



European Trade Union Confederation (ETUC)
Confédération européenne des syndicats (CES)

**A REVISION OF THE POSTING OF WORKERS DIRECTIVE:
Eight proposals for improvement**

**Final report from the
ETUC EXPERT GROUP ON POSTING**

Brussels, 31 May 2010

INTRODUCTION

In its response to the Laval and Viking cases of March 2008¹, the ETUC called for an urgent assessment of the need for revision of the Posted Workers directive ('the PWD').

Following the Rüffert and the Luxembourg judgements, demands for a revision became more pressing.

In a speech at the Commission's 'Forum on workers' rights and economic freedoms' on 9 October 2008, the ETUC General Secretary confirmed that a revision of the PWD was necessary with a view to reflect and accommodate the original objective of the directive, as stated in its preamble: *'(5) whereas (...) promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers'*².

Consequently, the ETUC set up an expert group on posting composed of academics and trade unionists in order to undertake an in depth assessment of the problems raised by the ECJ judgements and give ETUC advice on possible options and/or recommendations for a revision of the Directive.

In its position, adopted by the ETUC Steering Committee of 28 April 2009, the ETUC further specified the issues that would have to be addressed in a revision of the Posting Directive. This list of issues has provided the starting point for the work of the expert group, without limiting the debate to those issues.

The group met for the first time in February 2009 and had six meetings until October 2009. A report was drafted by the ETUC on the basis of the discussions in the expert group, and a first draft of the report was discussed in the ETUC's social policy group of 13 October 2009. The report was presented for information to the ETUC Executive Committee in Annex to the Resolution on the Posting Directive on 9-10 March 2010, a few outstanding issues were then discussed in the social policy working group of 27 April 2010, and the report was finalized in May 2010.

The expert group was chaired by Catelene Passchier, confederal secretary of the ETUC.

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1 Resolution adopted by the ETUC Executive Committee on 4 March 2008. Available at: <http://www.etuc.org/a/4704>

2 Speech available at: <http://www.etuc.org/a/5418>

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NB: This report is drafted by the ETUC, on the basis of discussions in the expert group, and its content is therefore the sole responsibility of the ETUC. This means that not all experts necessarily unanimously agree with all the detail mentioned in and under the various proposals.

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WHY A REVISION?

Preventing unfair competition on wages and working conditions/labour costs

This report is based on the assumption that the current interpretation of the PWD does not fulfil the objectives of the Community legislator to ensure a climate of fair competition, does not guarantee the respect for the rights of workers, and undermines fundamental social rights.

Whilst the PWD as a legal instrument can potentially play an important role in the fight against unfair competition, key amendments must be envisaged.

The ECJ rulings in the Laval, Rüffert and Luxembourg cases have highlighted some important structural weaknesses in the PWD. By interpreting the Directive primarily as an internal market instrument, rather than as a social protection tool, and as a 'maximum' Directive rather than a 'minimum' Directive, the PWD may not serve its basic aim and function anymore.

This report takes as a starting point the assumption that compliance with the Laval, Rüffert and Luxembourg cases will create a number of difficulties not only in the Member States directly concerned by the rulings, but also throughout Europe. Several jurisdictions may now find themselves in breach of EU law. The formal constraints imposed by the ECJ cannot be applied without disrupting national industrial relations systems in various Member States. In other words, the ECJ cases have opened up a number of weaknesses and loopholes in national transpositions of the PWD, which are clear incentives for employers to use posted workers as a way to gain an unfair competitive advantage in the host Member State.

In this document, various options are elaborated to deal with the main problems in the interpretation and functioning of the Posting Directive (PWD). Eight proposals have been developed which would allow the European legislator to strengthen protection of workers in the single market, thereby restoring the original function of the PWD. These proposals are enumerated in the order of the Articles of the PWD to which they propose amendments, i.e. not necessarily in order of importance.

The eight proposals are preceded by a chapter summarizing the EU legal context in which the Posting Directive must be understood, which also must be taken into account when reflecting on possible directions for solutions.

NB: Where in this report the terms 'he' and 'his' are used, they should be understood as to include 'she' and 'her'.

UNDERSTANDING THE POSTING of WORKERS DIRECTIVE (PWD) IN THE CONTEXT OF THE EU LEGAL FRAMEWORK

1. Introduction

1.a.) What is 'posting'?

There are no definitions of 'posting' at EU level other than the ones that can be found in the Posting Directive. In its preamble, reference is made to the '*transnational provision of services, prompting a growing number of undertakings to post employees abroad temporarily in the territory of a Member State other than the State in which they are habitually employed*'. Such provision of services may take the form either of performance of work by an undertaking, under its account and under its direction, under a contract concluded between that undertaking and the party for whom the services are intended, or of the hiring out of workers for use by an undertaking in the framework of a public or private contract.

When the Posting Directive came about, it was generally understood as an important instrument to combat 'social dumping', i.e. unfair competition on wages and working conditions of workers by foreign service providers on a host country (labour)market. And during the negotiations on the Maastricht Treaty and its Social Protocol, in the period of the Swedish accession, clear guarantees were given to Sweden that European Directives could be implemented according to 'existing Swedish practice in labour market matters'.³

In the meantime, it is increasingly the question if it still performs this important function, especially as a consequence of a long series of ECJ judgements, already starting before the '*famous four*' (Viking, Laval, Rüffert and Luxembourg). With the ECJ positioning the Directive clearly in a predominant 'internal market' approach, Member States (MS's) and national social partners have increasingly come under pressure when implementing and enforcing their laws and collective agreements to situations of posting, so much so that in some countries national systems of industrial relations and public procurement practices are seriously under threat.

In order to be able to develop the right proposals to counter these developments, it is necessary to understand the complexity of the current EU's legal framework in which the Posting Directive is functioning.

1.b.) Posted workers and host country rules: which problems arise?

There is an important difference in law and practice between a Polish worker who crosses a border to work in say Germany and gets a German employment contract (according to German law) with a German employer, and a Polish worker who has a Polish employment contract (according to Polish law) with a Polish employer and then moves as a worker of this company to Germany on a temporary basis to provide a service (in the context of a contract between the Polish firm and the German client/user enterprise, which could be a situation of subcontracting, agency work etc.).

³Letters between Swedish Labour Minister Hörnlund and Commissioner Flynn, October/November 1993

No doubt that the first one is a migrant worker in the sense of the EU Treaty (see further explanations below), and his German employer cannot treat him differently from his other workers, because he cannot discriminate on the basis of nationality and must treat all his workers the same. But in the second case, the worker has - and continues to work for - a Polish employer on his Polish employment contract, also when working in Germany. If this is a genuine employment situation (and the Polish firm is not a letterbox company), one must in principle respect the fact that this worker is and remains the worker of the Polish company, normally working in Poland, and only temporarily is going abroad for some specific activity, and that the worker can have a legitimate interest to keep the link with his employer and his home country, both in terms of employment rights and social security.

If different rules would apply to these two different situations, whereas in both situations workers cross borders to work in a host Member State, this would potentially lead to manipulation and incentives for undercutting of wages and working conditions in the host country by transnational chains of subcontractors, creative use of letterbox companies and other inventive ways to avoid and evade host country rules.

On the other hand, a simple host country principle or 'equal treatment' approach directed at the host country company will not have the desired effect, because the worker is, at least in legal terms,, not the worker of the same company! Other mechanisms (legislative, or collectively agreed) are therefore necessary to achieve that the cross border service provider and/or his workers are covered by the same rules as the host country (user) company and/or to limit unfair competition on wages and working conditions and labour costs (see below, paragraph 5; see for the special case of temporary agency workers paragraph 3.e. below).

The central and essential question is: to which extent, for which reasons, and under which circumstances can or must the employment contract (and possible collective agreement and other home country rules applicable to the parties to that contract, such as social security and tax rules) of the worker of a service provider moving cross border be 'overruled' by the rules (statutory or collectively agreed) of the host state?!

The Posting Directive is intending to do exactly that: it regulates if and under which conditions the host country rules regarding wages and working conditions (laid down in law or collective agreement) overrule the possible law and other rules of the country of origin (or any other country) applicable to the employment contract.

However, the next important question is, if the Posting Directive deals with this in an adequate way. Already before the "*famous four*" ECJ cases, there were some doubts about the functioning of the PWD in practice, and the possible need for revision. Since the four ECJ-cases, these doubts have become serious concerns, and the position taken by the ETUC has been since 2008 that a revision is now unavoidable.

In order to better identify which revisions are necessary, and for which reasons, it is important to summarize the current legal situation, reflecting the dominant way of thinking about 'posting' in the context of the internal market and European Private International Law (PIL).

2. The main provisions of the Posting of Workers Directive (PWD) and their objectives

According to the **preamble** of the PWD, the abolition of obstacles to the free movement of workers and services is one of the objectives of the Community, and any restrictions based on nationality or residence requirements is prohibited. However, *‘the promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers’*.

To ensure clarity of the applicable rules, ‘the laws of the MS’s must be coordinated’ in order to lay down a nucleus of mandatory rules for minimum protection to be observed in the host country in such situations.

This “hard core” of clearly defined protective rules should be observed by the provider of the services, notwithstanding the duration of the worker’s posting’.

According to the Commission’s website⁴: *‘To guarantee that the rights and working conditions of a posted worker are protected throughout the EU, and to avoid ‘social dumping’ where foreign service providers can undercut local service providers because their social standards are lower, the European Community has established a core of mandatory rules regarding the terms and conditions of employment to be applied to an employee posted to another Member State. These rules will reflect (!) the standards of local workers in the host Member State (that is, where the employee is sent to work).’*

‘The idea is that where a MS has certain minimum terms and conditions of employment, these must also applied to workers posted to that State. However, there is nothing to stop the employer applying working conditions which are more favourable to workers, such as, for instance, those of the sending MS (that is, where the employee normally works’.

Three types of situations are covered if they are taking place trans-nationally (Article 1):

- Situations of (sub)contracting, i.e. the posting undertaking concludes a contract with a company in the host state to provide a service and then sends the worker to the host state to perform the work on the account and under the direction of the posting company;
- Situations of intra corporate transfers: an employer posts a worker to a company owned by the same group but established in another country;
- Situations of temporary agency work: a temporary employment agency hires out a worker to a user company established or operating in another Member State.

The central provision of the PWD is (Article 3,1) the obligation for the host MS to ensure, *whatever the law applicable to the employment relationship*, the application of the list of core terms and conditions of employment which are laid down in the law, or – with regard to the construction industry - in collective agreements which are declared universally applicable. The most important ‘core conditions’ mentioned are: ‘minimum rates of pay’, ‘maximum work periods and minimum rest periods’, and the ‘conditions of hiring-out of workers’ (i.e. the rules applying to agency work!).

⁴ <http://ec.europa.eu/social/main.jsp?catId=26&langId=en>

Although the list of core conditions is written down as an exhaustive list, the PWD allows MS's to also apply terms and conditions on other matters 'in the case of public policy provisions' and 'on a basis of equality of treatment' between local and foreign company (Article 3,10 first indent).

And although the PWD only mentions the universally applicable collective agreements in the construction industry as the ones that must be applied, the PWD allows MS's (Article 3, 10 second indent) to also apply terms and conditions laid down in other collective agreements than universally applicable ones, as defined in Article 3, 8, and also for other activities than construction, again 'on a basis of equality of treatment'.

In Articles 4, 5 and 6 provisions on information, cooperation, enforcement and jurisdiction are laid down.

3. The Posting of Workers Directive (PWD) in the context of the current EU legal framework

3.a.) Posting Directive and Treaty provisions on free movement

(See relevant Treaty provisions in Annex A)

The legal situation can be summarized as follows:

- An EU citizen is free to move from one MS to another MS, according to Article 45 TFEU (Article 39 EC), for any form of gainful employment including service provision, (NB: once the EU citizen moves as a self employed person, he is covered by Article 49 TFEU/43 EC on establishment or 56 and 57 TFEU / 49 and 50 EC on service provision).
- An EU citizen making use of his free movement right, may in that capacity not be discriminated by a host country employer on the basis of his nationality, and should have equal access to the host country labour market and social security system.
- A service provider can *temporarily* pursue his activities in the host country under the *same conditions* as are *imposed* to service providers established in the host country; (when he stays permanently, it is 'establishment').
- There does not exist a general definition of a worker at EU level; what constitutes a 'worker' is dependent on national law and practice (this may be different in country of origin and host country).
- However, in the context of Article 45 TFEU (39 EC), the ECJ tends to support a wide definition of what constitutes a 'migrant worker' to ensure protection of workers;
- A 'posted worker' is a worker, and not a self employed person; not the posted worker as such, but the service that he provides in terms of work performed for the user or client company is a 'service'.
- The notion of a 'posted worker' does not exist in the Treaties. The question if a worker, moving as an employee of a service provider across the border, is (also) a migrant worker in the sense of Article 45 TFEU (39 EC) depends on the question if he is considered to be active on the labour market of the host country or of the country of origin (or another labour market).
- The ECJ, in the Rush-Portuguesa case⁵, took the position which is established case law until today, that a worker who temporarily moves as the employee of a service

⁵ ECJ Rush Portuguesa, C-113/89 of 27-03-1990

provider, does not enter the host country's labour market and therefore is not a 'migrant worker' in the sense of Article 45 TFEU/39 EC (however, if this same worker is an EU citizen who has the right to free movement within the EU, and during his posting applies for a job with a host country employer, he at that moment would become a 'migrant worker' in the sense of Article 45 TFEU/39 EC); (see below paragraph 3.e. for the special case of temporary agency work).

- The ECJ's case law is closely linked to the approach in European Private International Law (PIL) to decide which law is applicable to an employment contract, which is built on the general concept of the 'habitual place of work', which does not change when the worker only temporarily moves to another Member State;
- Both concepts seem to be at the basis of the Posting Directive.

3.b.) Posting Directive, private international law and rules on jurisdiction

The Rome I Regulation 2008 (revising the Rome Convention⁶ having similar rules⁶) regulates which law is applicable to contracts in case of possible conflict of law (i.e. in cross border situations, where more than one legal system potentially applies). See relevant provisions in Annex B.

What would the Rome I Regulation mean for posted workers?

If one would only apply the PIL rules on individual employment contracts to posted workers, then:

- a posted worker would be considered as habitually working in the country of origin;
- because he only temporarily crosses the border, his 'habitual place of work' is supposed not to have changed and therefore the applicable law does not change;
- if the posted worker does not have a habitual place of work, and moves from one country to another, the law of the country where his employer is established is applicable (which in cases of posting is the country of origin).

In other words: this would all lead to country of origin rules (!).

The only (but very important!) correction in this case would be the 'overriding mandatory provisions' that the host country has in place that it wants to apply to everyone on its territory, regardless of their contractual arrangements (but only if and in so far as it has such rules in place at all, and if it decides to apply them)

Collective agreements are not explicitly mentioned in the Rome I Regulation. To the extent that they are considered in Member States to be contractual arrangements between private parties, they will be covered by the general rules of Rome I, i.e. a general rule of freedom of choice of law, corrected by several specific rules. In the absence of a choice, and where the rules given provide no clarity, the contract will be governed by the law of the country with which it is most closely connected.

To the extent that they are considered in Member States to fall under specific public policy rules, which may especially be the case with regard to collective agreements that are declared universally applicable, they can be understood as 'overriding mandatory provisions' which are applicable regardless of the law otherwise applicable to the contract.⁷

⁶ Regulation 593/2008/EC is to replace the Rome Convention as of 17 December 2009 with regard to contracts concluded after this date, with the exception of Denmark, which remains subject to the Rome Convention

⁷ The PIL dimensions of collective agreements are highly complex and will not be further addressed within this document, because they are of less relevance in the current context.

Also important in this context is the **Brussels I Regulation**⁸ on the jurisdiction of courts, in situations of cross border conflicts. According to Brussels I, if a worker wants to sue his employer, he can do this either in the court of the Member State where the employer is established ('domiciled'), or where the employee habitually carries out his work, or, where there is no habitual place of work, where the business that hired the worker is situated. In other words, also the European rules on jurisdiction in effect lead often to a 'country of origin' approach!

3.c.) The Posting Directive as a response to the combined effects of Treaty, jurisprudence and PIL

The PWD is based on the internal market provisions of the EU-Treaties but also supplements the private international law rules on jurisdiction and applicable law. The PWD is meant as an important correction of the combined effect of the jurisprudence of the ECJ in *Rush Portuguesa*, and PIL:

If on the one hand the worker, who – as the worker of a service provider – crosses a border temporarily is not to be considered as a worker in the sense of Article 45 TFEU/ 39 EC, and therefore also does not enjoy the protection of Article 45, while on the other hand, the PIL rules only give him very unclear protection in terms of the possible application of the overriding mandatory rules of the host country (if the MS is free to apply them or not) then this clearly could lead to major problems, especially if the level of protection in the country of origin is much lower than in the host country.

Potential benefits

What are the benefits of the Directive, compared to a situation without a Posting Directive? By guaranteeing that posted workers benefit from a nucleus of working conditions which do not go below the minima established in the host country, the PWD tries to limit the social dumping that may be the combined effect of applying the free movement provisions of the Treaty and PIL-rules. It also aims at providing more transparency for service providers throughout the EU on which rules need to be applied.

i.) core protection of host state extended to posted workers

The Directive obliges (host) Member States to extend the protection of the core provisions of their labour laws and/or collective agreements to include workers who are posted to their territory, 'regardless of the law that is applicable to their contract', i.e. to workers who are otherwise normally subject to the laws and labour standards of their country of origin (Article 3).

In other words: the Directive safeguards that posted workers are treated equally with local workers at least with regard to the core protection. This safeguard was absent under the Rome Convention (now Regulation).

⁸ Regulation 44/2001/EC OJ L 12.

ii.) *Uniformity and transparency of applicable rules*

The Directive helps to increase transparency in several ways:

The list of core rights in Article 3 sub 1 guarantees a uniform minimum interpretation of Article 9 Rome Regulation (on 'overriding mandatory provisions'). Before the Directive, each MS was free to apply its laws or not; there was no uniformity as to the minimum standards which had to be applied by foreign employers. In addition, MS's have the obligation to make information on applicable rules available. Transparency does not only benefit the employer. In order to be able to rely on the rights granted to them by the directive, the workers should also be able to find out what these rights entail.

iii.) *host country core protection must also be respected by courts in the home country.*

Under Article 3 all Member States should ensure the core protection of the posted workers. This implies that when a court case would arise between the posted worker and his employer in the home state of the posted worker, this court should take the core protective rules of the host state into account when deciding on the mutual rights and duties of employer and employee. There is no such duty in EU rules on private international law.

iv.) *Jurisdiction and enforcement in the host state*

Article 6 establishes jurisdiction in the host state for claims rooted in the Directive. With this provision the directive adds an extra ground of jurisdiction to the (otherwise closed) system of the Brussels I Regulation: under Brussels I the court of the host state would not have jurisdiction to hear a complaint of an individual posted worker against his employer (as the host state would be neither the place of establishment of the employer nor the habitual place of work of the worker).

3.d.) Relation to social security coordination rules

The social security coordination rules of 1408/71 (recently replaced by Regulation 883/2004, which will apply as from 1 May 2010) also have a strong connection to Private International Law concepts.

The coordination rules are clearly based on a full equal treatment approach, stipulating that all persons residing in the territory of a Member State are subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State. However, the important point here is, again, to establish in which Member State a posted worker is 'residing', and which law therefore applies to him.

In Regulation 883/2004 this is dealt with in a special chapter: 'Determination of the law applicable'.

According to the Regulation, the insured person is subject to the legislation of one Member State only. The member state concerned is the one in which he or she pursues a gainful activity (lex loci laboris), i.e. the Member State of the place of work.

However, for posted workers there is a special rule, (Article 12) stating that:

“A person who pursues an activity as an employed person in a MS on behalf of an employer which normally carries out its activities there and who is posted by that employer to another MS to perform work on that employer’s behalf shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of such work does not exceed 24 months and that he/she is not sent to replace another person.”

Here comes in the PIL approach: a posted worker is assumed not to have changed his ‘habitual place of work’ if he only temporarily moves to another Member State in the framework of service provision, but remains connected to the country via his employer and his employment contract and his residence (which in Regulation 883/2004 is defined as ‘the place where the person habitually resides’, as opposed to the place of ‘stay’ which is defined as ‘temporary residence’).

The idea behind this approach is twofold: to encourage the temporary free movement of services and workers by imposing as little as possible administrative burdens, and to recognize the importance for the worker of the continuity of the relationship with his employer and the home country’s social security system.

Regulation 1408/71 and 883/2004 define a worker as ‘posted’ to another MS, if he normally works in one MS but is sent to another one by his employer for a period that does not exceed 12 months, and if he is not sent to replace another person who has completed his term of posting. The period of 12 months can be extended with one more period of 12 months. Vital defining features of a posting are a continued and direct relationship of subordination between posted worker and posting undertaking.

Although the intentions behind the continuation of the posted worker’s coverage by his home country’s social security system may be legitimate, the relatively long period (up to 24 months) of continued home country coverage is increasingly questionable within an enlarged EU in which there may be enormous differences in social security coverage and cost between sending and receiving countries, as this may in itself become a factor and incentive for unfair competition on wages and working conditions.

3.e.) Temporary agency work and Posting

In the context of Treaty provisions, PIL, and the Posting Directive, the special case of temporary agency work adds to the complexity.

The concept of temporary agency work, as in the meantime also defined at EU level in the recent Temporary agency work Directive (TAW⁹), covers situations in which workers - who are (in most MS’s but not in all) considered to be the workers of the agency – are placed at the disposal of a user enterprise under whose direction they will perform, on a temporary basis, tasks that belong to the normal business of the user enterprise. In other words: they become part (temporarily) of the workplace and work organisation of the user enterprise, but will in legal terms continue to be the worker of the agency.

The agency will pay their salary etc., but –according to most legal interpretations – delegates the powers to direct the worker in the performance of his tasks to the user company.

⁹ Council Directive 2008/104/EC of 19-11-2008 on Temporary Agency Work

This 'triangular' situation has caused many headaches until today, in terms of how to deal with the prevention of unfair competition on wages and working conditions within MS's, which may drive down (collectively agreed) wages in the user enterprise or lead to replacement of permanent workers by agency workers. This has led to a set of mechanisms that may exist in a variety of mixes in MS's, such as licensing systems to ensure that agencies are bona fide companies, maximum periods for assignments, prohibitions to do agency work in certain sectors or jobs, legislative and other rules to set pay levels that are equal or equivalent to workers in the user enterprise, etc.

After a long period of debate and battle at EU level, the TAW-Directive has recently come about which sets some minimum standards for agency work in general (i.e. to be transposed by MS's in their national law, and applicable regardless if there is a cross border dimension or not), including among other things a provision prescribing a form of *equal treatment* with regard to '*basic employment conditions*' which includes pay (but allows for derogation from this obligation by collective agreement !).

In situations of 'cross border agency work' (i.e. the agency is established in another country and sends its workers, recruited in its own country or elsewhere, but not in the host country!) to a user company in the host country, what does apply?

- a) First of all, the agency worker, moving to another country for agency work, may or may not be considered to be a migrant worker in the sense of Article 45 TFEU (39 EC). There is a persistent ambiguity here, because the ECJ in its case law (including in *Rush Portuguesa*) has clearly taken a different position on agency workers than on subcontracted posted workers in terms of their access to the labour market of the host country. Indeed, as it is the explicit aim of the agency to provide workers to the user company in the host country, it is clear that herewith the agency workers get access to the labour market of the host country.... (There are therefore MS's that insist in this case on the application of their migration rules, about which there are several current court cases¹⁰).

On the other hand, the worker is recruited on the labour market of the home country, remains the worker of the foreign agency and is supposed to not have changed his habitual place of work and residence to the host country. So, one might say that the agency worker is active at the same time on both the home countries and host country's labour market. This means that the agency worker at least (also) must be understood as a migrant worker in the sense of Article 45 TFEU (39 EC). At the same time, his employer, the cross border agency, is clearly a service provider in the sense of Article 56 TFEU (49 EC).

- b) To prevent agency workers to 'fall between wharf and ship', the Posting Directive has included cross border hiring out of workers (temporary agency work) in the definition of 'posting'. In combination with the definition of a posted worker ('a worker who for a limited period carries out his work in the territory of a MS other than the State in which he normally works') this leads to the application of the Posting Directive to most situations of agency work.

¹⁰ See pending Dutch case *Vicoplus* C-307/09, lodged on 3-8-2009

- c) However, the Posting Directive also refers, among the 'core provisions' of Article 3.1., to the 'conditions of hiring out of workers'. There is some ambiguity as to the meaning of this provision, in relation to article 3.9 of the Directive which states that MS's *may* provide that the posting undertaking must guarantee to its agency workers the terms and conditions (other than the core conditions?) which apply to temporary workers in the MS where the work is carried out. In any case, as from the moment of transposition of the TAW-Directive, the equal pay provisions applicable to national agency workers must probably be considered to belong to the 'core provisions' of Article 3.1. and therefore must be applied to cross border agency workers as well.

4. Which problems with the PWD in general (before and beyond ECJ cases)?

In a series of positions, adopted by the ETUC Executive Committee since 2003, when the European Commission started to evaluate the implementation of the Posting Directive, the ETUC identified the following problem areas ¹¹:

- a) the scope of the Directive, and notably the exclusion of merchant navy vessels (which for instance was problematic in the Irish Ferries case)
- b) the definition of a 'worker', being left (as is normally the case) to national law, but leading to problems with posted workers that appear to be 'bogus' self employed workers¹²
- c) the unclear definition of a 'posted worker', leading to problems in enforcement, for instance when is a worker 'habitually employed' in the country of origin? What to do when a worker is only hired by the posting company to be employed in the host country? Etc.
- d) the approach of the Directive, focussing on coordination of applicable law, rather than on setting standards. This means that in practice, where a host country does not have many standards in place, either in law or in collective agreements, there are also little standards applying to posted workers (example: UK, Poland, etc.);
- e) the limited obligation for Member States to apply collectively agreed standards which have been declared universally applicable. This is only obligatory for universally applicable collective agreements in construction, but not for universally applicable agreements in other sectors. There, Member States are allowed, but not obliged, to apply such agreements;
- f) The complexity of the rules, and the lack of accessible and transparent information for companies and workers with regard to the terms and conditions of employment which apply, leading to lack of enforcement;

¹¹ Posting of Workers Directive: ETUC Position on the Communication of the Commission on its implementation, December 2003
[ETUC position on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services](#), March 2006
[ETUC response to the ECJ judgements Viking and Laval](#), 4 March 2008
[Resolution on conditions for free movement: more protection of workers and fair competition](#), April 2009

¹² In its [position on the Green Paper on Labour law](#) and letter to the Commission of 1 March 2007 on the implementation of the Posting Directive, ETUC has asked the Commission to develop European guidelines to clarify the definition of a posted worker, taking into account that the definition of an employment relationship is matter to be dealt with at national level.

- g) The fact that enforcement provisions in the Directive are very weak, and effective enforcement is dependent on administrative cooperation and coordination between Member States, which is not well developed;
- h) The fact that ECJ rulings and the Commission's guidelines are questioning effective enforcement mechanisms developed at national level, as being obstacles to the free movement of services (for instance: prior declarations, a representative on the territory, etc.);
- i) Finally, the fact that 'posting' increasingly takes place in the framework of complex networks of subcontractors and agencies, which make it difficult to find out who is responsible for what, and allow companies to play around with letterbox companies and other constructions set up to avoid and evade laws and collective agreements.

The strong message, given by the ETUC in March 2006, was that the Commission should come up as soon as possible with **adequate proposals to simplify and improve the existing Directive**.

5. Mechanisms to reduce or eliminate unfair competition on wages and working conditions

5.a. Mechanisms at national /sectoral/local level

Most if not all European countries have developed in the last century elaborate systems with different elements, intended to reduce or eliminate downward competition between companies and their (sub)contractors on wages and working conditions that could lead to negative outcomes for workers, as corrections to the individual contractual freedom.

- 1) **Labour law**; limited or extensive rules on employment contracts, dismissal, minimum wages, maximum hours, health and safety etc. (depending on the national system all of them public policy provisions - 'ordre public'- or only part of it, etc.), applying to all companies in a certain territory.
- 2) **Mechanisms to limit competition between companies on wages and working conditions in collective bargaining**:
 - a) Sectoral collective agreements, binding an organised group of employers in the same sector and/or region
 - b) put pressure on every non-bound employer to sign a follow up agreement taking up the main issues of the sectoral agreement especially in the area of labour cost (the autonomous collective bargaining model in especially Sweden and Denmark).
 - c) extend the coverage of collective agreements, with inclusion of the public authorities, for instance declaring them universally applicable in various forms.
- 3) **Mechanisms to extend rules covering main contractors to include subcontractors / agencies**:
 - a) In collective agreements itself: include an obligation for the main contractor to bind his subcontractors to the same rules
 - b) Legal or contractual systems of client liability down the subcontracting chain
 - c) Legal or contractual obligations establishing equal treatment of agency workers with workers in the user enterprise (in most MS's limited to wages.....).

- 4) **Social clauses in public procurement**, demanding from tendering companies that they will observe locally applicable collective agreements, or 'living wages', etc.
- 5) **Enforcement mechanisms**, to check 'genuine subcontracting situations' (against letterbox companies, abuses by gang masters, etc.)

The legitimacy of all these instruments and mechanisms is recognized and protected in many national constitutions and international standards. At the same time, some of them have often been challenged, especially by conservative governments, with 'free competition' arguments, as soon as they are binding companies not on their own free (contractual) will, but for reasons of collective and/or public interest.

In recent times, employers and their organisations have found the way to the ECJ, to challenge some of these instruments as being obstacles to the free movement of services.

However, if these instruments would only cover national actors or companies, this would become a major incentive for unfair competition by foreign companies and service providers and for 'creative' legal constructions such as letterbox companies and transnational subcontracting chains to avoid domestic (host country) regulation. In the end, this would lead to the undermining of the instruments itself, because domestic companies would challenge the legitimacy of being themselves bound by those regulations, when they do not bind foreign competitors.

5.b. ILO Convention 94

Significant in this context is **ILO Convention 94 on public procurement**, and the debates currently around it. The aims of ILO Convention 94 have a strong connection to the recognition of collective bargaining as an important instrument to preserve and support. To prevent wages and working conditions being used as an element of competition for public contracts and ensure that public contracts do not exert downward pressure on wages and working conditions, the approach taken is, that conditions under public procurement contracts should **not** be **less favourable** than those established for the same work in the same area by collective agreement or similar instrument.

The logic of this approach is that the **state can** as a matter of fact **not be neutral** as it is often the single biggest buyer in a given market. If it insists on paying the level of wages that is similar to the collectively agreed wages prevailing in the relevant market, then it supports collective bargaining and strengthens the industrial relations system. If it does **not** do so, it unleashes pure price competition, which will set incentives to undermine the collective bargaining system, as the employer who is not bound by a collective agreement can always make much lower bids. If it only sets those standards for the main contractor and not for all subcontractors down the chain, then an enormous loophole is created both for the contractor and the State, and an enormous disincentive for collective bargaining. But a similar effect would occur, when the public authority would only demand the observance of minimum standards, especially where these are well below the normal collectively agreed standards (that are often also minimum standards for the sector concerned!)

An important aim of Convention 94 therefore is, to protect the core labour standard of collective bargaining itself.

5.c. The PWD: enabling or restricting mechanisms to reduce unfair competition?

The Posting Directive originally has to be understood as an attempt to recognize both the importance of the mandatory rules of the host country and of upholding collectively agreed standards in the host country, to prevent ‘social dumping’ in the case of temporary cross border posting of workers by service providers.

However, in the legal context in which it is operating, it can only do so with regard to those standards and rules that are considered to be binding and/or applicable to all local and foreign companies in the same way in a context of ‘equal treatment’.

To that end, it has introduced explicit references:

1. to systems of collective bargaining which extend the coverage of collective agreements beyond the signatory parties concerned (which *‘have been declared universally applicable’*), i.e. collective agreements which are **de jure** universally applicable to all undertakings in a certain profession or industry;
2. in the absence of collective agreements as mentioned under 1), to other collective agreements, which are (**de facto**) *generally applicable* to all similar undertakings in the same geographical area or sector, or concluded by the *most representative employers’ and labour organizations at national level* and which are *applied* (in practice!) *throughout national territory*, if they ensure equal treatment between foreign and local companies on the ‘core provisions’ of the Directive

For a long time, the general understanding was that the kind of collective agreements as mentioned under 2) were covering the Swedish and Danish autonomous collective bargaining systems. Since the ECJ judgement in the Laval case, this is no longer a given.

The ECJ judgement in the Rüffert case has created problems for systems in which it is legally possible, but not always applied in practice, to declare collective agreements universally applicable. It has questioned the legitimacy of public procurement law to set equal (minimum) standards for all companies tendering for a public contract in a certain region (federal state) at the level of the locally applicable collective agreement (which was not the one declared ‘universally applicable’ at national level).

The ECJ in the Luxembourg case has limited the possibility for Member States to legitimize the application of their labour laws to posting companies and posted workers in the interest of public policy.

In a series of other cases, the ECJ has also questioned instruments of application and enforcement, such as the requirement for the posting company of having a representative on the host country territory, and the requirements to provide for prior declarations or to keep social documents, as obstacles to free movement.¹³

To the extent that the PWD has been interpreted by the ECJ in a very restrictive manner, it has become – especially in some Member States and industrial relations systems – a highly problematic instrument, potentially leading to the opposite effect of what was intended, i.e. that legal and collective agreed standards come under pressure because they cannot be applied to cross border service providers, potentially leading to reverse discrimination (of local companies) and downward competition on wages and working conditions.

¹³ See Communication from the Commission - Guidance on the posting of workers in the framework of the provision of services {SEC(2006) 439}/* COM/2006/0159 final *:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52006DC0159:EN:NOT>

6. Conclusions

Generally speaking, the ECJ has interpreted the PWD in the context of the EU Treaty's provisions of free movement of services (notably Article 56 TFEU/former 49 EC) as a 'carve out' from the general obligations of the Treaty to remove obstacles to free movement. Anything that goes beyond, and is not explicitly allowed, by the PWD is considered to be an obstacle to the right of free movement of the transnational service provider.

The ECJ, in the cases *Laval*, *Rüffert* and *Com vs Luxemburg*, has interpreted the Directive in such a way, that it is now to be understood as a **maximum** Directive with regard to the **matters** that can be regulated, the **degree of protection** that can be required, and the **methods** that can be used to ensure that employment conditions must be equally observed by all national and foreign undertakings in the same region or sector. When host Member States want to apply higher or different standards by law, or trade unions in the host Member State take action to demand better standards by way of collective agreements, in particular to prevent 'social dumping' and promote fair competition between local and foreign service providers, this may be seen as an infringement of Article 56 TFEU (49 EC). In doing so, the ECJ has interpreted the PWD and the EU legal framework in which it is functioning too narrowly in an internal market perspective. It has put too much emphasis on the free movement rights of the posting company and on the individual employment relationship between posted worker and posting undertaking, while downplaying the collective and public interest dimension of social policy measures and instruments including collective bargaining.

The eight proposals developed below are intended to ensure that the Posting Directive can achieve its initial social policy objectives of guaranteeing the protection of workers and a climate of fair competition.¹⁴

However, taking into account the EU legal context, not all problems encountered can be solved by revising the Directive. First of all, just a revision of the PWD will not in itself change the ECJ's approach to Article 56 TFEU (49 EC). Secondly, this chapter has not addressed the ECJ judgement in the *Viking* case (as confirmed in the *Laval* case), on the possibilities for taking collective action, stemming from the ECJ's interpretation of the Treaty provisions on free movement in general, which is further limiting trade unions when taking collective action to put pressure on employers, including foreign service providers, to tackle cross border situations of unfair competition on wages and working conditions.

These issues can only be addressed at the level of the Treaties, taking into account also the now binding Charter of Fundamental Rights as well as the relevance of ILO and Council of Europe standards.

¹⁴ The proposals only regard amendments to the text of the Directive itself. The recitals of the Directive would have to be amended accordingly

EIGHT PROPOSALS FOR REVISION

PROPOSAL 1: Clarifying the legal basis and the social policy objectives of the PWD

Background

According to consistent ECJ case law, the purpose and the content of a Directive is to be understood in the light of its legal base. The legal base of the PWD is contained in the EC Chapter relating to the free movement of services (Art 56 to 62 TFEU / 49 to 55 EC).

Concerning the purpose of the PWD, Recital 5 states that the “promotion of transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers”. But no explicit objective has been introduced in the text of the Directive itself.

The absence of an unambiguous objective combined with an internal market legal base has allowed the ECJ to turn an instrument which was primarily intended as a tool for the protection of workers into an internal market instrument.

The Court reads the Directive in the light of Art 56 TFEU / 49 EC (free movement of services) and considers that it “seeks in particular to bring about the freedom to provide services, which is one of the fundamental freedoms of the Treaty” (Rüffert, paragraph 36).

On this basis, the ECJ interprets the PWD restrictively, considering that the mandatory rules listed in Article 3.1 constitute in principle the maximum protection that the host Member State can require for posted workers in the context of the Directive. Posted workers cannot be deprived from more favourable conditions existing in the Member State of origin. But outside this context, Article 3.7 - allowing the “application of terms and conditions of employment which are more favourable to workers” - only refers, according to the Court, to a situation where employers sign on their own accord a collective agreement in the host Member State. However, if trade unions cannot use their usual means of pressure (collective action) in order to encourage the employer to conclude such collective agreement in the host Member State, this Article will be deprived of a lot of its practical effect.

In sum, the Court has willingly or unwillingly given horizontal direct effect to the PWD. Horizontal direct effect means that the PWD has vocation to regulate the relations between private parties. It must be stressed that a trade union is not a regulatory body, equivalent to the arm of the State, but an independent and autonomous body. Horizontal direct effect normally does not exist for directives, as these instruments only create obligations towards the Member States; not towards individuals.

Therefore, the European legislator should:

- 1. Complete the legal base with a reference to the ‘social policy’ article, so as to ensure that protection of workers and the improvement of living and working conditions constitute guiding principles in the interpretation of the PWD***
- 2. State in the body of the Directive itself the aim of the PWD, i.e. the protection of workers and the promotion of a climate of fair competition in the internal market.***

This could be done by proposing the following amendments:

TEXT OF THE DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>Preamble:</p> <p>Having regard to the Treaty establishing the European Community, and in particular Articles 47 (2) and 66 thereof,</p>	<p>Preamble:</p> <p>Having regard to the Treaty <i>on the Functioning of the European Union</i> establishing the European Community, and in particular Articles <i>53(2), 62, 151 and 153</i> thereof,</p>

Explanation

Articles 53, 2 TFEU (47, 2 EC) and 62 TFEU (55 EC) relate to the freedom of establishment and the freedom to provide services. Article 153 TFEU (137 EC) is contained in the social policy chapter of the EC Treaty and relate amongst others to the “improvement of the working environment to protect workers' health and safety” and “working conditions”. Measures adopted pursuant to Article 153 TFEU (137 EC) aim at achieving the social objectives of the Treaty, mentioned in Article 151 TFEU (136 EC), including “*improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained*”.

A dual legal base confirms that the PWD is to be interpreted not only as an internal market tool but also as an instrument for the protection of workers. The reference to Art 153 TFEU (137 EC) means in particular that national provisions relating to the protection of workers should not in principle be regarded as potential obstacles to the posting of workers within the meaning of the Directive.

It should be noted that the decision-making procedure is the same for both Articles (qualified majority voting in Council and co-decision with European Parliament)

TEXT OF THE DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
	<p><i>Article 1 new</i></p> <p><i>Principles</i></p> <p><i>1. The purpose of this Directive is to guarantee the protection of workers, as well as to ensure a climate of fair competition in the internal market.</i></p>

Explanation

Article 1 new defines the objectives and principles which should guide the application of the Directive.

In accordance with the dual legal base, the first paragraph lays down the principle that the both the protection of workers as well as a climate of fair competition in the internal market are intertwined objectives.

PROPOSAL 2: restoring the autonomy of the social partners

The European legislator should:

- *introduce a clause safeguarding the autonomy of the social partners, in particular the right of trade unions to defend workers' interests and to fight for equal treatment. This clause will deprive the PWD, as interpreted by the ECJ, of its maximum character for terms and conditions laid down through collective bargaining.*

TEXT OF THE DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
	<p><i>Article 1 new</i> <i>Principles</i></p> <p>(...)</p> <p><i>2. This Directive may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States and in international treaties , including the right or freedom to strike and the right to collective bargaining These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.</i></p> <p><i>3. Posted workers shall not be used to replace workers being on strike.</i></p>

Explanation

Article 1 new defines the objectives and principles which should guide the application of the Directive. (see above under proposed new article 1 paragraph 1.

The second paragraph introduces the so-called Monti clause in the Directive.

The third paragraph provides for a clear prohibition to replace workers on strike by posted workers, a practice that has recently been used both in old and new Member States! NB: this provision does not contain a positive regulation of the right to strike, but rather protects the fundamental right to strike of workers as guaranteed by the Charter of fundamental rights and other international standards. Without this prohibition, the exercise of the right to strike would become illusory.

PROPOSAL 3: Clarifying the scope of the Directive

Background

The PWD is based on the assumption that posted workers do not become part of the host country's labour market. However, this assumption is increasingly becoming a fiction. In a number of cases, posted workers are not temporarily sent in the context of transnational provision of services, but are used on a lasting basis by undertakings in order to gain a competitive advantage based on cheaper labour costs. These workers have in fact become entirely part of the host country labour market and should as a result be considered as migrant workers, within the meaning of Art 45 TFEU (39 EC). Art 45 establishes a clear non discrimination principle between migrant and local workers.

As evidenced by its legal base, the PWD is closely linked to the notion of cross border provision of services. However, it appeared from the facts of the Laval case that Article 56 TFEU (49 EC) was not the only applicable provision. Article 49 TFEU (43 EC) relating to freedom of establishment may have had also vocation to regulate the activities of the concerned undertakings. The undertaking Laval was formally established in Latvia, posting workers to its wholly owned branch established in Sweden for the purpose of building work. It appeared that Laval was in fact using an artificial corporate structure in Latvia (the head office was a bakery!) in order to escape all the obligations under Swedish legislation and rules relating to collective agreements.

The Court, however, approaches the question of applicability of the PWD as a mere factual check, which must therefore be carried out by the national judge (Laval paragraph 45; see also brief analysis of the scope in Rüffert paragraph 19). These superficial legal checks could be a logical consequence of the fact that the Directive itself defines the scope in a superficial manner.

The European legislator should therefore provide for a more precise definition of some key elements defining the scope of the PWD:

- ***More precise definitions of the type of activities covered by the PWD must be envisaged so as to avoid employment legislation in the host country being abused by letter box companies. Such companies do not engage in genuine and meaningful business activities in the country where they have their registered office but are simply set up with the objective of posting cheaper workers to a branch established in the host country.***

TEXT OF THE DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>Article 1 Scope</p> <p>1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.</p> <p>2. This Directive shall not apply to merchant navy undertakings as regards seagoing personnel.</p> <p>3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:</p> <p>(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or</p> <p>(b) post workers to an establishment or to an undertaking owned by the group in the territory of a Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or</p> <p>(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.</p>	<p>Article 1 Scope</p> <p>1. This Directive shall apply to undertakings established in a Member State which, in the framework of the transnational provision of services, post workers, in accordance with paragraph 3, to the territory of a Member State.</p> <p>2. This Directive shall (not)** apply to merchant navy undertakings as regards seagoing personnel.</p> <p>3. This Directive shall apply to the extent that the undertakings referred to in paragraph 1 take one of the following transnational measures:</p> <p>(a) post workers to the territory of a Member State on their account and under their direction, under a contract concluded between the undertaking making the posting and the party for whom the services are intended, operating in that Member State, provided there is an employment relationship between the undertaking making the posting and the worker during the period of posting; or</p> <p>(b) (deleted)</p> <p>(c) being a temporary employment undertaking or placement agency, hire out a worker to a user undertaking established or operating in the territory of a Member State, provided there is an employment relationship between the temporary employment undertaking or placement agency and the worker during the period of posting.</p>

<p>4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.</p>	<p>4. Undertakings established in a non-member State must not be given more favourable treatment than undertakings established in a Member State.</p>
<p><u>Explanation</u></p> <ul style="list-style-type: none"> • ** Article 1 paragraph 2 is currently the subject of a second phase sectoral consultation of the European Social Partners in the transport sector, with a view to reassess the usefulness of a derogation for merchant navy crew. Depending on the outcome of this consultation, amendments to Article 1.2 may have to be envisaged. • Article 1.2 (b) of Directive 96/71/EC treats intra-corporate transferees as posted workers. However, the automatic inclusion of such workers in the scope of the PWD is not justified since there may not be an actual provision of a service at stake. <p>The transfer of an employee from one part of an undertaking to another establishment does not always constitute a cross border commercial activity, justifying <i>per se</i> the application of the posted worker Directive. The PWD, however, would apply to such transfers where they do involve the provision of a service, i.e. in the case where the criteria contained in Article 2 as amended are fulfilled.</p>	
<p>Article 2 Definition</p> <p>1. For the purposes of this Directive, 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.</p>	<p>Article 2 Definition</p> <p>1. For the purposes of this Directive, <i>the following definitions shall apply:</i></p> <p><i>a) 'transnational provisions of services' means the cross border provision of a service, within the meaning of Articles 49 and 50 EC, and involving real economic activity in the Member State of establishment of the service provider.</i></p> <p><i>This Directive does not cover situations where most or all of the services of an undertaking are directed at the territory of a particular Member State but the place of establishment is maintained outside that Member State.</i></p>

<p>2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.</p>	<p>b) 'posted worker' means a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.</p> <p><i>The undertaking posting a worker within the meaning of Art.1.3 shall in particular demonstrate</i></p> <ul style="list-style-type: none"> <i>- that the worker is habitually employed in another Member State than the Member State of posting and will return there after the period of posting;</i> <i>- that the worker is not sent to replace a posted worker performing the same or similar task in order to circumvent rules regarding the temporary nature of the posting; **</i> <p>c) 'host Member State' means the Member State to which the worker is temporarily posted within the meaning of this Directive</p> <p>2. For the purposes of this Directive, the definition of a worker is that which applies in the law of the Member State to whose territory the worker is posted.</p>
<p><u>Explanation</u></p> <p>Article 2 as amended identifies the persons and activities covered by the PWD. The application of the PWD should be determined having regard both to the activity which justifies the posting of a worker from one Member State to another (i.e. a transnational provision of service) and to the status of the posted worker himself. In both cases, the notion of 'temporariness' is key.</p> <ul style="list-style-type: none"> • Article 2.1.a) new <p>The 'transnational provision of services' involves a cross border economic activity, in accordance with the EC Treaty. Article 2.1.a) new insists on the genuine character of the economic activity in the Member State of establishment.</p>	

As the ECJ held in relation to social security rules, undertakings must carry on significant activity in the state of establishment. For instance, purely internal management activities are not in itself significant¹⁵.

Furthermore, as the Court has ruled in the Van Binsbergen case, the EU Treaty allows measures designed to prevent the exercise of the fundamental freedom to provide services to be abused by persons directing most or all of their services at the territory of a particular Member State but maintain their place of establishment outside that State in order to evade its professional rule¹⁶.

Accordingly, the scope of the PWD should not be abused with a view to use posted workers in order to evade employment laws of a particular Member State.

Article 2.1. a) (new) does not have as objective nor as consequence to redefine the fundamental freedom of establishment as interpreted by the ECJ¹⁷. It must indeed be kept in mind that the PD does not regulate the fundamental freedom of establishment; it lays down rules for the protection of posted workers. Therefore failure to fulfil the criteria set out by Article 2.1.a) will not impact on the actual freedom to provide services nor on the related right for companies established in another Member State to send their own workers to the host Member State.

Article 2.1.b) qualifies the temporary status of a posted worker, referring to material criteria that can be derived from the jurisprudence.

The Posting Directive is supposed to only apply when the worker works for a limited period in the host country, which is currently interpreted by courts in a very in-transparent manner, allowing sometimes for periods of 'posting' for up to five years. However, in situations of long postings it cannot be reasonably upheld that the worker's habitual place of work and/or residence has not changed and still remains in the home country, and that the labour market on which he is active has not in the meantime become in reality the one of the host country.

The ETUC is recommended to further explore if and under which conditions a more precise definition of the 'limited period' can contribute to prevent social dumping and facilitate enforcement.

15 Josef Plum C-404/98 paragraphs 21 and 22

16 Van Binsbergen C-33/74 paragraph 13. See also Commission v Germany C-205/84, Vereniging Veronica Omroep Organisatie C-148/91

17 a company can have its registered office in one Member State and carry on all its economic activity in another State (Centros C-212/97; Uberseering C-208/00; Inspire Arts C-167/01)

PROPOSAL 4: restoring the minimum character of the PD

Background

The judgments state that the PD is a ‘maximum’ Directive as regards both the list of terms of conditions contained in Art 3.1 and the degree of protection (‘minimum’ terms & conditions). Until now, Art 3.7 and Art 3.10 were used by the Member States as a justification to have more flexibility outside scope of Art 3.1. Recital 17 provides indeed that “the mandatory rules for minimum protection in force in the host country must not prevent the application of terms and conditions of employment which are more favourable to workers”. However, the ECJ has interpreted Art 3.7 and 3.10 in such a restrictive way that Art 3.1 must now be regarded as setting maximum standards.

The legislator must state unequivocally the minimum character of Art 3.1 in its stated aims and objectives (see above) as well as by recognizing the autonomy of social partners to fight for, negotiate and agree higher levels of protection (see above, proposal 2). Also, the host Member State should be allowed to impose equally upon foreign and national employers a higher degree of protection than ‘minimum standards’. These provisions must fulfil criteria of transparency and accessibility, ensuring that a service provider established outside the host Member State can ascertain in advance the applicable labour standards.

The legislator should therefore clarify in article 3.1. itself that the nucleus of standards that must be guaranteed to posted workers is a list of core issues/standards, rather than a list of (minimum) levels.

TEXT OF THE DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>Article 3 Terms and conditions of employment</p> <p>1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:</p> <ul style="list-style-type: none"> - by law, regulation or administrative provision, and/or - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex: <p>(a) maximum work periods and minimum rest periods;</p> <p>(b) minimum paid annual holidays;</p> <p>(c) the minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;</p> <p>(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;</p> <p>(e) health, safety and hygiene at work;</p> <p>(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;</p> <p>(g) equality of treatment between men and women and other provisions on non-discrimination.</p>	<p>Article 3 Terms and conditions of employment</p> <p>1. Member States shall ensure that, whatever the law applicable to the employment relationship, the undertakings referred to in Article 1 (1) guarantee workers posted to their territory the terms and conditions of employment covering the following matters which, in the Member State where the work is carried out, are laid down:</p> <ul style="list-style-type: none"> - by law, regulation or administrative provision, and/or - by collective agreements or arbitration awards which have been declared universally applicable within the meaning of paragraph 8 <i>first paragraph** (deleted)**</i>: <p>(a) maximum work periods and minimum rest periods, <i>including protective measures with regard to night work.</i></p> <p>(b) <i>(deleted)</i> paid annual holidays;</p> <p>(c) <i>(deleted)</i> rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;</p> <p>(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;</p> <p>(e) health, safety and hygiene at work;</p> <p>(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;</p> <p>(g) equality of treatment between men and women and other provisions on non-discrimination.</p>

<p>For the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.</p> <p>Article 3.7</p> <p>7. Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment which are more favourable to workers.</p> <p>Allowances specific to the posting shall be considered to be part of the minimum wage, unless they are paid in reimbursement of expenditure actually incurred on account of the posting, such as expenditure on travel, board and lodging.</p>	<p>For the purposes of this Directive, the concept of <i>(deleted)</i> rates of pay referred to in paragraph 1 (c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted. <i>Allowances specific to the posting shall in principle not be considered to be part of the rate of pay. They may only be deducted from wages where the national law, collective agreements and/or practice of the Member State to whose territory the worker is posted so provide.</i></p> <p>Article 3.7</p> <p>7. *Paragraphs 1 to 6 shall not prevent application of terms and conditions of employment <i>of the host country or of the country of origin of the posted worker</i> which are more favourable to workers, <i>in particular through the exercise of the fundamental right of workers and employers, or their respective organisations, to negotiate and conclude collective agreements at the appropriate levels and to take collective action to defend their interests, including strike action, to protect and improve the living and working conditions of workers including the right to equal treatment.</i></p> <p><i>(here deleted; inserted above)</i></p>
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	<p><i>New Article 3.7.a</i> <i>This Directive is without prejudice to the Member States' right to apply or introduce legislative, regulatory or administrative provisions, in areas harmonised by minimum provisions in EC law, which are more favourable to workers or to promote or permit collective agreements concluded between the social partners which are more favourable to workers.</i></p>
	<p><u>Explanation</u></p> <ul style="list-style-type: none"> • The reference to Article 3.8 needs to be adapted for reasons of consistency with proposal 5. The reference to the activities is deleted to compel Member States to extend the protection of the PWD to all sectors and activities (see Proposal 6) • The degree of protection which must be guaranteed by the host Member State under Article 3.1 should not be limited to the 'minimum' level, nor should this reference be understood as only referring to systems of statutory minimum wages. For instance, where several rates of pay may be applicable in a given area and sector or industry, the posted worker should at least be guaranteed the rate of pay as laid down by collective agreements within the meaning of Article 3.8. This is also more consistent with the general approach of Article 3.1, which says that certain matters (and not: levels) are 'core provisions' that should be applied when they are set by law or collective agreement. At the end of Article 3.1. it is said that 'rates of pay' should be defined by national law or practice. Here it is important to add 'collective agreements' as a source of definitions of pay. • The term 'minimum rates of pay' has always been ambiguous in terms of its relation to statutory minimum wages and (minimum) rates of pay as set in collective agreements. However, it must be made absolutely clear that the degree of protection which must be guaranteed by the host Member State under Article 3.1 should not be limited to national minimum wage rates, in those systems where statutory minimum wages exists. Such limited pay protection permits unfair competition and the undercutting of wages. It should be clear that posted workers should be paid the rate of pay for a given job. Addressing this issue is particularly important from a policy perspective in countries such as the UK, where collective agreements are not legally binding on employers who are not signatories to them, but which nevertheless in practice set the going rate of pay in a given sector. Currently, posting employers are free to pay rates below collectively agreed industry levels.

Consideration was given to amending Article 3.1 to guaranteeing posted workers the prevailing rate of pay within a host country, as determined by legislation or by collective agreements within the meaning of Article 3.8. However, others argued that this notion could be problematic in systems with legally binding collective agreements where there may be uncertainty as to which pay rate represents the 'prevailing rate of pay.'

Deleting the term 'minimum' before 'rates of pay' should be sufficient to confirm that the Directive does not only safeguard posting workers rights to statutory minimum wages in host countries, but rather provides them with the right to the rate of pay for the job, as determined by national law, collective agreement or practice.

- The Directive clearly has as an objective to respect existing systems of statutory minimum wages, (minimum) rates of pay set in collective agreements, and systems for declaring collective agreements generally binding, but entails no obligation to introduce such systems where they do not exist (as confirmed by Declaration No 5 by the Council and the Commission, added to the minutes of the Council (Council Document 10048/96).

- night work is an important issue, which should be unambiguously covered by the PWD

- It could be argued that the list of core provisions should include the right (of the posted worker!) to participate in collective action including strike action. An additional argument for this would be, that, according to the Rome II regulation on non-contractual obligations, the law applicable to damages arising out of collective action is the law of the country where the action is to be or has taken place (Article 9). However, where both the employer and the worker have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. This issue is quite complex and needs further investigation.

- It is more logical to move the second paragraph of Article 3.7, which relates to allowances specific to posting, to the list of Art 3.1 as it relates to the notion of pay.

- The new text in paragraph 3.7 confirms explicitly that this Directive is laying down minimum requirements in respect in particular of the working conditions of the host Member State. In addition, this paragraph contains a safeguard clause which clarifies that the PWD is without prejudice to the right of social partners to act as independent, autonomous organizations with the power of regulating their dealings through collective agreement. In other words, the PWD does not affect trade unions' prerogative to negotiate additional and/ or more favourable terms and conditions of employment than those explicitly listed in the Directive. The related right to take collective action cannot be constrained by the provisions of the Directive.

It should also be made absolutely clear that trade unions can fight for the improvement of the living and working conditions of workers, including for equal treatment of local and migrant workers.

- A new article 3.7.a. would clearly allow also the host Member State and social partners to take responsibility for the respect and implementation of EC social law provisions, and not only leave that to the country of 'habitual employment' (country of origin), as the ECJ seemed to imply in the Luxembourg case.
Such provisions are an integral part of the '*ordre public sociale communautaire*', the respect of which should be monitored and enforced especially in the place where the work is performed.

PROPOSAL 5: Respecting and safeguarding the plurality of industrial relations systems in the Member States

Background

It follows from Rüffert that the PWD is a maximum Directive with regard to its methods of implementation. A collective agreement can only be enforced upon posted workers if it fulfils the formal conditions listed in Art 3.1 and 3.8. The ECJ reads these Articles in a restrictive manner, thereby displaying a rigid vision of industrial relations which will be difficult to comply with at national level where several collective agreements may have vocation to apply.

It appears from the Rüffert judgment that Art 3.1 second alinea (as defined in Art. 3.8 under point 8 first alinea) and the other forms of generally applicable collective agreements mentioned in Art 3.8 are interpreted as mutually exclusive.

Collective agreements which are generally applicable can only be relied on where the host Member State does not have a system for declaring collective agreements to be of universal application, in accordance with Art 3.1 and 3.8 first paragraph (para 27 Rüffert). This ruling gives rise to considerable difficulties for the national industrial systems which rely on both types of agreement (f.i. Germany and Italy).

The introduction of a competition element between collective agreements acts as a disincentive for employers to agree on better terms and conditions of employment in a given sector/ geographical zone.

It follows that the European legislator should re-introduce sufficient flexibility in the methods of implementation of the PWD so as to ensure that the diversity of national industrial systems in host Member States is respected whilst guaranteeing the required transparency and certainty for undertakings established in other Member States.

To prevent any misunderstandings, it is important to mention the finding of the ECJ in point 68 of the Laval Case that, since the purpose of Directive 96/71 is not to harmonise systems for establishing terms and conditions of employment in the Member States, the latter are free to choose a system at the national level which is not expressly mentioned among those provided for in that directive, provided that it does not hinder the provision of services between the Member States. This means that in such cases, according to the ECJ, Article 56 TFEU (49 EC) directly applies.

It follows that those systems that do not fall within the scope of the PWD, i.e. article 3.8, can only be protected against the direct application of Article 56 TFEU (49 EC) as currently interpreted by the ECJ by an obligation at EU Treaty level to change this interpretation (for instance by a Social Progress Protocol as proposed by the ETUC).

<p>provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.</p> <p>Equality of treatment, within the meaning of this Article, shall be deemed to exist where national undertakings in a similar position:</p> <ul style="list-style-type: none"> - are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and - are required to fulfil such obligations with the same effects. 	<p>provided that their application to the undertakings referred to in Article 1 (1) ensures equality of treatment on matters listed in the first subparagraph of paragraph 1 of this Article between those undertakings and the other undertakings referred to in this subparagraph which are in a similar position.</p> <p>Equality of treatment, within the meaning of this Article, shall be deemed to exist where <i>the majority of</i> national undertakings in a similar position:</p> <ul style="list-style-type: none"> - are subject, in the place in question or in the sector concerned, to the same obligations as posting undertakings as regards the matters listed in the first subparagraph of paragraph 1, and - are required to fulfil such obligations with the same effects.
<p><u>Explanation</u></p> <ul style="list-style-type: none"> • The second paragraph of Article 3.8 as amended explicitly allows the host Member State to refer also to other forms of (de facto) generally applicable collective agreements. The amended text must allow on the one hand that in countries like Germany a regional collective agreement, made applicable by public procurement law, and covering only a part of the sector, is considered to be binding instead of or in addition to the national universally binding collective agreement; on the other hand, the text must not have the effect that in a country like Sweden the Member State is obliged to make de facto collective agreements universally applicable. • Article 3.8, alineas 1,2 and 3, is amended to clarify that it is not required to demonstrate that a collective agreement is generally applicable to <u>all</u> similar undertakings; such requirement is nearly impossible to fulfil in practice. Rather, it should suffice to demonstrate that a collective agreement is generally applicable/ applied to a majority of similar undertakings and/or similar workers in a given area and in the profession or industry concerned, or a part thereof. • In some systems, it is not the amount of companies covered but the percentage of workers in the sector, which is decisive for considering a collective agreement generally binding. 	

It is important to clarify, that by introducing the notion of 'majority of similar undertakings and/or similar workers' it is in no way intended to interfere with situations in which in some Member States more than one collective agreement applies to a company, for instance because the blue collar workers are covered by a different collective agreement than the white collar workers, or indeed the higher and managerial staff.

In such situations, the references to 'similar workers' , 'in the profession' or 'part thereof' (i.e. of the industry concerned) puts without any doubt, that for instance the collective agreement covering the higher and managerial staff should as such be considered in terms of its scope, covering similar workers (i.e. with similar professions) in other companies.

- Directive 96/71/EC also gave Member States the possibility to refer to collective agreements which have been concluded by the most representative social partners. For those agreements, referring to the relevant geographical area and profession or industry concerned – as opposed to 'the national territory' - reflects more accurately the practice in the Union.
- Equality of treatment: this provision must be adapted in relation to the changed approach (majority instead of all companies covered!)

PROPOSAL 6: public procurement as a method of implementation

Background

One of the most remarkable things with the Rüffert judgment is that it did not at all refer to or deal with the regulation of public procurement in the European Union. This is very astonishing since the German regulation concerned explicitly dealt with public procurement and not primarily with posting of workers.

It is also remarkable in light of the fact that, as highlighted by the Advocate General in the Rüffert case, the possibility of integrating social requirements into public procurement contracts has already been recognised by the Court (Beentjes case 31/87 and C-225/98 Commission v. France) and is now enshrined in Directive 2004/18. Article 26 of that directive, headed “Conditions for performance of contracts” reads as follows:

“Contracting authorities may lay down special conditions relating to the performance of a contract, provided that these are compatible with community law and are indicated in the contract notice and the specifications. The conditions governing the performance of a contract may, in particular, concern social and environmental considerations”.

A similar position was also held by the Commission in its 2001 Interpretative Communication (COM) 566 Brussels, 15.10.2001 where it stated:

“In general, any contracting authority is free, when defining the goods and services it intends to defining the goods and services it intends to buy, to choose to buy goods services or works which correspond to its concerns as regards social policy including through the use of variants, provided that such choice does not result in restricted access to the contract in question to the detriment of tenderers from other Member States”.

The reasoning by the ECJ seems to indicate that you cannot “lay down special conditions relating to public contracts” since these conditions will not apply to the private sector equally. This is of course something that clearly contradicts the EU legislation on public procurement (that by definition only regulates public contracts) and the ILO convention 94 on Social clauses in public contracts (1949). There are good reasons for simply regarding the outcome in Rüffert wrong since it overrides the obligations of several Member States according to binding international law already before they became Members of the EU.

The aim and purpose of Convention C94 is that employees performing work under a public contract do not enjoy conditions of labour less favourable than those enjoyed by other workers in the same trade or industry. The Convention defines 'fair wages' as: “wages, hours of work and other conditions which are not less favourable than those established by collective agreement, arbitration award, or national laws, for work of the same character in the trade or industry concerned in the district where the work is performed” ('Article 2.1). 10 Member States have ratified the Convention.

In the Rüffert judgement the Court leaves some (very limited) room for the possibility to justify different treatment of workers on public and private contracts in certain cases:

the Court explicitly says that the case-file submitted to the Court in Rüffert “contains no evidence to support the conclusion” that special protection was needed for workers on public contracts (paragraph 40).

The fact that it is an important issue of public policy to give special protection to workers on public procurement, which is internationally accepted in the International Labour Organisation and also at EU level in the legal framework of public procurement, has completely escaped the Court.

It follows that the European legislator should clarify (in article 3.8 and/or 3.10) that public contracts that are consistent with European (and ILO) standards on public procurement are an acceptable method of implementation of the PWD, and should clarify in article 3.10 that public contracts can go beyond the list of minimum standards of 3.1. for reasons of public policy.

<p>Article 3.10</p> <p>10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:</p> <ul style="list-style-type: none"> - (...) - (...) 	<p>Article 3.10¹⁸</p> <p>10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:</p> <ul style="list-style-type: none"> - (...) - (...) - <i>terms and conditions of employment regarding the matters referred to in Article 3.1. as well as regarding other matters in the case of public contracts, as defined in Article 1.2 (a) of Directive 2004/17/EC and Article 1.2 (a) of Directive 2004/18/EC</i>
<p><u>Explanation</u></p> <p>The new third and fourth alineas aim at securing compatibility between the PWD and social clauses in public procurement procedures. For instance, national public procurement law should be able to require from contracting authorities and all their contractors the respect of the terms and conditions of employment contained in the relevant collective agreement.</p> <p>These public contracts could either refer to the list of core provisions in article 3.1., or they could refer to other terms and conditions of employment which are deemed important in the public interest (see below).</p>	

18 See page 44 for the whole amended text of Article 3.10, in accordance with proposals 6, 7 and 8

Public contracts are defined in the public procurement Directive (2014/26/EC) as: “contracts for pecuniary interest concluded in writing between one or more economic operators and one or more contracting authorities and having as their object the execution of works, the supply of products or the provision of services within the meaning of this Directive”. Contracting authorities means the State, regional or local authorities, bodies governed by public law, associations formed by one or several of such authorities or one or several of such bodies governed by public law.

PROPOSAL 7: Restoring the notion of public interest

Background

In the Luxembourg judgement, the Court has ruled that the host Member State cannot impose upon foreign and national employers equally other terms and conditions than those listed in Art 3.1 unless they constitute public policy provisions within the meaning of Art 3.10 PWD. This Article is therefore of a central importance for national provisions which are important for the internal social and economic order. However, the Court considers that Art 3.10 PWD is an exception to the principle underlying the PWD and must therefore be interpreted very restrictively.

The Court considers that the host Member State cannot determine unilaterally the scope of public policy measures. Appropriate evidence must be brought as to their necessity and proportionality of a public policy measure. The list of conditions to fulfil may expand in future case law as the ECJ is to assess on a case by case basis the public policy nature of the measure.

Already it is clear that the “protection of purchasing power of workers and good labour relations” is not sufficient evidence (Commission v Luxembourg paragraph 53).

By introducing an excessive and unpredictable list of conditions, the Court has in fact deprived Art 3.10 from any useful effect.

It is therefore necessary for the legislator to restore the initial objective of this provision, and to allow the host Member State to apply upon foreign and national employers equally provisions which, according to the host Member State internal legal and social order, are necessary for the protection of workers.

TEXT OF THE DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
Article 3.10 10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of: - terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,	Article 3.10 ¹⁹ 10. This Directive shall not preclude the application by Member States, <i>or, in accordance with the practice in the Member State, by management and labour,</i> to national undertakings and to the undertakings of other States, of; - terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of <i>social and</i> public policy provisions,

19 See page 44 for the whole amended text of Article 3.10, in accordance with proposals 6, 7 and 8

<p>- (...)</p>	<p><i>including provisions which are appropriate to the attainment of the protection of workers, equal treatment, the prevention of social dumping, or fair competition,</i></p> <p>- (...)</p>
<p><u>Explanation</u></p> <p>The amendment of article 3.10 aims at restoring the possibility for the host Member State, as well as for social partners in those Member States in which this is relevant, to impose provisions which are not explicitly listed in Article 3.1 of the Directive but which constitute overriding reasons of public interest justifying their application to posted workers. This new possibility should be regarded as additional to the notion of public policy, which has already been defined in the Luxembourg judgment.</p> <p>An explicit reference to the notion of ‘equal treatment’ is added as an additional objective to be understood as a social or public policy objective.</p>	

PROPOSAL 8: Securing effective enforcement

Background

Practice in member states suggests a significant lack of enforcement of the provisions of the PWD. This has been acknowledged among others by the Commission²⁰ and the European Parliament.²¹

Firstly, Member States are only obliged to apply their (universally applicable) collective agreements to posted workers of the building sector only (i.e. the activities mentioned in the Annex to the Directive). However, they are allowed to also apply their universally applicable collective agreements in other sectors.

Secondly, the provisions of the Directive relating to enforcement are very weak. Article 4 only provides for the obligation of public authorities to communicate with each other with regard to information on the transnational hiring-out of workers, while Article 5 merely demands them to take 'appropriate measures' with regard to failure to comply with the Directive. Articles 4 and 5 must therefore be revised with a view to strengthen their practical meaning.

In practice, better enforcement of the provisions of the PWD involves 2 aspects:

- an obligation for Member States to control the observance of the applicable terms and conditions of employment
- appropriate measures in case of breach of the obligations laid down in the PWD, in particular dissuasive and effective sanctions. The introduction of a joint & several liability system is a core element of an adequate system of sanctions. Recent years have seen the increase of subcontracting across the EU. By creating extremely complex networks of subcontractors, main contractors can create easy ways to circumvent legal or collectively agreed labour standards and working conditions.

The European legislator should:

- 1. Make the option for Member States to apply their universally applicable agreements also to other posted workers than the ones mentioned in the Annex to the Directive (construction sector and similar) into an obligation.***
- 2. strengthen the obligations for Member States to monitor and enforce the PWD***

NB: Strengthening the obligations for Member States to monitor and enforce the PWD is in many countries and trade union organisations seen as an essential element of a better and more effective PWD. However, especially for countries where social partners play an important role in the monitoring and enforcement of labour standards, it is important to prevent that such measures interfering with national industrial relations.

²⁰ E.g. Communication from the Commission, Guidance on the posting of workers in the framework of the provision of services, COM (2006) 159 final; Commission Recommendation of 31 March 2008 on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services, OJ 2008/C 85/01.

²¹ See Resolution of 11 July 2007 on the Commission Communication on the posting of workers in the framework of the provision of services: maximising its benefits and potential while guaranteeing the protection of workers; Resolution of 22 October 2008 on Challenges to collective agreements in the EU (Andersson-Report).

The whole text of Article 3.10, as amended by PROPOSALS 6 , 7 and 8 would read as follows:

TEXT OF DIRECTIVE 96/71/EC	AMENDMENT (<i>in bold italics</i>)
<p>Article 3.10</p> <p>10. This Directive shall not preclude the application by Member States, in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of:</p> <p>- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,</p> <p>- terms and conditions of employment laid down in the collective agreements or arbitration awards within the meaning of paragraph 8 and concerning activities other than those referred to in the Annex.</p>	<p>Article 3.10</p> <p>10. This Directive shall not preclude the application by Member States, or, in accordance with the practice in the Member State, by management and labour, to national undertakings and to the undertakings of other States, of;</p> <p>- terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of social and public policy provisions, including provisions which are appropriate to the attainment of the protection of workers, equal treatment, the prevention of social dumping, or fair competition</p> <p>- (deleted)</p> <p>- terms and conditions of employment regarding the matters referred to in Article 3.1. as well as regarding other matters in the case of public contracts, as defined in Article 1.2 (a) of Directive 2004/17/EC and Article 1.2 (a) of Directive 2004/18/EC</p>
<p><u>Explanation</u></p> <p>The effect of the proposed amendment 8 would be that Member States are obliged to extend the protection of universally applicable collective agreements to <u>all</u> posted workers, and not just to workers of the construction sector.</p> <p>The ANNEX to the Directive can therefore also be deleted, see below.</p>	

<p>ANNEX</p> <p>The activities mentioned in Article 3 (1), second indent, include all building work relating to the construction, repair, upkeep, alteration or demolition of buildings, and in particular the following work: (etc.)</p>	<p><u><i>(deleted)</i></u></p>
<p>Article 5 Measures</p> <p>Member States shall take appropriate measures in the event of failure to comply with this Directive.</p> <p>They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive.</p>	<p>Article 5 Measures</p> <p>1. Member States shall take appropriate measures in the event of failure to comply with this Directive. <i>They shall in particular ensure that sanctions that are effective, dissuasive and proportionate in relation to the seriousness of the offence are applicable in cases of infringement of the obligations arising from this Directive.</i></p> <p><i>Member States shall</i> ensure that adequate procedures are available to workers <i>and</i> their <i>designated</i> representatives, <i>as defined by Article 5b new</i>, for the enforcement of obligations under this Directive.</p> <p>2. <i>Each Member State shall take the necessary measures to ensure that an undertaking which appoints another undertaking to provide services is liable, in addition to and/or in place of the employer, for the obligations of that undertaking, of any subcontractor or of any hirer of labour appointed by that undertaking, at least concerning payment of:</i></p> <ul style="list-style-type: none"> - <i>pay;</i> - <i>any damage caused by infringement of the applicable terms and conditions of employment;</i>

	<p>- <i>any financial sanction imposed under Article 5.</i></p>
<p><u><i>Explanation</i></u></p> <ul style="list-style-type: none"> • An essential element of enforcement is the imposition of adequate sanctions. The amended first paragraph clarifies that Member States should devise appropriate, effective and dissuasive sanctions in case of violation of the obligations arising from the Directive • The second paragraph as amended obliges Member States to introduce a system of joint & several liability for the recovery of pay, damages and fines. <p>To the extent that a debt cannot be recovered from a subcontractor it should be recoverable from other contractors in the chain of subcontracting, up to and including the main contractor.</p> <p>This system has been validated by the ECJ in the Wolff & Müller case²². Eight Member States have so far implemented such a system of liability, which has been deemed to be a good practice example²³.</p> <p>Given the difficulties in recovering joint & several liability claims in case of cross border subcontracting, it is essential that more harmonisation throughout the EU is achieved in this area.</p>	
	<p><i>Article 5a (new) Enforcement</i></p> <p><i>1. Host Member States shall ensure that effective and adequate means of control are carried out on their territory to ensure legality of the posting and compliance with the rights and obligations stemming from this Directive.</i></p> <p><i>To this end, public authorities in the host Member State and/or social partners shall be entitled to require in particular:</i></p> <ul style="list-style-type: none"> - <i>a copy of form E 101</i> - <i>a copy of the contract of employment or a document produced in accordance with Directive 91/533/EC</i> - <i>time sheets</i>

²² C-60/03

²³ See COM (2006) 159 p.12 and European Parliament resolution of 26 March 2009 on Social responsibility of subcontracting undertakings in production chains

	<ul style="list-style-type: none"> - <i>pay slips</i> - <i>an assessment of the risks to safety and health at work, including protective measures to be taken, in accordance with Directive 89/391/EC</i> - <i>where the posted worker is a third country national, copies of the work permit and of the residence permit</i> - <i>a representative of the undertaking posting the worker, with an address for service of documents in the host Member State.</i> <p><i>2. The host Member State may require that the documents referred to in the above paragraph are available without delay to the competent national authorities during the entire term of service provision in its territory.</i></p> <p><i>3. The host Member State may require prior notification of posting, supplemented by the relevant information in respect of wages and employment conditions.</i></p>
<p><u>Explanation</u></p> <ul style="list-style-type: none"> • Article 5 a new paragraph 1 <p>The first subparagraph of this new Article imposes on Member States the obligation to monitor and control the effective application of the rights and obligations stemming from the Directive.</p> <p>To this end, national authorities must be able to carry out a number of concrete control measures. The second subparagraph explicitly allows the host Member State to require that a number of key documents are available for inspections. The list provided for in this paragraph is indicative ('in particular'):</p>	

- Copies of the E101 form and employment contract - or equivalent document in accordance with Directive 91/533/EEC on an employer's obligation to inform employees on the conditions applicable to the contract or employment relationship - enable the host Member State to ensure that the worker is habitually and legally employed in another Member State, within the meaning of the amended Article 2 (see Proposal 3: clarifying the scope of the Directive) and to check the application of the mandatory rules provided for under Article 3.1
- Timesheets, payslips and health & safety risks assessment at the workplace are essential for the host Member State to check the application of the mandatory rules provided for under Article 3.1
- Where the posted worker is a third country national, copies of the work and residence permits enable the host Member States to control the legality of the employment in the country of origin
- The presence of a representative on the territory of the host Member State who can undertake the formal responsibilities of the service provider as an employer is indispensable for contact with national authorities and social partners

- Article 5 a new paragraph 2

The host Member State should be able to require that the documents are available for inspection throughout the time of posting

- Article 5 a new paragraph 3

The host Member State should be able to require the service provider to notify its intention of using posted workers. Such prior declarations are a basic mechanism to prevent abuses and fraud.

Article 5b (new) Designated representatives

1. Member States shall ensure that legal entities, associations, and organisations, which have in accordance with the criteria laid down by their national law, a legitimate interest in ensuring that the provisions of this Directive are complied with, as well as trade unions, may engage, either on behalf or in support of a worker in judicial, administrative and/ or criminal procedure provided for the enforcement of obligations under

	<p><i>this Directive, irrespective whether the posted worker is a party in the proceedings**</i></p> <p><i>2. Member States shall allow designated representatives who lodge a complaint against an employer on behalf of a worker not to disclose the identity and place of residence of the complainant.</i></p>
<p><u><i>Explanation</i></u></p> <p>The involvement of workers and their representatives forms a basic pillar of enforcement. This amendment is designed to facilitate complaints. The formulation is inspired from Racial Equality Directive 2000/43/EC and from the employers' sanctions Directive 2009/52/EC.</p> <p>** at the end of the first paragraph is added: "irrespective whether the posted worker is a party in the proceedings", as trade unions should be able to act without the consent of the posted worker and even if the posted workers does not start proceedings. In this respect, see also Judgment of the Court (Second Chamber) of 10 July 2008, Case C-54/07 ²⁴.</p>	

²⁴ in which the ECJ ruled that “ Article 15 of Directive 2000/43 (Race Equality Directive) required that rules on sanctions applicable to breaches of national provisions adopted in order to transpose the Directive had to be effective, proportionate and dissuasive, even where there was no identifiable victim.”

Annex A

The Posting Directive and the relevant Treaty provisions on free movement

Article 18 TFEU (12 EC) establishes the important principle that, within the scope of the Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 45 TFEU (39 EC) is about ‘free movement of workers’, i.e. the freedom of natural persons to move to another country for employment. Article 39 covers workers who as individuals cross a border to enter into an *employment contract with a host country employer*.

Regulation (1612/68), implementing the Treaty provisions on free movement of workers, clarifies that a citizen of the EU has the freedom to move within the EU ‘*to take up and engage in gainful employment in conformity with the relevant regulations applicable to national workers*’, in any capacity (permanent, seasonal, service provision).

The general principle governing ‘free movement of workers’ is: abolition of discrimination based on nationality as regards employment, remuneration and other conditions of work and employment, in the following sense:

- equal access to the labour market of the host country
- the host country employer cannot discriminate the worker on the basis of his/her nationality
- equal access to social security in the host country, and a right to the same benefits

Article 49 TFEU (43 EC) is about ‘the right of establishment’. General principle governing this provision is: restrictions on nationals of one MS to establish in another MS shall be prohibited.

Freedom of establishment includes the right to take up and pursue activities as a self employed person and to set up and manage undertakings under the conditions laid down for its own nationals by the law of the country where such establishment is effected (in other words: equal treatment of local and foreign companies and self employed persons including service providers).

Article 56 TFEU (49 EC) is about ‘services’. General principle is: restrictions on nationals established in one MS to provide services to a national of another MS are prohibited (in other words: no obligation to establish in order to be able to provide services).

Article 57 TFEU (50 EC) further sets the framework for the exercise of this freedom. It defines a service as an ‘activity’ of an industrial or commercial nature or as activities of craftsmen and the professions (in other words: persons themselves are not services!)

The person providing the service (!) may, in order to do so, temporarily pursue his activity in the State where the service is provided, under the same conditions as are imposed by that State on its own nationals (in other words: only temporarily; if he does it on a permanent basis, it is establishment as covered by article 43; and also here: equal treatment of companies/self employed persons)

Article 61 TFEU (54 EC) says that, as long as restrictions on freedom to provide services have not been abolished, each MS shall apply such restrictions without distinction on grounds of nationality or residence to all persons providing services (here again: non-discrimination of local and foreign service providers).

Annex B

Posting Directive, private international law and rules on jurisdiction

The Rome I Regulation 2008 (revising the Rome Convention²⁵ having similar rules²⁵) regulates which law is applicable to contracts in case of possible conflict of law (i.e. in cross border situations, where more than one legal system potentially applies).

The rules on employment contracts are as follows:

Article 8:

- a general principle of free choice of law, i.e. the parties to the contract are *free to choose* which law they want to apply to their contract
- if they do not make a choice, then the law applies of the country in which (or: from which) the employee *habitually* carries out his work
- this does not change if he is only temporarily employed in another country (the notion behind this is, that the worker is supposed to have an interest in the stability and continuity of his contract with the employer)
- if there is no 'habitual place of work', because the worker performs his work in different countries, without a clear centre of his working activities, then the law applies of the country where the employer's business is established
- NB correction 1): if the parties do make a 'free choice', this may not have the result of *depriving the worker of the protection* that he would have had under the law that would have applied according to the normal rules as explained above (i.e. those legal provisions from which you cannot derogate by agreement)
- NB correction 2): if the circumstances of the case show that the contract is *more closely connected* to another country than the above mentioned rules prescribe, then the law of that other country applies.

In addition, the Rome I Regulation also contains an important provision on 'mandatory provisions', which override the above mentioned rules:

Article 9

- Overriding mandatory provisions are provisions the respect for which is regarded as *crucial* by a country for safeguarding its public interests such as its political, *social* or economic organisation;
- These provisions are applicable to any situation falling within their scope, *irrespective of the law otherwise applicable* to the contract.

According to the **Brussels I Regulation on jurisdiction**, if a worker wants to sue his employer, he can do this either in the court of the Member State where the employer is established ('domiciled'), or where the employee habitually carries out his work, or, where there is no habitual place of work, where the business that hired the worker is situated.

²⁵ Regulation 593/2008/EC is to replace the Rome Convention as of 17 December 2009 with regard to contracts concluded after this date, with the exception of the UK and Denmark, who have not opted into this revision, and therefore remain subject to the Rome Convention.

Section 5 deals with Jurisdiction over individual contracts of employment.
The general rule is:

Article 19

An employer domiciled in a Member State may be sued:

- 1) in the courts of the Member State where he is domiciled
- 2) in another Member State:
 - a. 'in the courts for the place where the employee habitually carries out his work' (or the last place where he did so)
 - b. if the employee does not have any habitual place of work, 'in the courts for the place where the business which engaged the employee is or was situated'.