputed that IREM, the successful contractor, had its own permanent workforce of Portuguese and Italian workers. This in turn makes the legal position one that has been clear for over two decades. The free movement of service provisions:

preclude a Member State from prohibiting a person providing services established in another Member State from moving freely on its territory with all his staff and preclude that Member State from making the movement of staff in question subject to restrictions such as a condition as to engagement in situ or an obligation to obtain a work permit. To impose such conditions on the person providing services established in another Member State discriminates against that person in relation to his competitors established in the host country who are able to use their own staff without restrictions, and moreover affects his ability to provide the service.⁷⁵

⁷⁴ UNITE Press Release, 23 February 2009, widely cited in UK newspapers.

⁷⁵ *Rush Portuguesa*, n 27 above, para 12, cited with approval in *Laval*, n 2 above, para 56.

In other words, under Article 49 EC, an Italian contractor can hire whom it wants (compliance with Italian home-state law being assumed)⁷⁶ and thereafter is free to move to provide services in the UK with its workforce. This is to ensure equality of treatment between the Italian contractor and the contractors of the host-state (UK) who are similarly free to hire whom they please in compliance with their national (UK) rules. It is worth considering whether even such well-established EU law positions now face the fate of becoming controversial in the changed EU context.

Non-standard scenario I: the employer with no home-state workforce

In *Alstom*, the EU contractors apparently initially had no workforce, but stated their intention not to hire British workers. Such a scenario has not yet been considered by the Court. How might it respond? It is possible that the Court would state that in practice, such contractors are in the same situation as contractors which already have their own workforce, leaving them free as just discussed to hire subsequently a workforce wherever they please. In other words, the employer is assumed to be protected by the ‘home-state cloak’ of Article 49 with regard to its hiring decisions irrespective of when (before or after the contract has commenced) and where (in the home-state, in the host-state) they are made.

However, it is at least equally plausible that an employer, present in a host-state without a workforce, which manifests a refusal to consider applications for vacant posts from applicants in that state, will not be considered to be subject to the same treatment as an employer moving with its already-constituted (or largely constituted) staff recruited in the home-state. In other words, the ‘home-state cloak’ afforded by Article 49 must in some way match up to the reality of the EU contractor’s presence and actions in order to continue to apply. If that cloak does not cover hiring decisions made in this way, this appears to be a breach of EU law, of the foundational principle of non-discrimination on grounds of nationality. In the employer’s exercise of its freedom to provide services under Article 49 EC, it has breached the principle of non-discrimination on grounds of nationality.⁷⁷

Non-standard scenario II: the employer discriminates in favour of host-state workers

Similar considerations concerning whether Article 49 has been breached apply to the resolution of the *Total* dispute. Here, however, there is the additional element of the employer explicitly engaging to hire a certain percentage of *host-state*

⁷⁶ A large number of posted workers cases concern the hiring by employers in their state of origin of Third Country Nationals (TCNs) (eg Turkish workers) and then facing difficulties bringing these TCNs as posted workers into the host state: see centrally *C-43/93 Vander Elst* [1994] ECR I-3803.

⁷⁷ A breach, however, encouraged by the construction and interpretation of Article 49 EC. It would be difficult to present a UK-based worker, hired by a non-UK employer to provide services in the UK, as a ‘posted worker’. According to Article 2(1) PWD, ‘a posted worker means a worker who, for a limited period, performs work in the territory of a Member State *other than the state in which the posted worker normally works*’. Accordingly, to take clear advantage of the Article 49 employer benefits, it is safer for the employer to avoid hiring host-state workers.

workers,⁷⁸ making it perhaps more difficult to protect this decision with the 'home-state cloak' of Article 49 EC. In that event, application of the foundational EU law principle of non-discrimination on grounds of nationality means that the legality under EU law of the ACAS-brokered resolution of the Total dispute must be questioned seriously. How, without directly and overtly breaching this principle, can an undertaking be given that 102 jobs will be allocated to British workers?

If the Article 49 'home-state cloak' applies to protect the hiring decisions in each of these fact-scenarios, despite its uneasy fit, the matter is closed (judicially at least). However, if it does not protect some of the hiring decisions, a second question arises as to whether discriminated-against job applicants can rely on Article 49 (and Article 12) of the Treaty against the employers.

Does Article 49 EC apply to private sector employers?

One may well ask, how can such a central matter be so unclear? The vertical direct effect of the fundamental freedoms of goods and persons is well-established. All can be applied against the state. However, the extent to which the fundamental Treaty freedoms can be applied to private parties varies according to the freedom. To summarise, the Court has made the following findings: The free movement of goods is not horizontally directly effective (so that Tesco in the UK can urge customers to 'Buy British' goods, while the UK Government cannot). The Court reached the opposite conclusion in relation to Article 39 EC concerning free movement of workers, finding in *Angonese*⁷⁹ that a job applicant turned down for a job in an Italian bank could invoke Article 39 EC against the prospective employer. The remaining fundamental personal freedoms, freedom to provide services (Article 49 EC) and freedom of establishment (Article 43 EC), have been found, pre-*Laval* and *Viking*, to be 'semi-horizontally directly effective'. Although they (probably) remain so after *Laval* and *Viking*, the criteria governing which non-state bodies can be expected to bear responsibility for breaches of these freedoms are both more extensive and less clear.⁸⁰

I am interested in whether claims could be taken against those EU employers found to have breached EU non-discrimination on grounds of nationality rules.⁸¹ My argument is that both the *Laval/Viking* line of authority and the distinct

⁷⁸ Again, what is the status of these UK-based workers under EU law? They have not moved to another Member State, so Article 39 EC is not applicable. They do not fit into the category of posted workers (see n 77 above) although their employer is a temporary service-provider under Article 49 EC. Nor, however, is it a 'purely internal situation'; the cross-border link provided by the UK worker's employer status as a cross-border service-provider.

⁷⁹ C-281/98 *Roman Angonese v Cassa di Risparmio di Bolzano* [2000] ECR I-4139.

⁸⁰ See A. Dashwood, '*Viking* and *Laval*: Issues of Horizontal Direct Effect' (2007-8) 10 CYELS 525; S. van den Bogaert, 'Horizontality: the Court Attacks?' in C. Barnard and J. Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Oxford: Hart, 2002) 123.

⁸¹ In the Alstom dispute, for example, a claim by a qualified British job-applicant against the Polish contractors Remak or ZRE. In the Total dispute, for example, a claim by a disgruntled Sicilian engineer excluded from a job opportunity by IREM's promise to recruit 102 British workers in order to resolve the dispute.

Angonese authority point towards an affirmative answer, though each for different reasons. Nonetheless, each importantly reinforces the other.

Looking first at the *Laval/Viking* strand, the Court's reasoning on extending horizontal direct effect to unions, although not extensive, is elaborated more fully in *Viking* than in *Laval*. The Court essentially extended by analogy its reasoning in earlier case-law to trade unions. That earlier case-law found that ensuring the effectiveness and uniform application of Community law required the free movement of persons provisions to 'extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services.' The previous cases had concerned professional bodies, often sporting associations.⁸² The extension to unions was justified by what was identified as their similar collective capacity to regulate access to the new markets in dispute (the Swedish market for construction services in *Laval*, the Estonian ferry-trip market in *Viking*). It is unclear whether unions, such as those in the UK, with much less collective capacity than those in Sweden or Finland, would be included in this extension. However, assuming that they would be, would employers in their capacity as service-providers similarly be covered by this extension? It might be argued that employers (rather than employers' associations), unlike unions, do not regulate in 'a collective manner'. My view is that this argument would be difficult to sustain for two reasons: First, it is only from an extremely formal legal perspective that an employer is viewed as an individual rather than as a collective grouping of persons and assets. In an effectiveness-oriented perspective such as that adopted by the Court an employer has a collective effect as unions do. Second, to find that unions, but not employers, could have Article 49 EC applied against them would be highly controversial as it would be seen to advantage unfairly business interests over workers' interests in the interpretation of the fundamental freedoms.

Turning to *Angonese*, this makes it clear that the free movement of workers provisions can be invoked against purely individual conduct of employers where that conduct results in discrimination (in that case, indirect) on grounds of nationality. As well on drawing on its established reasoning (effectiveness, uniform application of Community law) for extending the applicability of Article 39 EC beyond public authorities, the Court drew an analogy with the horizontal direct effect of the gender equal pay obligation in Article 141 EC, noting that Article 39 EC similarly was 'designed to ensure there is no discrimination on the labour market'.⁸³ Suffice it to note that there can be no Article 49 EC scenario closer to that of the situation identified in *Angonese* than that of our job applicants turned down by prospective employers simply because of their nationality. The combined

⁸² Case 36/74 *Wabrave and Koch v Union Cycliste Internationale* [1974] ECR 1423; Case 13/76 *Donà v Mantero* [1976] ECR 1333; Case C-415/93 *Union Royale Belge des Sociétés de Football Association ASBL v Bosman* [1995] ECR I-4921; Joined Cases C-51/96 *Deliège v Ligue francophone de judo ASBL* [2000] ECR I-2549; Case C-309/99 *Wouters v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577.

⁸³ For arguments that the *Angonese* reasoning is weak, see both authors cited above at n 80.

force of these two strands of authority makes a strong case for employer liability under Article 49 EC.

DEMARCATING ARTICLE 49 EC FROM APPLICATION OF THE OTHER PERSONAL TREATY FREEDOMS

Contrasting the classic posted workers scenario with some variants in fact reveals some problematic boundary issues between Article 49 and the other personal Treaty freedoms. The rationale for the Article 49 approaches to posted workers, particularly the new approach, rests firmly on a scenario in which the employer is based in its home-state and makes temporary forays into the host-state with its home-state hired workforce in order to carry out projects. This is what provides the rationale for both not treating posted workers the same as host-state workers (as they do not enter the host-state's labour market) and not requiring home-state employers to consider host-state job applicants (as the employer is also only temporarily entering the host-state). The further the employer providing services diverges from this scenario, the more questions can legitimately be raised both about the standards the posted workers should receive and about the lack of obligation on the employer to consider a wider base of applicants than those considered from a home-state perspective.

A first variation, explored in the previous section, is that the service-provider does not move with its home-state hired workforce. This makes the protection under Article 49 EC of its right to hire whom it pleases (according to home-state law) problematic. It also makes the presumption that the labour law of the state of establishment of the service-provider should apply to those workers hired much less compelling. The UK disputes clearly demonstrate the need for a clear and persuasive rationale to allow foreign service-providers to apply the law of their state of establishment to their hiring decisions and their workforce. In this variation from the classic scenario, that rationale becomes hard to find.

A second variation is when the service-provider (and much more importantly, the posted workers) are only nominally present in the home-state and in fact spend very significant and extended periods of time in the host-state(s). The Court's recent departure from its earlier position on when a business was established as opposed to providing services makes this scenario a very live possibility. It used to be the case that a business needed to demonstrate its 'temporary' entry into the host-state in order to be able to benefit from Article 49.⁸⁴ More recent case-law has changed the presumption so that unless the service-provider genuinely and permanently moves to another Member-State, Article 49

⁸⁴ Case C-55/94 *Gebhard* [1995] ECR I-4165, para 27: indicating that the Court would ascertain application of Article 49 EC 'in the light not only of the duration of the provision of the service but also of its regularity, periodicity and continuity'.

will continue to apply. This is consistent with Article 49 (and the new approach) being applied, even in extended periods of presence by posted workers in the host-state.⁸⁵ Legally and socially, this is controversial.⁸⁶ The boundaries of demarcation between Article 49 (assuming home-state rules will apply) and Articles 39 and 43 (assuming host-state rules will apply) applying to workers and their employers become highly important conceptually and practically. Writing before *Laval* and *Viking*, Edwards and Nic Shuibhne strongly defend the Court's advance of Article 49 into territory previously occupied by Article 43. Legally, they argue, any problems created by a 'gap' in application of host-state standards are best dealt with, not by restricting the scope of Article 49, but by using proportionality to tailor when host-state standards are nonetheless appropriately applied in a services situation.⁸⁷ Without debating how persuasive this position was pre-*Laval*, it is important to stress that it is considerably less tenable under the new approach because the justification space to tailor host-state standards to distinctive posted workers scenarios has been dramatically reduced and contained. Socially, it is not difficult to imagine that long-term stretches of life in a (typically more expensive) host-state on a minimum skeleton of host-state labour standards can seem exploitative to posted workers and host-state inhabitants alike. Yet that is the effect of applying the new approach in combination with the expanded area of application of Article 49.

LEGAL AND SOCIAL CONTROVERSY IN POSTING OF WORKERS

The analysis developed in this paper demonstrates that the new approach was the wrong solution to the challenge EU enlargement presents for regulating posting of workers. This is true even in its application to classic posting scenarios. A posting of workers which fits the classic scenario of a temporary (and not long-term) entry into a host Member State by an EU employer with its already constituted workforce is relatively unproblematic. In terms of policy approach, application of the Court's new approach to the host-state standards to be applied to posted

⁸⁵ See, especially C-215/01 *Schnitzler* [2003] ECR I-14847, para 30: 'Thus 'services' within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years, where, for example, the services in question are supplied in connection with the construction of a large building. Services within the meaning of Treaty may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States.': see the excellent discussion and identification of this development in Hatzopoulos and Do, n 30 above, 927-930.

⁸⁶ See the EP calling on the Commission to review the Directive including, 'the principle of equal treatment of workers in the context of free movement of services, respect for different labour models and the duration of posting': EP Resolution of 22 October 2008, *Challenges to Collective Agreements in the EU* (2008/2085 (INI)), para 30.

⁸⁷ D. Edward and N. Nic Shuibhne, 'Continuity and Change in the Law Relating to Services' in A. Arnall, P. Eeckhout, and T. Tridimas (eds) *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs* (Oxford: Oxford University Press, 2008) 243, 249 (see also 258-259).

workers is (at least) less controversial when it comes to classic postings. In addition, in classic posting scenarios, leaving the employer free to hire in accordance with its home-state rules seems appropriate. Nonetheless, even here, the second approach identified above – whereby higher host-state standards are permitted by the Directive, but are policed carefully by Article 49 – is superior on a number of counts. Importantly, this is so even if one unequivocally endorses the policy goal espoused by the new approach – ie EU service-providers should be able, outside a narrow range of minimal host-state protections, to apply home-state rules to posted workers.⁸⁸ The new approach is textually much less faithful to the Posted Workers’ Directive than the second approach. It fails to respect the relationship the Treaty sets up between the Directive (as a minimum harmonization measure) and Article 49. Above all, by imposing an *a priori* normative straitjacket in defining acceptable host-state standards, it fails to provide valuable space to respect normative pluralism in labour standard-setting in the Member States. That is to say, even in classic postings, the second doctrinal set of issues on collective standard-setting and collective action remains highly problematic. So too do the issues identified concerning the horizontal direct effect of Article 49 against trade unions, particularly in situations where classic postings provoke diffuse protest by workers in which unions may only be tangentially involved.

However, the new approach raises much more intractable legal and social problems when combined with the last doctrinal innovation identified in this article – the expansionist tendencies of Article 49. This combination is doctrinally dubious, does not bring legal certainty, and is politically and socially inflammable. It may prove to be cold comfort for the Court of Justice that its new approach equips it with tools to use against those wishing to protest against that very new approach.

⁸⁸ Indeed, a respectable argument could even be made for giving home-state standards an even freer rein than currently permitted by the PWD, even as restrictively interpreted under the new approach, to short-term postings (less than three months), at any rate outside the construction industry. This constituted one important plank of the Commission’s original proposal for the Posted Workers’ Directive: see further Davies, n 28 above.