The Revision of the Posted Workers Directive: High hopes or empty promises in the search for a stronger social dimension?

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Introduction

What does a posted worker think, when a local colleague gets almost twice as much pay, even though he and his local colleague had been sweating over the same tasks shoulder to shoulder earlier that day?[1] What does a local worker think, when he is sent home for good because a posted colleague was simply cheaper? What will local and posted workers think of the proposal the European Commission (henceforth: the Commission) published on 8 March 2016 to revise the Posted Workers Directive? Should they have high expectations of this proposal, or is it a rather empty promise that posting will get a more social dimension?

Under Article 56 of the Treaty on the Functioning of the European Union (henceforth: the TFEU), undertakings can send their employees to another Member State to temporarily provide a service there. These 'posted' workers remain governed by the labour law of the home Member State while carrying out the temporary service elsewhere within the European Union (henceforth: the Union). Because service providers can therefore take advantage of low labour standards to win contracts abroad, posting raises concerns about unfair competition, unequal pay between posted and local workers, and displacement of local workforces by cheap posted workers, often referred to as 'social dumping'.[2] Ultimately, such practices may also force Member States to lower their labour standards in order to remain competitive, igniting a so-called 'race to the bottom'.[3] In response to those concerns, the Posted Workers Directive (henceforth: the Directive) was adopted in 1996. At the core of the Directive is Article 3(1), which requires host Member States to apply a set of employment conditions to posted workers laid down in law or in collective agreements.[4] That way, as Eurocommissioner Spidla said at the time, the Directive was supposed to be 'a key instrument both to ensure the free movement of services and to prevent social dumping.'[5]

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[1] According to the European Commission's estimates, differences in wages between local and posted workers in the European Union range from 10-15 % in the Danish construction sector to almost 50 % in the road transport sector in Belgium. See European Commission, 'Impact Assessment accompanying the document Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (COM (2016) 128 final) (Impact Assessment)' SWD (2016) 52 final.

[2] Because 'social dumping' is a politically salient term, I try to avoid the term as much as possible, instead referring to 'cheap labour replacing expensive local workers' or 'competition on the basis of differences in labour costs', unless I quote other scholars using the term.

[3] Catherine Barnard, 'Social dumping and the race to the bottom: some lessons for the European Union from Delaware?' (2000) 25 European Law Review 57, 57-58. See also Simon Deakin, 'Regulatory Competition after *Laval*' in Catherine Barnard (ed), *Cambridge Yearbook of European Legal Studies 10* (Hart Publishing 2008) 606.

[4] Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services [1996] OJ L018/03 (Posted Workers Directive), art 3(1).

[5] Quoted in Catherine Barnard, 'Fifty years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution' in M Dougan and S Currie (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 323.

The Directive could not however live up to the promise to fulfil that dual purpose. Concerns about social dumping, as Dolvik and Visser observe, surged following the Union's big enlargement in 2004 as posting became a lucrative business for Eastern European service providers.[6] While transitional restrictions were drawn to limit the free movement of persons from the new Member States, no such restrictions were allowed to the free movement of services. The scope of posting as an attractive alternative for regular labour migration therefore increased significantly. Moreover, as Dolvik and Visser explain, the huge East-West welfare gaps provided Eastern service providers considerable competitive advantages.[7] It was however in particular the Court of Justice of the European Union (henceforth: the Court) that exacerbated the social downsides of posting by interpreting the Directive primarily as an internal market instrument and limiting its effectiveness as a social protection measure. As such, the Directive has become a symbol of the deep-running tensions between the Union's economic and social dimension and its social deficit.[8]

So instead of preventing social dumping, the Court actually transformed the Directive into one of its main facilitators, as Countouris and Engblom write.[9] The construction works of a tunnel in Maastricht shows for example how posted workers are prone to unequal treatment and exploitation.[10] There, an employer deducted almost 1000 euros each month, more than half of the salary of the posted workers, for the rent of a house that was intended to be demolished and in which three posted workers in total stayed. The British Lindsey Oil Refinery dispute on the other hand shows how posting threatens to displace local workforces. For the construction of an oil refinery, the contractor namely refused to use local British workers because his own Portuguese and Italian workers were less costly, even though unemployment rates in the United Kingdom were high at the time.[11] The strikes that followed, where British workers carried 'British jobs for British workers' signs, quickly made the headlines in British newspapers. Similar to the concerns about the 'Polish plumber' during the French

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[6] Jon Erik Dolvik and Jelle Visser, 'Free movement, equal treatment and workers' rights: can the European Union solve its trilemma of fundamental principles?' (2009) 40 Industrial Relations Journal 491, 492.

[7] Ibid 497-499. To illustrate this, the Impact Assessment provides that gaps in minimum wages widened from 1:3 before the 2004 enlargement to 1:10 afterwards. See Impact Assessment (n 1) 13.

[8] Kristina Maslauskaite, 'Posted Workers in the EU: State of Play and Regulatory Evolution' (Policy Paper 107, Jacques Delors Institute 2014), 1.

[9] Nicola Countouris and Samuel Engblom, 'Civilising the European Posted Workers Directive' in M Freedland and J Prassl (eds), Viking, Laval *and Beyond* (Hart Publishing 2014) 282.

[10] Rob Cox, 'Slaven van de A2' *Limburgs Dagblad* (5 oktober 2013) https://maastricht.pvda.nl/wp-content/uploads/sites/318/2013/10/DDL-achtergrondartikel-1.pdf accessed 5 June 2017. See on another Dutch example of exploitation also Nanda Troost, 'SER: detacheren buitenlandse werknemers in Nederland 'schimmig' *De Volkskrant* (19 November 2014) http://www.volkskrant.nl/economie/ser-detacheren-buitenlandse-werknemers-in-nederland-schimmig~a3793341/ accessed 5 June 2017.

[11] Audrey Gillan and Andrew Sparrow, 'Strikes spread across Britain as oil refinery protest escalates' *The Guardian* (30 January 2009) https://www.theguardian.com/business/2009/jan/30/oil-refinery-dispute accessed 5 June 2017. See also Catherine Barnard, ''British Jobs for British Workers': The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) 38 Industrial Law Journal 245.

referendum in 2005, concerns about posting have played an important role in the deepening mistrust in the European Union and growing anti-European sentiments.

The Directive has attracted an unfettered and almost continuous stream of academic criticism on a range of different issues. Few have however focused on the Commission's proposal launched in March 2016 to revise the Directive in the Union's 'fight against social dumping', as President Juncker recently named it.[12] According to the Commission, that revision will make posting "more clear, *fair* and easy to enforce" (emphasis added).[13] The tacit promise to also strengthen worker protection however raises questions how the proposal exactly contributes to that purpose and whether it tackles the issues that have emerged over the years. This research therefore seeks to answer the following research question:

To what extent does the Commission's Proposal for Revision of the Posted Workers Directive strengthen the Directive's social purpose to protect workers?

The research question is thus limited to the content and impact of the Directive itself and does not address enforcement issues related to posting, which are covered by the Posted Workers Enforcement Directive.[14]

The research is structured as follows. The first chapter sets the scene by placing the Posted Workers Directive in the context of the wider discussion on the European Union's social dimension and its 'social deficit'. It then sketches the legal complexity of posting and the socio-economic and legal origins leading to the Directive's adoption in 1996. Against that background, the second chapter analyses how the Directive has primarily turned into an internal market instrument, whilst its effectiveness as a social policy instrument to protect workers has been marginalized. This chapter also examines how the Court has settled the conflict between the fundamental social right to collective action and the fundamental freedom to provide services in favour of the Union's economic aim and how that has further weakened the social dimension of posting. The third chapter then investigates to what extent the Commission's proposal for revision of the Directive will contribute to a stronger social dimension for posting. It evaluates the Commission's proposed changes to the Directive's legal framework and furthermore investigates which issues the Commission could have tackled that

[12] European Commission Press Release, 'The 'Europe Speech' given by President Jean-Claude Juncker at the Konrad Adenauer Foundation' (Berlin, 9 November 2016) http://europa.eu/rapid/press-release_SPEECH-16-3654_en.htm accessed 6 June 2017.

[13] European Commission Press Release, 'Commission presents reform of the Posting of Workers Directive – towards a deeper and fairer European labour market (Strasbourg, 8 March 2016) http://europa.eu/rapid/press-release_IP-16-466_en.htm accessed 12 May 2017.

[14] Directive 2014/67/EU of the European Parliament and of the Council of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No 1024/2012 on administrative cooperation through the Internal Market Information System ('the IMI Regulation') OJ L159/11.

remained unaddressed in the proposal. The concluding chapter provides a short summary of the proposal's impact on the Directive's social dimension and links the research to the larger debate on the Union's social dimension.

1. The adoption of the Posted Workers Directive in the context of the European Union's social dimension

1.1 Introduction

This chapter provides the background against which the Posted Workers Directive (henceforth: the Directive) was adopted in 1996. To set the scene, the chapter first depicts the discussion about the Union's social dimension and its social policy competences, of which the Directive is an eminent example. It then explains the legal complexity of posting and describes the socio-economic and legal origins leading up to the Commission's proposal for a Posted Workers Directive in the early 1990s. The chapter concludes with a short focus on the Directive's adoption in 1996 and the choice of its legal basis.

1.2 The development of the Union's social dimension and its 'social deficit'

How strong the Union's social dimension should be has circulated ever since its inception in the 1950s. At the root of this discussion is the disequilibrium between the Union's social and economic fundaments as created in the 1950s.[15] Because the deliberate choice was made to limit the European project to economic integration, Scharpf writes that the economic was effectively 'decoupled' from the social.[16] In this period of 'benign neglect', as Hervey names it,[17] strong social competences were deemed unnecessary, the underlying assumption being that the removal of all artificial obstacles to the free movement rules would automatically lead to an optimum allocation of resources and rates of economic growth, and hence also to an optimum social system.[18]

Despite this lack of social competences, the Community made some social progress in those early decades nevertheless, albeit by the grace of the Member States' willingness to cooperate. Awareness grew that a greater social content was necessary than the Treaty of Rome had envisaged, were the Community to survive.[19] This spurred legislative action at the Community level, for example in the mid 1970s, when the Community enacted several legislative instruments in the field of social policy, including for example a directive on equal pay for men and women[20] and a directive on safeguarding employees' rights in case of transfers of undertakings.[21] Also in the 1990s legislative

[15] Catherine Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action (2012) 37 European Law Review (2012) 117, 118.

[16] F W Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' (2002) 40 Journal of Common Market Studies 645, 646.

[17] T Hervey, *European social law and policy* (Longman 1998), 17.

[18] M Shanks, 'The Social Policy of the European Communities' (1977) 14 Common Market Law Review 375, 375.

[19] Ibid 377.

[20] Directive 75/117/EEC of the Council of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women [1975] OJ L45/75.

[21] Directive 77/187/EEC of the Council of 14 February 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses [1977] OJ L61/26. See for a full list of legislation adopted in this period Catherine Barnard,

activity pushed the development in the social policy field forward. This followed in particular from the Community Charter of Fundamental Social Rights and the complementing Action Programme, which included a proposal for regulating transnational posting.[22] In the absence of a specific social policy competence, however, the Community had to base these instruments upon Articles 100 and Article 235 EEC, which required unanimous voting in the Council. Member State influence was therefore significant, and the progress made depended heavily on the Member States' willingness to cooperate.

It was only in 1997, when the Member States adopted the Treaty of Amsterdam, that social policy gained a stronger foothold in the Treaties. Article 137 TEC was added to the social policy chapter, which provided a legal basis to propose directives laying down minimum requirements in some areas of social policy, albeit that in most of these areas unanimity was required in the Council.[23] This limited legal basis was complemented by the newly invented Open Method of Coordination, a form of governance in which the Member States and the Commission agree to a series of common objectives, while the Member States themselves remain free to choose how to achieve these.[24] This annual cycle of policy formation, implementation and monitoring is nowadays an important part of the Union's social policy.

Ever since the Treaty of Amsterdam, however, the social policy chapter has remained largely unmodified. While the development of social policy remains principally in the hands of the Member as social policy is a shared competence, the Union's own social competences have not been strengthened any further. As the Member States thus remain the principal actors in the social policy field and the Union's social competences limited, the disequilibrium between the economic and the social created in the 1950s hence to a great extent persists up until today.

Today, the Union's social dimension is still at the heart of a discussion that is unlikely to come to a halt soon. Calls for a stronger social dimension have increased in particular because of the social impact of financial pressures, budgetary cuts and austerity measures following the two crises that hit the Union in 2008 and 2010.[25] In 2014, the Commission introduced the European Pillar of Social Rights, which according to President Juncker is intended to 'serve as a compass for a renewed process of convergence towards better working and living conditions among participating member states.'[26] This initiative fits the view of Ferreira and Kostakopoulou that the Union is in search of a soul.[27]

'Eu 'Social Policy': From Employment Law to Labour Market Reform' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (OUP 2011), 646-647.

[22] Barnard, 'Eu 'Social Policy'' (n 21) 651.

[23] Consolidated Version of the Treaty establishing the European Community [1997] OJ C340/173, art 137.

[24] D M Trubek and L G Trubek, 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Co-ordination' (2005) 11 European Law Journal 343, 348.

[25] N Ferreira and D Kostakopoulou, *The Human Face of the European Union* (Cambridge University Press 2016) 1.

[26] European Commission, 'The European Pillar of Social Rights' (Priority Policy Area) https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en accessed 25 May 2017.

[27] Ferreira and Kostakopoulou (n 25) 1.

Because as long as the disequilibrium between the Union's economic and social pillars continues, its 'social deficit' remains.[28] The Posted Workers Directive is a striking example of that discussion, which 'has come to symbolize the deep-running tensions between the social and economic pillars of European integration.'[29]

1.3 The legal complexity of posting

According to the European Commission, cross-border posting concerns the activity whereby an employer sends his employees temporarily abroad to carry out a service in another Member State.[30] Pennings has identified three elements characteristic of cross-border posting: it concerns a temporary employment activity (1) in another country than where the employer is established (2), while the employment relation between the posted worker and the posting company in the home Member State continues (3).[31] The one characteristic that distinguishes posting from regular labour migration under Article 45 TFEU, as Houwerzijl observes, is thus its temporary character.[32] That temporary nature is not however specified in the Directive, contrary to for example Regulation (EC) 883/2004, which provides that posted workers remain covered by the social security legislation of the home Member State, unless a period of 24 months is exceeded.[33] Temporariness within the limits of the Directive is therefore currently determined in light of the case law of the Court, which has interpreted temporariness as depending not only on the duration of the service, but also on its regularity, periodicity or continuity.[34]

What makes posting a legally complex construction is the conflict of laws that flows from it. While the worker's employment contract remains governed by the labour law of the home Member State, he or she namely also encounters the labour law system of the host Member State. To what extent a host Member State can impose its labour law standards on posted workers and how this conflict of laws should be resolved is thus the underlying legal issue pertaining to posting.

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[28] S A de Vries, 'Het ex-Monti II-voorstel: 'Paard van Troje' of zege voor sociale grondrechten?' (2013) 4 Nederlands Tijdschrift voor Europees Recht 123, 129.

[29] Maslauskaite (n 8) 1.

[30] European Commission, 'Posted Workers' (Employment, Social Affairs and Inclusion, Moving and working in Europe) http://ec.europa.eu/social/main.jsp?catId=471# accessed 24 May 2017.

[31] F Pennings, 'Arbeidsrechtelijke aspecten van detachering van werknemers in/uit België en Nederland (*Tewerkstelling over de grenzen* 1996) 2.

[32] M S Houwerzijl, *De Detacheringsrichtlijn: Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EC* (Wolters Kluwer 2004) 10.

[33] Regulation 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/01, art 12.

[34] Case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para 27; Case C-215/01 *Bruno Schnitzer* [2003] ECR I-14847, para 28.

1.4 Origins of the Posted Workers Directive

1.4.1 Socio-economic origins

Until the mid 1980s, the conflict of laws in posting featured low on the political agenda, even though early secondary legislation in the 1970s took two different approaches to the issue. On the one hand, as Evju writes, Regulation (EEC) 1612/68 on the free movement of workers seemed to suggest that posted workers were entitled to equal treatment from day one under the host State's labour law just like migrant workers.[35] Regulation (EEC) 1408/71, on the other hand, explicitly provided that posted workers were subject to home State regulation in the field of social security.[36] Posting nevertheless caused little problems within the Community because of its limited scope, the low unemployment rates the original Member States dealt with and the reasonably equivalent standard levels of living and social protection at the time.[37] A political necessity to clarify the rules pertaining to posting therefore lacked.

Towards the end of the 1980s, however, the need to regulate posting became ever more clear. In particular the scope of posting surged towards the end of the 1980s following the accession of Spain and Portugal in 1986 and the positive effects of the Commission's White Paper to complete the internal market on the free movement of services.[38] In addition, posting had also gained in popularity as it enabled companies to compete on the basis of differences between the Member States in labour costs, which had widened as a result of the 1986 enlargement. The need to regulate posting at the Community level became even more urgent because Member States started to adopt national rules dictating which labour standards in the host Member State would also apply to workers posted to their territory.[39] Service providers initiated legal proceedings in response, claiming that these national rules limited their freedom to provide services. The dispute in *Rush Portuguesa* in 1990 provided the Court the opportunity to clarify some of the issues pertaining to posting, which also served as the main legal starting point for the Commission to propose a directive on posting.

1.4.2 Legal origin: Rush Portuguesa

Rush Portuguesa illustrated the fears of some Member States about the consequences of posting. The service provider in this case was a Portuguese undertaking specialized in construction work, which brought its own Portuguese staff to carry out rail construction work in France. Rush Portuguesa had

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[35] S Evju, 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast' in Barnard C and Odudu O (eds), *Cambridge Yearbook of European Legal Studies Volume 12* (Hart Publishing 2012) 156; Regulation (EEC) 1612/68 of the Council of 15 October 1968 on the freedom of movement for workers within the Community [1968] OJ L257/02.

[36] Regulation (EEC) 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the community [1971] OJ L149/02.

[37] A Desmazieres de Séchelles, 'Free movement of workers and freedom to provide services ' in Henry Schemers et al (eds.), *Free movement of persons in Europe. Legal problems and experiences* (1993 Asser Instituut), 479.

[38] Houwerzijl (n 32) 3.

[39] Ibid.

however infringed a French labour law which dictated that only the Office national d'immigration could employ third country nationals in France.[40] Rush Portuguesa challenged this French labour law on the basis that it restricted its freedom to provide services.

In its judgment, the Court first of all gave way to service providers to effectively compete on the basis of labour costs only. Even though cases such as *Seco* and *Webb* had already alluded to it, the Court placed posted workers fully within the free movement of services.[41] The main reason it did so was because posted workers would return to the home Member State after having completed the work abroad, 'without at any time gaining access to the labour market of the host Member State.'[42] The Court thus drew a fundamental line between migrant workers and posted workers. It furthermore ruled that a Member State could not prohibit a service provider from another Member State from using his own personnel in carrying out a contract.[43] Hence, Barnard notes, the Court effectively opened up the possibility for companies to profit from their comparative advantage on the basis of cheap labour costs.[44]

The Court nevertheless gave 'a crumb of comfort'[45] to the Member States fearing that cheap posted workers would displace local labour forces by noting that a host Member State could extend labour norms laid down in legislation or collective labour agreements to posted workers.[46] Because the Court had not specified which norms the Member States could impose in particular, however, it implied that the whole array of labour law norms could be imposed.[47] The Court seemed to realize the potentially harmful effects of its dictum on the free movement of services, as is clear from the *Vander Elst* case, which appeared a few years later. There, while repeating its dictum, the Court stated that host Member States could extend their legislation and collective labour agreements *relating to minimum wages* only.[48]

While the Court did not explain its dictum in *Rush Portuguesa*, Davies suggests that it could be seen as a start and incentive to regulate the posting of workers on the legislative front.[49] After all, even though the Commission had announced that it intended to publish a proposal on working conditions applicable to posting in the Action Programme in 1989, it had not yet given a concrete follow-up thereto. *Rush Portuguesa* had furthermore created legal uncertainty which labour standards

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[40] Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* [1990] ECR I-1417 para 2.
[41] Ibid para 12.
[42] Ibid para 15.
[43] Ibid para 12.
[44] Catherine Barnard, 'Fifty Years of Avoiding Social Dumping? The EU's Economic and Not So Economic Constitution' in Dougan M and Currie S (eds), *50 Years of the European Treaties: Looking Back and Thinking Forward* (Hart Publishing 2009) 311, 322.
[45] Evju (n 35) 163-164.
[46] *Rush Portuguesa* (n 40) para 18.
[47] Evju (n 35) 163.
[48] Case C-43/93 *Raymond Vander Elst v Offices des migrations internationales* [1994] ECR I-3803 para 23.
[49] P Davies 'Market Integration and Social Policy in the Court of Justice' (1995) 24 Industrial Law Journal 49, 74. See also Houwerzijl (n 32) 75.

host Member States could impose on posted workers, while the Commission moreover deemed the possible social dumping consequences of posting undesirable.[50] According to Evju, the Court's ruling therefore came to serve as a catalyst for the adoption of the Posted Workers Directive as well.[51]

1.5 Adoption of the Posted Workers Directive

Whereas a first proposal to regulate posting was tabled as early as 1991, roughly a year after *Rush Portuguesa*, the Member States were able to reach a qualified majority on the text only in 1995, after the high labour standard countries Finland, Austria and Sweden had acceded to the Union. In the Directive, the Commission sought to strike a balance between the objectives to guarantee the free movement of services and to protect posted workers.[52] Davies notes that the Commission thereby attempted to address the imbalance the Court had created in the *Rush Portuguesa* judgment, in which it had ruled that host Member States could apply labour standards on posted workers without having specified which standards exactly.[53] The main provision that would ensure the Directive's balanced dual purpose was Article 3(1), according to which a host Member State could apply only a limited set of labour standards to a worker posted on its territory.

Despite this dual purpose the Directive envisaged to pursue, the Directive's legal basis was only based on the free movement of services. The obvious advantage of that legal basis was that it required qualified majority voting only. The downside, however, was that this suggested that the Directive had as its principal aim the furthering of the freedom to provide services, and not to increase worker protection, as Davies observes.[54] The Commission was nevertheless convinced that the Directive would pursue a dual purpose, namely to promote the free movement of services and to protect workers. Hence, when the Directive was finally adopted in 1996, it was considered a victory for the social policy of the Community.[55] As the next chapter will show, however, that optimism soon evaporated after the Eastern European enlargement in 2004.

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[50] Houwerzijl (n 32) 4.
[51] Evju (n 35) 161.
[52] Houwerzijl (n 32) 85.
[53] P Davies 'Posted Workers: Single Market Or Protection of National Labour Law Systems?' (1997) 34 Common Market Law Review 571, 592.
[54] Ibid 572-573.
[55] Dolvik and Visser (n 6) 497.

2. The Posted Workers Directive: subordination of the social to the economic

2.1 Introduction

Although concerns about social dumping and displacement of local workforces quickly waned after the Directive's adoption in 1996 due to decreasing discrepancies in wages and labour standards between the Member States,[56] they returned as quickly again after the Union's Eastern enlargement in 2004. This was mainly because of the huge increase in scale of posting as well as the new enormous gaps in wages and welfare standards between the old and new Member States.[57] In light of these socio-economic developments and the Court's interpretation of the Directive that followed, it soon became clear that the Posted Workers Directive could not live up to Eurocommissioner Spidla's promise that it would promote the free movement of services and prevent social dumping equally.

This chapter explains how the Directive has primarily turned into an internal market instrument whilst its effectiveness as a social policy instrument to protect workers has been limited. It first highlights the main legal issues arising from the Directive's legal framework and explains how in particular the Court's interpretation pushed the Directive's social aim to the background. The next section then shows how the Court effectively settled the conflict between the fundamental social right to collective action and the fundamental freedom to provide services in favour of the latter, thereby limiting trade unions' possibilities to improve workers' situations through collective action. The chapter ends with an interim conclusion.

2.2 The Posted Workers Directive's legal framework: legal issues

2.2.1 Legal basis

The first issue in the Directive's legal framework that works to the detriment of its social purpose is that its legal basis lies in the chapter on the free movement of services only,[58] which implies that the Directive is primarily an internal market instrument and much less so a worker protection measure. The Court has reinforced that view in its case law. In *Laval*, as Barnard observes,[59] the Court namely 'firstly' speaks of the Directive's aim to ensure the free movement of services, and only 'secondly' of its purpose to protect workers.[60] In *Rüffert*, it furthermore ruled that the purpose of the Directive is 'in particular to bring about the freedom to provide services, which is one of the fundamental freedoms guaranteed by the Treaty',[61] as Evju notes.[62] Also recital 5 of the Directive reinforces the view that

[56] Ibid 497.
[57] Ibid 497-498.
[58] Arts 57(2) and 66 EC, now arts 53 and 62 TFEU.
[59] Catherine Barnard, '*Viking* and *Laval*: An Introduction' in C Barnard (ed), *Cambridge Yearbook of European Legal Studies Volume 10* (Hart Publishing 2008) 463, 478-479.
[60] Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet, Svenska Byggnadsarbetareforbundets avd. 1, Byggettan, Svensa Elektrikerforbundet* [2007] ECR I-11767, para 74-76.
[61] Case C-346/06 *Dirk Rüffert v Land Niedersachsen* [2008] ECR I-1989, para 36.

there is a certain hierarchy between the Directive's economic and social objectives, which provides that the 'promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers.'[63] The legal basis therefore conveys the message that the free movement of services surfaces as the Directive's primary objective, while worker protection is only secondary and instrumental thereto.[64] The legal basis hence leads Barnard to conclude that 'it is a mistake to think of the [Directive] as a worker protection measure.'[65]

2.2.2 Article 2(1): The issue of temporariness

A second issue is the lack of a definition of 'temporariness' in determining the personal scope of the Directive. Temporariness is decisive in determining whether a worker is a posted worker falling under the free movement of services, or, when the activity is not temporary, a migrant worker under the provisions of free movement of workers. Article 2(1) of the Directive, however, merely specifies that a posted worker is a worker who carries out his work abroad 'for a limited period'.[66] Since also the intention of the employer plays an important role in determining whether the employment activity is temporary, as Laagland explains, service providers can ensure that their workers are considered posted workers instead of a migrant workers more easily, who are consequently not entitled to equal treatment under the provisions on free movement of workers.[67]

2.2.3 Article 3(1), Article 3(7) and Article 3(10): from minimum to maximum protection

A third issue detrimental to the Directive's social dimension concerns Article 3(1) in combination with Articles 3(7) and 3(10), which illustrate most clearly that the Directive is primarily seen as an internal market instrument. Article 3(1) provides a list of terms and conditions of employment that host Member States need to apply to posted workers, regardless which labour law applies to the employment relationship.[68] It lists the following employment conditions:

- maximum work periods and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay;
- conditions of hiring-out of workers;
- health, safety and hygiene conditions;
- protective measures pertaining to the employment conditions of pregnant women, children and young people;

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[62] Evju (n 35) 169-170.
[63] Posted Workers Directive (n 4) recital 5.
[64] Evju (n 35) 169.
[65] Barnard, '*Viking* and *Laval*: an introduction' (n 59) 480.
[66] Posted Workers Directive (n 4) art 2(1).
[67] F Laagland, 'Navigeren door het labyrint van grensoverschrijdende detachering' (2016) 10 Arbeidsrechtelijke Annotaties 3, 10.
[68] Posted Workers Directive (n 4) art 3(1).

- equality of treatment between men and women and other provisions on non-discrimination.

When the Directive was adopted, it was unclear whether this list was exhaustive or not. Because the Directive does not harmonize the content of these employment conditions but only names them, it was furthermore unclear what level of protection Article 3(1) allowed under these conditions: only minimum protection, or also higher levels of protection?

Even though it was assumed that the list in Article 3(1) was non-exhaustive,[69] the Court made it unequivocally clear in *Laval* that it was an exhaustive list of terms and conditions, meaning that Member States could not go beyond the set of employment conditions in Article 3(1).[70] The Court furthermore clarified that the level of protection under Article 3(1) could only be *minimum* protection.[71] Some commentators such as Dolvik and Visser nevertheless presumed that host Member States were free to apply higher levels of protection than the bare minimum on the basis of Article 3(7).[72] That Article namely provides that Article 3(1) of the Directive does not prevent the application of more favourable terms and conditions of employment to posted workers.[73] The Court interpreted that exception restrictively, however, ruling that only home Member States could use Article 3(7) in case they provided better protection than the host Member State would.[74] If Article 3(7) could be used by host Member States, the Court clarified, it would deprive the Directive of its effectiveness.[75]

Furthermore, even though Article 3(10) seems an exception to Article 3(1) as it provides that Member States may apply terms and conditions in the case of public policy provisions other than those provided for in Article 3(1),[76] the Court also read Article 3(10) restrictively in *Commission v Luxembourg*.[77] There, the Court clarified that the exception could only be invoked whenever it pursued an imperative requirement in the public interest,[78] and that 'public policy (...) may be relied on only if there is a sufficiently serious threat to a fundamental interest of society.'[79] Barnard hence concludes that the Court ruled the exception provided for in Article 3(10) 'almost out of existence'.[80]

The Court's interpretation of the abovementioned Articles shows how the minimum protection the Directive provided for simultaneously had become the maximum as well. Member States could not add any other employment conditions to the exhaustive list in Article 3(1), while Article 3(10) as an

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[69] Dolvik and Visser (n 6), 497.
[70] *Laval* (n 60) paras 74-76. Emphasised in Case C-319/06 *Commission v Luxembourg* [2008] ECR I-4323, para 26.
[71] *Laval* (n 60) paras 60, 67-77.
[72] Dolvik and Visser (n 6), 501.
[73] Posted Workers Directive (n 4) art 3(7).
[74] *Laval* (n 60) para 80. See also *Ruffert* (n 61) paras 33-35.
[75] Ibid.
[76] Posted Workers Directive (n 4) art 3(10).
[77] *Commission v Luxembourg* (n 70).
[78] Ibid paras 32-33.
[79] Ibid para 50.
[80] Catherine Barnard, 'The UK and Posted Workers: The Effect of Commission v Luxembourg on the Territorial Application of British Labour Law: Case C-319/06 *Commission v Luxembourg*, Judgment 19 June 2008' (2009) 38 Industrial Law Journal 122, 129.

ostensible exception thereto was interpreted narrowly. The level of protection that Member States could give under Article 3(1) was moreover only the minimum, while the apparent exception thereto was again interpreted restrictively, as only home Member States could employ the favourability exception in Article 3(7). This again reinforces the view that the Directive is interpreted primarily as an internal market instrument and much less so as a social policy measure.

2.2.4 Article 3(1)(c): the composition of 'minimum rates of pay'

A fourth issue in the Directive concerns the interpretation of the term 'minimum rates of pay' as one of the terms and conditions of employment listed in Article 3(1)(c). Member States themselves determine the precise content of these employment requirements, provided that they provide minimum protection only. The Court had already specified in *Laval* that 'minimum rates of pay' must be read as 'minimum wages'.[81] It remained unclear, however, what elements of remuneration could be included in the concept. This is particularly important for the sake of worker protection: the more elements of remuneration it includes, the more it supports equal pay for equal work at the same place. The less elements, however, the bigger the gaps in pay between local and posted workers, and the more opportunities for service providers to compete on the basis of differences in labour costs.

In *Commission v Germany* and *Isbir,* the Court interpreted the concept 'minimum rates of pay' narrowly, ruling that certain elements of pay could not be included.[82] Citing *Laval*, the Court repeated that it was up to the Member States to define the constituent elements of minimum wages in the absence of a clear definition in the Directive itself, provided that this would not impede the free movement of services.[83] It then considered elements such as allowances and supplements to fall outside the notion of minimum wages, because these were deemed to alter the relationship between the service provided by the posted worker and the pay received in return.[84] The Court therefore considered that certain elements of minimum wages in host Member States fell outside the scope of 'minimum rates of pay'. That way, the Court further decreased the Directive's effectiveness as a social policy instrument, while reinforcing the possibilities for service providers to compete on the basis of labour costs.

The Court has however given a more broad interpretation to the concept 'minimum rates of pay' in the recent *Sähköalojen ammattiliitto* case, in which it allowed Member States to include elements of remuneration such as basic hourly pay according to pay groups, a grant of holiday

[81] *Laval* (n 60) para 70.

[82] Case C-341/02 *Commission v Germany* [2005] ECR I-2733, para 39; Case C-522/12 *Tevfik Isbir v DB Services GmbH* [2013] ECLI:EU:C:2013:711, para 38.

[83] *Isbir* (n 82) para 37.

[84] *Commission v Germany* (n 82) para 39; *Isbir* (n 82) para 38.

allowance, a daily allowance and travelling time compensation.[85] Contrary to the Court's older case law, the *Sähköalojen ammattiliitto* ruling shows 'great consideration for the social dimension of the issue', as Pecinovsky writes.[86] Whereas it is too early to see this case as an evolution of the Court's case law, he notes, it does give 'hope to those who thought that the Court would stop at nothing to safeguard the economic freedoms when they were obstructed by collective actions or protective social measures.'[87] The next chapter shows how the Commission has used this ruling in its proposal to strengthen the Directive's social purpose.

2.2.5 Article 3(8): the use of collective agreements

A fifth issue concerns the restrictive interpretation of the types of collective agreements that can be used pursuant to Article 3(8) to lay down the minimum employment conditions provided for in Article 3(1). Article 3(1) provides that these requirements can be laid down in law or in collective agreements declared universally applicable. In case a Member State does not have a system of declaring collective agreements universally applicable, Article 3(8) provides that generally applicable collective agreements or collective agreements concluded by the most representative organisations at national level may also be used. Because collective agreements grant workers better working conditions than minimum conditions laid down in legislation, the use of different forms of collective agreements is an important source of granting posted workers better protection under the Directive.

The Court, however, interpreted the situations and the way in which collective agreements pursuant to Article 3(8) could be used narrowly. In *Laval*, the Court ruled that Sweden could not rely on certain collective agreements pursuant to Article 3(8) because it had not attempted to use that Article.[88] Implicit from this reasoning, according to Evju, is that a Member State must have explicitly mentioned Article 3(8) in its legislation implementing the Directive to use that provision.[89] The result, he observes, is that norm-setting by collective bargaining is unacceptable without explicit Member State regulation. In *Rüffert*, the Court furthermore ruled that the collective agreement in question could not fall under Article 3(8), because it was not declared universally applicable, only applied to public procurement and not to private contracts, and contained wages that went beyond the standards of a federal collective agreement that was declared universally applicable.[90] It also ruled that a Member State could only rely on Article 3(8) to use a collective agreement if it did not have a system of

[85] Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* [2015] ECLI:EU:C:2015:86; A G Veldman, 'Het minimumloonbegrip in de Detacheringsrichtlijn – ruimte voor sociale bescherming' (2015) 10 Nederlands Tijdschrift voor Europees Recht 328, 330.

[86] P Pecinovsky, 'Evolutions in the Social Case Law of the Court of Justice: The Follow-Up Cases of the *Laval* Quartet: *ESA* and *RegioPost*' (2016) 7 European Labour Law Journal 294, 305.

[87] Ibid 308.

[88] *Laval* (n 60) para 67.

[89] Evju (n 35) 175.

[90] *Rüffert* (n 61) paras 26, 30 and 31.

declaring collective agreements universally applicable.[91] This implies that the use of these different systems are mutually exclusive, which denies Member States the possibility to use different collective agreement systems. This restrictive reading of Article 3(8) thus again narrowed the possibilities to apply more favourable employment conditions to posted workers through collective agreements.

2.2.6 Public procurement and subcontracting chains

A last issue concerns the question to what extent Member States can enforce the labour standards enshrined in Article 3(1) through public procurement, in particular to ensure that also posted workers in subcontracting chains receive the minimum protection the Directive has to offer.[92] Member States can use public procurement to pursue multiple objectives, including social ones, as Article 70 of the Public Procurement Directive provides.[93] Because the Directive currently does not address what pay a worker in a subcontracting chain is entitled to, who are therefore in a particularly vulnerable position, Member States may choose to employ public procurement law to ensure that they nevertheless receive the minimum protection the Directive provides for.

Prior to the entry into force of the Public Procurement Directive and its predecessor,[94] however, the *Rüffert* judgment had created considerable uncertainty about the role of public procurement in pursuing such social objectives. There, the Court considered a German law requiring contractors carrying out a public contract to pay their own workers and those in subcontracting chains the minimum wage laid down in a collective agreement unlawful, because the collective agreement was not declared universally applicable. The precise scope of the *Rüffert* judgment remained unclear, as Kaupa writes: could Member States employ public procurement to pursue social policy objectives at all?[95]

In the recent *RegioPost* ruling, the Court confirmed that that is indeed possible, provided that the procurement law in question is conform Articles 3(1) and 3(8) of the Directive.[96] The *RegioPost* case is similar to *Rüffert*, except that in *RegioPost* the obligation for a contractor to pay a certain minimum wage to its own workers and those in subcontracting chains was laid down in a regional law, and not in a collective agreement, as was the case in *Rüffert*. The Court accepted the regional law as falling within the scope of Article 70 of the Public Procurement Directive[97] which allows for an

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[91] Ibid para 27.

[92] The Impact Assessment clarifies that subcontracting entails the practice whereby a principal contractor externalises single expertises to other undertakings or self-employed workers, see Impact Assessment (n 1) 14.

[93] Directive 2014/24/EC of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65, art 70.

[94] Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, pubic supply contracts and public service contracts [2004] OJ L134/114.

[95] Clemens Kaupa, 'Public Procurement, Social Policy and Minimum Wage Regulation for posted Workers: Towards a more Balanced Socio-Economic Integration Process?' (2016) 1 European Papers 127, 131.

[96] Ibid 138.

[97] Art 26 under the 2004 Public Procurement Directive (n 94), which is now art 70 under the 2014 Public Procurement Directive (n 93).

obligation to pay a certain minimum wage in public contracts.[98] Most importantly, the Court deemed it irrelevant that the obligation only applied to public contracts and not to private ones.[99] Kaupa finds that outcome unsurprising: after all, Article 70 of the Public Procurement Directive would become useless and unjustifiable if public procurement conditions needed to apply to both public and private contracts, since they apply to public contracts only by their very nature.[100]

RegioPost therefore confirms that Member States may employ public procurement law to oblige a contractor to pay its own workers and those in subcontracting chains a particular minimum wage. The precise scope and impact of the *RegioPost* remains unclear, however, in particular because the Court extensively distinguished it from *Rüffert* in its judgment.[101] Whereas it thus remains disputable to what extent *RegioPost* overrules *Rüffert*,[102] the 'permissive signal to Member States and their courts is a strong one', as Garben writes.[103] The next chapter will show that the Commission has also picked up this signal, which has built upon the *RegioPost* ruling in its proposal for revision to ensure that Member States can strengthen the protection of posted workers in subcontracting chains through public procurement law.

2.3 The right to collective action and the economic freedom to provide services: *Laval*

The preceding sections have shown how the Court's narrow interpretation of the Directive has limited the scope for Member State action to strengthen the Directive's social aim to protect workers. In addition, the Court has also restricted the possibilities of trade unions to improve the situation of workers through collective action by reading the exercise of that right restrictively, most notably in *Laval*.[104] The case concerned a Latvian construction company which posted 35 Latvian workers to Sweden to carry out a contract there. There is no law in Sweden on minimum wages, nor does it have a system of declaring collective agreements universally applicable. Instead, wages and labour standards are set by means of enterprise-level collective bargaining. In *Laval,* the local trade union responsible for these negotiations failed to conclude the negotiations with the Latvian construction company about the labour standards applicable to the Latvian posted workers. In response, the trade union initiated blockades of the company's construction sites. The Latvian company challenged these

[98] Case C-115/14 *RegioPost GmbH & Co. KG v Stadt Landau* [2015] ECLI:EU:C:2015:566, para 64.
[99] Ibid paras 64-65.
[100] Kaupa (n 95) 136.
[101] *RegioPost* (n 98) paras 62-69.
[102] See for example M Kullmann, 'Openbare aanbesteding en het toepassen van het wettelijk minimumloon: Rüffert overruled?' (2016) 19 Tijdschrift Recht en Arbeid; M J M M Essers, 'Arrest Regiopost en sociale voorwaarden bij overheidsaanbestedingen' (2016) 5 Nederlands Tijdschrift voor Europees Recht.
[103] Sasha Garben, 'The Constitutional (Im)balance between 'the Market' and 'the Social' in the European Union' (2017) 13 European Constitutional Law Review 23, 40.
[104] *Laval's* sibling judgment is *Viking*, which concerned the freedom to establishment. The overall outcome is the same as in Laval, namely that the Court settled the conflict between the economic freedom at stake and the fundamental social right in favour of the former. Viking did not concern posted workers, however, and as such will not be examined in detail. See Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP, OU Viking Line Eesti* [2007] ECR I-10779.

strikes on the basis that they infringed its freedom to provide services. The Court was hence asked to reconcile the right to strike with the economic freedom to provide services.

The Court settled that conflict between these two principles in favour of the economic freedom at stake. It first determined that the provisions on the free movement of services could have horizontal direct effect on trade unions and thus applied in the case at hand.[105] It then held that the trade union's strikes were a restriction to the company's freedom to provide services under Article 56 TFEU, because they were liable to render the company's performance of its service more difficult.[106] The Court therefore needed to assess whether these restrictions could be justified. Although it accepted that worker protection against social dumping could in principle constitute a legitimate aim, it rejected its use in this particular case because the Directive in principle already safeguarded worker protection.[107] Since the demands of the trade union went further than this minimum protection, the trade union could therefore not rely on that objective as a legitimate aim to justify the restriction.[108] In absence of a legitimate aim, the Court did not have to assess the proportionality criteria.

It is in particular the unusually insensitive and strict application of the justification test that has limited the trade unions' exercise of the right to collective action and to strike. First, to establish whether the restrictions pursued a legitimate aim, the Court did not accept the mere exercise of the right to strike as a self-sufficient legitimate aim. Instead, it was the *aim* of the strike that rendered it legitimate or not.[109] This differs strikingly from the *Schmidberger* and *Omega Spielhallen* cases, in which the Court accepted the fundamental right at stake as a self-sufficient legitimate aim, the aim of that right's exercise being irrelevant to determine its legitimacy.[110] In *Laval*, to the contrary, the Court did not treat the fundamental right to strike as a self-sufficient ground for justification, but considered that 'the right to take collective action *for the protection of the workers of the host State against possible social dumping*' (emphasis added) could constitute a legitimate aim.[111]

Second, the Court also failed to give a margin of discretion to the trade unions in striking a balance between the fundamental right to collective action and the economic freedom to provide services.[112] Whereas the Court gave the Member States that wide margin of discretion in

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[105] *Laval* (n 60) paras 97-98.
[106] Ibid paras 99-100.
[107] Ibid para 108.
[108] Ibid.
[109] A C L Davies, 'One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ' (2008) 37 Industrial Law Journal 126, 141.
[110] Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659, para 74; Case C-36/02 *Omega Spielhallen – und Automatenaufstellungs-GmbH v Overbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, para 35.
[111] *Laval* (n 60) para 103.
[112] Loic Azoulai 'The Court of Justice and the Social Market Economy: The emergence of an ideal and the conditions for its realization' (2008) 45 Common Market Law Review 1335, 1350-1351; J Malmberg and T Sigeman, 'Industrial Actions and EU Economic Freedoms: the autonomous collective bargaining model curtailed by the European Court of Justice' (2008) 45 Common Market Law Review 1115, 1130; Barnard, '*Viking* and *Laval*: an Introduction' (n 59) 486.

Schmidberger and *Omega Spielhallen*, Malmberg and Sigeman observe that it was virtually non-existent in *Laval*.[113] Azoulai therefore notes that the Court does subject trade unions to the limits pertaining to the economic freedoms that Member States also need to respect, such as proportionality and judicial review, but that it does not accord trade unions the discretion to define and protect the social objectives that Member States do have.[114] He concludes that the Court 'refuses to consider the system of social relations as a "constitutional order" enjoying the capacity of self-determination.'[115]

According to Davies, it is likely that the Court's approach to *Laval* on the one hand and *Schmidberger* and *Omega Spielhallen* on the other differs because *Laval* concerned a dispute between private parties.[116] Given this difference, Van Hoek and Houwerzijl observe that this implies that the Court does not treat the conflicting fundamental right to strike and the freedom to provide services equally in private disputes, as opposed to vertical disputes that involve Member States.[117] They also note that this means that Member States can try to prevent wage competition more easily than trade unions, who are to a large extent set offside.[118]

The Court's far-reaching restrictions on the exercise of the right to collective action and to strike against competition on the basis of labour costs and unequal treatment of posted workers thus limit the possibilities of trade unions to improve matters for workers by narrowing their possibilities to take collective action. This has also consolidated the competitive advantage service providers from low wage countries enjoy in posting.[119] What follows in particular from the Court's ruling, as Van Hoek and Houwerzijl note, is that the Court deems competition on the basis of differences in wages and labour standards fair, as long as the minimum protection provided for by the Directive is respected and guaranteed.[120] Under the Directive as it stands today, however, this also means that the Court approves practices where posted workers receive much less pay than their local counterparts, and where local workforces are displaced by posted colleagues, which in the end exerts downward pressures on labour standards.

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[113] Malmberg and Sigeman (n 112) 1130.
[114] Azoulai (n 112) 1350.
[115] Ibid.
[116] Davies, 'One Step Forward, Two Steps Back?' (n 109) 142.
[117] A A H Van Hoek and M S Houwerzijl, 'Loonconcurrentie als motor van de interne markt? Een tweeluik – Deel 1: De arresten *Viking, Laval* en *Rüffert*, verdragsaspecten' (2008) 7/8 Nederlands Tijdschrift voor Europees Recht 190, 204-205.
[118] Ibid 202. See also Evju (n 35) 177.
[119] Dolvik and Visser (n 6) 503.
[120] Van Hoek and Houwerzijl (n 117) 201.

2.4 Interim conclusion

This chapter has shown that the Directive is primarily an internal market instrument and that its effectiveness as a social policy instrument has been curbed:

- The single legal basis of the Directive in the chapter on the free movement of services implies a hierarchical relationship between the Directive's economic and social purposes, with a primary role for its economic objective and only a secondary and subordinate role for its social purpose to protect workers;
- In the absence of a specific time limit to the temporary nature of posting, service provides can ensure that their workers are deemed posted and not migrant workers more easily, which works to the detriment of the workers and their employment rights;
- The Court's narrow interpretation of Articles 3(1), 3(7) and 3(10) shows how the minimum protection the Directive offers is simultaneously the maximum protection Member States can give, which shows the limited opportunities for Member States to enhance worker protection beyond the bare minimum under the Directive;
- The strict reading of Article 3(8) limits the use of collective agreements to ensure better employment conditions to posted workers;
- In light of the conflict between the free movement of services and the fundamental right to collective action, the Court has limited trade unions' opportunities to improve worker's situations by taking a narrow view to the exercise of the right to collective action.

The Court has however also addressed and improved two of the issues described above in recent rulings:

- It has given a wider interpretation of the notion 'minimum rates of pay' in *Sähköalojen ammattiliitto*, which significantly reduces the gap in pay between posted and local workers;
- It acknowledges the role of public procurement in ensuring the rights of posted workers in *RegioPost*, and in particular those in subcontracting chains.

Whether the Commission's proposal for revision of the Directive addresses the legal issues discussed in this chapter and whether it will strengthen the Directive's social dimension will be analysed in the next chapter.

3. The Commission's proposal for revision of the Posted Workers Directive

3.1 Introduction

The previous chapter has shown that the Directive is currently interpreted and used primarily as an internal market instrument while its effectiveness as a social protection measure is limited. In response to the growing concerns about the social effects of the Directive on worker rights and about downwards pressures on labour standards, the Commission published a proposal for revision of the Directive on 8 March 2016.[121] This proposal pursues multiple objectives, according to the Commission, as it not only aims to create a level playing field and to clarify the rules applicable to posting, but also aims to 'facilitate the posting of workers within a climate of (...) respect for the rights of [posted] workers'.[122]

This chapter analyses to what extent the Commission's proposal for revision will strengthen the Directive's social dimension. The first section discusses the impact of the five main proposed changes to the Directive's legal framework on its social purpose. The next section then shows which issues have remained unaddressed and recommends what the Commission could have done to address these in a way that could have further enhanced the Directive's social dimension. It ends with an overall conclusion.

3.2 Analysis of the Commission's proposed changes

3.2.1 'Remuneration' replaces 'minimum rates of pay' in Article 3(1)(c)

The first change the Commission has put forward in its proposal for revision is to replace the word 'minimum rates of pay' in Article 3(1)(c) with 'remuneration'.[123] Pursuant to Article 3(1) of the proposal, remuneration is defined as 'the elements of remuneration rendered mandatory by national law, regulation or administrative provision, collective agreements or arbitration awards which have been declared universally applicable' or by other collective agreements within the meaning of Article 3(8). According to the Impact Assessment accompanying the Commission's proposal for revision, the change serves to create a level playing field and to reduce wage differences between local and posted workers.[124]

Replacing 'minimum rates of pay' with 'remuneration' would strengthen the Directive's social dimension significantly. Building upon the Court's *Sähköalojen ammattiliitto* judgment as discussed

[121] European Commission, 'Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (Proposal for Revision of the Posted Workers Directive)' COM (2016) 128 final.

[122] European Commission Press Release, 'Commission presents reform of the Posting of Workers -Directive – towards a deeper and fairer European labour market' (Strasbourg, 8 March 2016) http://europa.eu/rapid/press-release_IP-16-466_en.htm accessed 7 June 2017.

[123] Proposal for Revision of the Posted Workers Directive (n 121) art 1(2)(a).

[124] Impact Assessment (n 1) 10, 13.

above,[125] the Impact Assessment clarifies that 'remuneration' encompasses all elements of remuneration paid to local workers when these are laid down in law or in collective agreements declared universally applicable.[126] This implies that employers must give posted workers the same advantages that local workers are also entitled to, including holiday allowances, daily flat-rate allowances and compensation for travelling time. It would furthermore recognize different pay level groups in which a posted worker may fall, and might also include seniority allowances, allowances for dirty work or 13th or 14th month bonuses.[127] This would give social partners some discretion in bargaining over these constituent elements of pay, as Zahn notes.[128] The change would strengthen the Directive's social dimension significantly: the more constituent elements fall within the notion of 'remuneration', the more it reduces differences in labour costs between posted and local workers.

There are some issues, however, that might weaken the social impact of this proposed change. As a study for the Employment and Social Affairs Committee of the European Parliament recognizes, it for example remains somewhat unclear which elements can be included in the notion exactly.[129] What is worrying, in light thereof, is that the proposal removes the reference in Article 3(1) from the Directive itself that the concept is defined by the Member States themselves. The Member States' competence to set rules on remuneration is instead recognized in recital 12 of the proposal's preamble, which also provides that these rules must be justified by the need to protect posted workers and that they cannot disproportionately limit the free movement of services.[130] So what exactly can be included as constituent elements? Whereas the abovementioned elements were explicitly mentioned in the Impact Assessment, it is for example questionable whether elements such as maternity pay, unfair dismissal compensation, sick pay or redundancy pay can also be included, as Verschueren notes.[131] It is therefore likely that the Court will have to clarify that term in its future case law.[132] But instead of leaving the matter 'in the hands of sometimes unpredictable and volatile case law' of the Court, as

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[125] See section 2.2.4 at page 18.

[126] Impact Assessment (n 1) 23.

[127] Impact Assessment (n 1) 22, 24. See also *Sähköalojen ammattiliitto* (n 85).

[128] Rebecca Zahn, 'Revision of the Posted Workers' Directive: Equality at Last?' (2016) 5 European Legal Studies on-line papers 1, 13.

[129] E Voss, M Faioli, J Lhernould and F Iudicone, 'Posting of Workers Directive - current situation and challenges' (Study for the European Parliament Committee on Employment and Social Affairs, European Parliament 2016) 64 http://www.europarl.europa.eu/RegData/etudes/STUD/2016/579001/IPOL_STU(2016)579001_EN.pdf accessed 26 May 2017.

[130] Proposal for Revision of the Posted Workers Directive (n 121) recital 12.

[131] Herwig Verschueren, 'The Revision of the Posting of Workers Directive: protectionism or combating social dumping?' (Presentation at the Ius Commune Congress, 2016) dia 22 http://www.iuscommune.eu/html/activities/2016/2016-11-24/workshop_6_Verschueren.pdf accessed 27 May 2017.

[132] European Trade Union Confederation, 'ETUC Revision of the Posting of Workers Directive: ETUC assessment for further consultation – Orientation paper' (2016) 2 http://www.effat.org/sites/default/files/events/14141/en-05h-etuc_revision_of_the_posting_of_workers_directive.pdf accessed 27 May 2017.

Garben notes,[133] it would have been better if the proposal itself had been more specific about the exact definition of the notion 'remuneration'.

A second issue is that despite this proposed change total costs between posted and local workers will continue to differ. That is first of all because employers still need to pay social charges and taxes under the home Member State rules, as the Dutch Christian National Trade Union (hereinafter CNV) notes.[134] Because these costs greatly differ between Member States, total costs of posted and local workers will continue to differ. There will therefore still be room for undertakings to compete on the basis of labour costs only. A third issue, moreover, is that the actual effect of this change to a large extent depends on whether de facto collective agreements are recognized under Article 3(8) of the Directive. If they are not, this means that the remuneration available to posted workers will be determined on the basis of minimum protection laid down in law only. That way, local workers may enjoy higher protection under de facto collective agreements while posted workers may not. As will be discussed in section 3.3.3, that is likely to occur, given that the proposal does not address the current narrow approach to the use of collective agreements pursuant to Article 3(8).

Despite these issues, the Commission's proposal to replace 'minimum rates of pay' with 'remuneration' will certainly add more weight to the Directive's social purpose by decreasing the costs differences between local and posted workers, nearing the promise for 'equal for equal work at the same place'.[135] After all, the more pay between local and posted workers is levelled, the less opportunities it gives to service providers to compete on the basis of differences in labour costs.

3.2.2 Temporariness of posting: a 24-month time limit

The second change the Commission has proposed for the revision of the Directive is a 24 month time-limit to posting.[136] Article 2bis paragraph 1 of the proposal provides that the host Member State becomes the country where a worker is habitually working when that worker has been posted there for more than 24 months. Pursuant to the Rome I Regulation, this time limit means that a posted worker will fall entirely under the labour law system of the host Member State (i.e. is entitled to equal treatment) in case he or she has been posted there for more than two years.[137] Recital 8 of the proposal furthermore clarifies that the equal treatment starts from day one of the posting when this is *anticipated* to take more than 24 months, whereas the equal treatment only starts after the 24 month period when exceeding the time limit was *un*anticipated.[138] Paragraph 2 furthermore specifies that the

[133] Garben (n 103) 40.
[134] Christelijke Nederlandse Vakbond, 'Standpunt van het CNV over de Detacheringsrichtlijn' (2016) 3 https://www.cnv.nl/fileadmin/user_upload/publieksversie_herziening_Detacheringsrichtlijn.pdf accessed 1 June 2017.
[135] 'The 'Europe Speech' given by President Jean-Claude Juncker at the Konrad Adenauer Foundation' (n 12).
[136] Proposal for Revision of the Posted Workers Directive (n 121) art 1(1).
[137] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/06, art 8(2).
[138] Proposal for Revision of the Posted Workers Directive (n 121) recital 8.

cumulative duration of posting is taken into account to determine the total duration of posting when a posted worker is replaced by another who performs the same task, although this rule applies only to workers that have been posted for at least six months.

The Impact Assessment notes that the time limit first of all aims to bring the Directive in line with the Regulation on the coordination of social security systems to clarify the applicable rules.[139] That Regulation namely provides that a posted worker is not integrated into the social security system of the host Member State, unless a period of 24 months is exceeded.[140] The Commission furthermore recognizes that the absence of a time limit has 'adverse consequences on the fairness of competition between posting and local companies' and that 'workers in long-term postings are more exposed to abuses of their working conditions.'[141] The Commission hence also considers that there is a need to address the issue of temporariness for the sake of worker protection.

A first issue with this time limit, however, is that its relevance is questionable. When analysing this change as an attempt to strengthen the Directive's social aim, the unavoidable question arises how often posting exceeding those 24 months actually occurs. Despite lacking data, the Impact Assessment of the Commission provides some answers to this question, which shows that long-term posting represents only a small share of total postings and that posting for longer than 24 months occurs only rarely.[142] It moreover mentions that the average duration of posting in 2014 was 103 days, which is less than 4 months. It therefore concludes that the impact of the 24 months time limit 'would be circumscribed to a limited group of workers.'[143] If the time limit catches only situations that hardly ever occur, it is doubtful how that effectively contributes to worker protection. Quite some stakeholders have therefore argued that the time limit is too long and that it should be limited to 12[144] or 6 months.[145]

A second issue, as CNV and the French Senate point out, is that the time limit can easily be circumvented.[146] The cumulative duration provided for in paragraph 2 of the provision is namely only

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[139] Impact Assessment (n 1) 17.

[140] Regulation (EC) 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166/01.

[141] Impact Assessment (n 1) 16-17.

[142] Ibid 39.

[143] Ibid.

[144] Committee of the Regions, 'The Revision of the Posting of Workers Directive (Opinion)' (120th plenary session, SEDEC-VI/011, 2016) 4-6 http://cor.europa.eu/en/activities/opinions/pages/opinion-factsheet.aspx?OpinionNumber=CDR%202881/2016 accessed 23 June 2017.

[145] E.g. CNV (n 134); European Federation of Building and Woodworkers in E Voss, M Faioli, J Lhernould and F Iudicone, 'Posting of Workers Directive - current situation and challenges' (n 129); European Trade Union Confederation, 'ETUC Revision of the Posting of Workers Directive' (n 132); European Economic and Social Committee, 'Revision of the Posting of Workers Directive' (Opinion SOC/541, 2016) at 4.2.3 http://www.eesc.europa.eu/?i=portal.en.soc-opinions.38855 accessed 2 June 2017.

[146] CNV (n 134) 4; Eric Bocquet (Sénateur), 'Rapport d'information fait au nom de la commission des affaires européennes (1) sur la proposition de révision ciblée de la directive 96/71/CE relative au détachement des

taken into consideration when workers have been posted for at least 6 months.[147] Service providers can hence easily circumvent the rule by posting workers for a little less than 6 months. What could help to prevent this, CNV suggests, is to include that one posting period endures when a posted worker takes over the task of another posted worker within 4 weeks of the former worker being sent back to the home Member State.[148]

A third issue is that service providers can easily use the distinction between the *anticipated* and *unexpected* durations of posting for longer than 24 months to their advantage. Article 2bis namely provides that a posted worker who is *anticipated* to exceed the 24 month time limit is entitled to equal treatment from day one, whereas a posted worker who is not anticipated to but *effectively* exceeds that limit is only entitled thereto from the day the time limit has lapsed. When the duration of posting is unclear, as Laagland points out, employers can easily argue that the exceeded period was unanticipated.[149] In light of these issues, the social impact of the time limit seems limited.

3.2.3 Subcontracting

A third proposal of the Commission is to add a new paragraph on subcontracting, which gives Member States the option to subcontract only to those undertakings which ensure that posted workers in subcontracting chains receive the same remuneration as the contractor's own workers, including remuneration based on company-level agreements.[150] That proposal hence builds upon the *RegioPost* ruling of the Court, in which it recognized that Member States can use public procurement law to enforce the minimum protection of posted workers.[151] The proposed change would certainly increase protection of posted workers in subcontracting chains as it will grant them the same remuneration as their local colleagues.

What makes the paragraph on subcontracting somewhat shaky, however, as the European Economic and Social Committee observes, is that it refers to 'certain terms and conditions of employment covering remuneration.'[152] The unclear scope of that phrase allows for different interpretations, which creates legal uncertainty and ultimately leaves room for the Court in its case law to interpret that provision. That is all the more true considering the 'non-discriminatory and proportionate basis' on which these employment conditions must be guaranteed, according to the proposed change. As noted above, it may be undesirable to leave this interpretation up to the Court's sometimes volatile case law. The Commission's proposal on subcontracting would take away these uncertainties and solidify the better protection for posted workers in the subcontracting chain if this

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travailleurs' (Sénat, Session Ordinaire du 26 mai 2016) 24 https://www.senat.fr/rap/r15-645/r15-6451.pdf accessed 10 June 2017.

[147] Proposal for Revision of the Posted Workers Directive (n 121) art 1(1).

[148] CNV (n 134) 4.

[149] Laagland (n 67) 11.

[150] Proposal for Revision of the Posted Workers Directive (n 121) art 1(2)(b).

[151] See section 2.2.6 at page 19.

[152] European Economic and Social Committee (n 145) at 4.3.4.

specific phrase would have been further specified. The proposed change will nevertheless add some weight to the Directive's social dimension, as it will give Member States the possibility to provide better protection for those workers posted in subcontracting chains through public procurement law.

3.2.4 Equal treatment of temporary agency workers

The fourth proposal of the Commission is to change Article 3(9) on temporary agency workers, so that that Article obliges Member States to treat temporary agency workers from abroad equally as an undertaking's own workers.[153] A temporary agency worker is a specific type of posted worker who is hired out to another undertaking by a temporary employment undertaking. [154] The movement abroad is therefore the very purpose of providing the service, while the temporary agency worker carries out his tasks under the control of the user company.[155] Article 3(9) currently provides Member States the option to give temporary agency workers from abroad the same treatment as the normal workers of an undertaking. That contradicts Article 5 of the Temporary Agency Work Directive, however, which specifies that undertakings are obliged to treat temporary agency workers the same way as if they were recruited by the undertaking itself.[156] Thus, while temporary agency workers from within a Member State itself are entitled to equal treatment pursuant to Article 5 of the Temporary Agency Work Directive, temporary agency workers from abroad are not, pursuant to Article 3(9), unless a Member State has made use of the option to treat them equally too.

While looking promising at first sight the actual impact of this proposed change is rather limited, as it appears rather unnecessary. That is mostly because the biggest receiving Member States of temporary agency workers have already used the option given to them under Article 3(9).[157] Whereas the Impact Assessment mentions that the change would affect a number of Member States that have not used the option so far, it also recognizes that it targets 'only a very limited group of posted workers'.[158] Admittedly, the change does provide much better protection for those few temporary agency workers that would actually benefit from this. But what it mostly does, as the Commission also recognizes, is that it improves consistency between the Posted Workers Directive and the Temporary Agency Work Directive.[159] The overall impact of this change on the Directive's social dimension is thus limited.

[153] Proposal for Revision of the Posted Workers directive (n 121) art 1(2)(c).
[154] Posted Workers Directive (n 4) art 1(3)(c).
[155] Impact Assessment (n 1) 15.
[156] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work [2008] OJ L327/09, art 5.
[157] Impact Assessment (n 1) 26.
[158] Ibid 40.
[159] Ibid 26.

3.2.5 Use of collective agreements declared universally applicable apply to all sectors

The last change to the Directive's legal framework is that the reference to 'the activities referred to in the Annex' is removed from Article 3(1) second indent.[160] Article 3(1) currently provides that the terms and conditions of employment a host Member State wishes to impose on posted workers can be derived from a collective agreement declared universally applicable in the construction sector only. Article 3(10) second indent furthermore provides Member States the option to apply terms and conditions of collective agreements that concern other activities than the construction sector only too.[161] By removing the reference to the Annex, the Commission thus proposes to make the use of collective agreements in all sectors mandatory.

The Impact Assessment shows that this proposed change again will have only a limited effect. Currently, only a few Member States with a system of universally applicable collective agreements have not made use of the option in Article 3(10) to extend the use of universally applicable collective agreements to all sectors.[162] Many other Member States moreover do not have a system of making collective agreements universally applicable, so the change will not affect them anyway. Thus, the Commission concludes that this change will only impact Germany, Ireland, Luxembourg and Cyprus.[163] Whereas extending the use of collective agreements made universally applicable in essence seems to add some weight to the Directive's social purpose, it will ultimately have a minor impact only.

3.2.6 Interim conclusion

This section has shown that the Commission's proposal for revision adds more flesh to the bones of the Directive's social purpose to a certain extent:

- Replacing the concept of 'minimum rates of pay' with 'remuneration' raises high expectations as it nears the 'equal pay for equal work at the same place' principle and reduces competition on the basis of labour costs, albeit that its precise impact remains to be seen as the precise scope of the term is not entirely clear yet;
- The paragraph on subcontracting looks a promising change to make posting more fair in the specific case of subcontracting.

The other proposed changes seem more limited in their impact on the Directive's social dimension:

- The 24-month time limit seems irrelevant as well as easy to circumvent;
- The adaption to Article 3(9) to ensure that temporary agency workers are treated equally will target a small group of temporary agency workers only as net receiving Member States have already used the option under Article 3(9) to ensure their equal treatment;

[160] Proposal for Revision of the Posted Workers Directive (n 121) art 1(3).
[161] Posted Workers Directive (n 4) art 3(10)(2).
[162] Impact Assessment (n 1) 24.
[163] Ibid.

- Also extending the use of collective agreements declared universally applicable to all sectors will have limited impact only, since net receiving Member States again have already used the option to extend the use of collective agreements to other sectors as well.

Overall, the proposal is thus certainly a step forward in the search for a stronger social dimension for posting. The next section will analyse some unaddressed issues which could have added some extra weight to that social purpose.

3.3 Unaddressed issues: suggestions for a stronger social dimension

The preceding section has shown that the Commission's proposal for revision of the Directive will certainly strengthen its social dimension, albeit not very extensively. This section therefore analyses which other issues the Commission could have addressed in its proposal in order to further contribute to the Directive's social purpose.

3.3.1 Balancing the fundamental social right to collective bargaining and the economic freedom to provide service: the saving clause

The issue that is perhaps most loudly absent from the Commission's proposal is the conflict between fundamental social rights and economic freedoms. In this debate, many scholars have turned their attention to the Court in putting forward suggestions how to address and solve this conflict. They for example encouraged the Court to take a human rights approach to the conflict,[164] to remodel the proportionality test[165] or to allow for a greater margin of appreciation.[166] The relevant question here is not what the Court could do, however, but what the legislator could do in the Directive's revision to address the conflict.

Although the Union is not allowed to legislate on the right to strike following Article 153(5) TFEU, the possibility exists to nevertheless address this conflict through so-called 'saving' clauses in secondary legislation.[167] 'Saving' means that a provision expressly excludes fundamental social rights from its scope in situations in which those rights might be affected.[168] The Monti Regulation was the first to include such a clause, which was formulated as follows:

[164] F Dorssemont, 'Values and Objectives' in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 51-53.
[165] Barnard, 'A Proportionate Response to Proportionality' (n 15).
[166] Steve Weatherill, '*Viking* and *Laval*: the internal market perspective' in M Freedland and J Prassl, Viking, Laval *and Beyond* (Hart Publishing 2014).
[167] Lörcher K, 'Social Competences' in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe* (Hart Publishing 2012) 183-184.
[168] Vasiliki Kosta, *Fundamental Rights in EU Internal Market Legislation* (Hart Publishing 2015) 240.

'This Regulation may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike.'[169]

The provision can therefore 'save' something from the application of secondary legislation. It cannot, however, save it from the application of the Treaties, as *Viking* and *Laval* made clear.[170] Ultimately, such saving clauses must thus also be compatible with the Treaty provisions, upon which the Court decides.

So what is the exact value of a saving clause? Most importantly, as Kosta notes, a saving clause provides the legislator the opportunity to send a message to the Court how it should balance economic freedoms and fundamental social rights in case of conflict.[171] She points out that 'the legislator could provide impetus for a higher degree of fundamental rights protection within the internal market than has been witnessed in the cases *Viking* and *Laval*.'[172] The formulation of the saving clause in the Monti Regulation is a good example of that message, which according to Syrpis and Novitz shows great respect for fundamental social rights and for the autonomy of national systems.[173]

A saving clause can also be formulated in a narrower way, however, which weakens that message to the Court. Not only the Posted Workers Enforcement Directive[174] but also the Services Directive contains such a clause. The saving clause in the Services Directive is formulated as follows:

'This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law.'[175]

According to Sypris and Novitz, the only effect of this type of saving clause is that it sends the (redundant) message that it is up to the Court to assess the relationship between economic and social rights, but it hardly gives an indication how the Court should strike a balance between the two.[176] They comment that this is a missed opportunity, as 'the political institutions would at least have provided a

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[169] Regulation (EC) 2679/98 of the Council of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States (Monti Regulation) [1998] OJ L337/08, art 2.
[170] Kosta (n 168) 231.
[171] Kosta (n 168) 234. See also Tonia Novitz, 'EU Labour Law as Human Rights' in Catherine Barnard (ed), *The Cambridge Yearbook of European Legal Studies Volume 9* (Hart Publishing 2007) 369.
[172] Kosta (n 168) 241.
[173] P Syrpis and T Novitz, 'Economic and Social Rights in Conflict: Political and Judicial Approaches to their Reconciliation (2008) 417.
[174] Posted Workers Enforcement Directive (n 14) art 1(2).
[175] Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (Services Directive) [2006] OJ L376/36, art 1(7).
[176] Syrpis and Novitz (n 173) 416.

clear indication to the Court of the weight to be afforded to the various interests at stake, which might be expected to lead the Court to find a way either to exclude trade unions from scrutiny under the free movement provisions of the EC Treaty, or to find that their actions were justifiable and proportionate.'[177]

A strong message to the Court that it should provide for a higher degree of fundamental rights protection thus requires that the saving clause is formulated similar to the one included in the Monti Regulation instead. In light of its potential impact, it is unfortunate and a missed opportunity that the Commission has not proposed to include such a saving clause.

3.3.2 A dual legal basis?

The second and perhaps most tricky issue the Commission left untouched, and which several stakeholders and Member States have addressed in their opinions, is the Directive's legal basis.[178] As explained above, scholars see the Directive's single legal basis in the free movement of services as a confirmation that the Directive is primarily an internal market instrument.[179] Adding a second legal basis in the social policy chapter could therefore emphasise 'that the [Directive] is to be interpreted not only as an internal market tool but also as an instrument for the protection of workers', as the European Trade Union Confederation writes.[180] The most likely candidate for this second legal basis would be Article 153(2) TFEU, which provides for the adoption of directives in the field of inter alia the improvement of the working environment to protect workers' health and safety and working conditions.[181]

The choice of a legal basis leaves little room for experimentation, however, as the Court can annul a legislative act if it has an incorrect legal basis.[182] The Court's case law on the choice of legal basis shows that its correct use depends on objective factors amenable to judicial review, which include the aim and content of an act.[183] If a measure pursues two objectives of which one is predominant and the other merely incidental, it should be based on a single legal basis.[184] A dual legal basis, to the contrary, can only be used in exceptional circumstances 'if (...) the act simultaneously

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[177] Ibid 417-418.

[178] Committee of the Regions, 'Opinion on 'The posting of workers in the framework of the provision of services'' (2013) OJ C17/67; European Economic and Social Committee (n 145) at 5.7; Eric Bocquet (Sénateur) (n 146) 20; Minister Lodewijk Asscher and others, 'Posting of Workers Directive' (Letter to Commissioner Thyssen, 18 June 2016).

[179] See section 2.2.1 at page 14.

[180] European Trade Union Confederation, 'A Revision of the Posting of Workers Directive: Eight proposals for improvement' (Brussels, 2010) 20 https://www.etuc.org/IMG/pdf/final_report_ETUC_expert_group_posting_310510_EN.pdf accessed 2 June 2017.

[181] Art 153(2)(a) and (b) TFEU. It must be noted that Article 153(5) excludes legislation concerning among others pay. Because the Directive does not harmonize the content of pay but only provides that undertakings should pay minimum rates that the Member States have defined themselves, it does not however pose a problem.

[182] The Court can do so under art 263 TFEU.

[183] Case C-300/89 *Commission v Council (Titanium Dioxide)* [1991] ECR I-2867, para 16.

[184] Case C-137/12 *Commission v Council* [2013] ECLI:EU:C:2013:675, para 53.

pursues a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other.'[185] Using a dual legal basis for the Directive would therefore require that the Directive pursues both aims to promote the free movement of services and to protect workers on an equal footing.

It is difficult to say with certainty whether the revised version of the Directive would pursue its economic and social objectives in a non-hierarchical way to justify that dual legal basis. The Commission's proposed revision does not explicitly state which aims it pursues and in which order. Recitals 1-4 of the revision, as the European Parliament's Committee on Legal Affairs (hereinafter the Committee) argues, suggest however that the Directive pursues its social and economic objectives in an non-hierarchical way indeed.[186] Whereas recital 1 and 2 namely emphasise the promotion of the free movement of services, recital 3 explicitly mentions 'social justice and protection'.[187] It is in particular recital 4 that confirms that view, which provides that the revision seeks to assess 'whether the [Directive] still strikes the right balance between the need to promote the freedom to provide services and the need to protect the rights of posted workers.'[188] The Committee argues that 'there is an increased emphasis on the protection of workers' rights' under the Commission's proposed revision which would shift the balance in recital 4 towards worker protection.[189] The Committee therefore concludes that Article 153(2) can indeed be added so as to provide the Directive with a dual legal basis.

The evidence presented that the use of a dual legal basis would be correct is quite thin, however. The analysis of the Commission's proposal in section 3.2 does support the Committee's argument that the proposed revision adds more weight to the Directive's social aim, but it has also shown that the steps forward are somewhat limited in impact on the Directive's social dimension. It is therefore doubtful whether the extra weight the proposal would add to the Directive's social aim is enough to conclude that the revised Directive would pursue its social and economic 'indissociably' and on an entirely equal footing.

It is ultimately the Court that decides whether a dual legal basis would be the correct choice for the revised Directive. Given the Court's guidance that dual legal bases can only exceptionally be used, it is understandable that the Commission took the 'better safe than sorry'-approach to the Directive's legal basis by leaving it as it is right now. Regarding the steps forward the revised Directive would effectuate, as shown in the preceding section, it would be a shame if the Court would annul the Directive after all because of an incorrect choice of legal basis. Thus, although an extra legal

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[185] Case C-178/03 *Commission v Parliament and Council* [2006] ECR I-107, para 44.

[186] European Parliament Committee on Legal Affairs, 'Opinion on the legal basis of the Commission proposal for a Directive concerning the posting of workers (COM(2016)128)' (007 (COD) 2016), 6 http://www.europarl.europa.eu/sides/getDoc.do?type=COMPARL&reference=PE-604.710&format=PDF&language=EN&secondRef=02 accessed 30 June 2017.

[187] Proposal for Revision of the Posted Workers Directive (n 121) recital 1-3.

[188] Ibid recital 4.

[189] European Parliament Committee on Legal Affairs (n 186) 8.

basis would have been a significant step forward, it is understandable that the Commission has left the legal basis untouched for now.

3.3.3 Article 3(8): a more flexible approach to collective agreements

A third issue that has remained unaddressed in the Commission's proposal is the strict approach to the use of collective agreements under Article 3(8). Because the Court interpreted the types of collective agreements to be used rather narrowly, posted workers often do not enjoy better employment conditions laid down in collective agreements because these agreements are not recognized under Article 3(1) or 3(8) of the Directive. This means that for example sectoral, regional and company level collective agreements are currently excluded.[190] That is particularly unfortunate since these types of collective agreements have become more significant over the years, as the French Senate writes.[191]

The Commission's revision could have been an opportunity to allow for more flexibility in recognizing and respecting different industrial systems in the Member States and different types of collective agreements in which terms and conditions of employment may be laid down. The European Parliament has proposed to amend Article 3(8) as follows:

'Member States may also, in accordance with national law and practice and on a non-discriminatory basis, base themselves on collective agreements or arbitration awards which are, as defined by the Member State where the work is carried out, representative in the geographical area, the profession or industry concerned and which offer the most favourable terms and conditions of employment to the worker.'[192]

That way, also other forms of collective agreements which are currently not recognized by the Directive would provide better protection for posted workers.

So while an amendment of Article 3(8) would be of great added value to the Directive's social dimension, the Commission has let this opportunity pass by. What is perhaps most unfortunate about leaving Article 3(8) untouched, is that that also diminishes the impact of the newly introduced concept of 'remuneration' as discussed above in section 3.2.1. Unlike local workers, posted workers will namely miss out on the higher protection collective agreements have to offer over minimum legislation if these are not recognized under the Directive. According to the European Trade Union

[190] European Trade Union Confederation, 'Eight Proposals for Improvement' (n 180) 34.
[191] Eric Bocquet (Sénateur) (n 146) 22.
[192] European Parliament Committee on Employment and Social Affairs, 'Draft European Parliament Legislative Resolution on the proposal for a directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services' (007 (COD) 2016) 15-16 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-582.163+01+DOC+PDF+V0//EN&language=EN accessed 26 May 2017.

Congress, this effectively means that the promise of equal pay for equal work at the same place is 'equal pay that many posted workers will never get.'[193]

3.3.4 Article 3(10): opportunities for public policy considerations

A last issue the Commission could have addressed in its proposal is the Court's narrow interpretation of Article 3(10). That strict interpretation currently makes it almost impossible for Member States to use the exception to add more employment conditions applicable to posted workers to the list in Article 3(1) for the sake of public policy, as was shown section 2.2.3. Van Peijpe however illustrates that in certain circumstances such public policy considerations should be seen as fair restrictions to the freedom of undertakings to provide services. Poor housing conditions are for example not only detrimental to posted workers' well-being, he notes, but it can also cause nuisance and social conflicts in the areas in which the housing is provided for.[194] Under the Court's current interpretation, Member States cannot however use the exception in Article 3(10) to pursue that public policy goal. A more flexible approach to the use of Article 3(10) would therefore enable Member States to pursue these public policies, which would slightly worker protection at the same time as well.

3.3.5 Interim conclusion: recommendations for a stronger social dimension

The first section of this chapter has shown that the Commission's proposed revision of the Directive will add more weight to the Directive's social dimension. In this section, some options have been considered which could have strengthened that dimension even further, but which the Commission has unfortunately failed to address in its proposal. This included the following four recommendations:

- A saving clause on the fundamental rights and fundamental freedoms conflict similar to the saving clause in the Monti Regulation could have sent a strong message to the Court to resolve that conflict in a more social-friendly manner;
- Adding a second legal basis in the social policy field (Article 153(2) TFEU) could have functioned as a guiding principle in the interpretation of the Directive that it pursues its economic and social aim in a non-hierarchical manner. In light of the Court's case law on the exceptional use of dual legal bases, this recommendation is however tricky, which makes it understandable that the Commission has left it untouched in its proposed revision. Because of the steps forward the proposal would effectuate, it is recommended to leave the legal basis as it is right now;
- A more flexible approach to the types of collective agreements to be used under the Directive by allowing the use of for example sectoral and company-level agreements could have

[193] European Trade Union Confederation Press Release, 'Posted Workers revision – equal pay for some' (8 March 2016) https://www.etuc.org/press/posted-workers-revision-%E2%80%93-equal-pay-some#.WWCkbYTyjIW accessed 7 June 2017.

[194] Taco van Peijpe, 'Collective Labour law after *Viking, Laval, Rüffert* and *Commission v Luxembourg*' (2009) 25 International Journal of Comparative Labour Law and Industrial Relations 81, 107.

addressed the Court's restrictive interpretation of Article 3(8), so as to ensure that the higher protection these collective agreements provide can actually be extended to posted workers;

- Article 3(10) could have been amended so as to allow for a bit more room for manoeuvre for Member States to use the exception more frequently.

3.4 Conclusion: how high are the hopes, how empty the promises?

This chapter has sought to answer the question to what extent the Commission's proposal for revision of the Directive will strengthen its social dimension to protect workers. The first section has shown that in particular the proposed changes to replace 'minimum rates of pay' with 'remuneration' and to include a paragraph on subcontracting will definitely be steps forward in giving the Directive a stronger social dimension. It is therefore not an empty promise, as it raises some hopes for a more social face for posting. The Commission has nonetheless left some issues untouched which could have further strengthened the Directive's social purpose. Given the limited steps forward that the proposal will effectuate, this is unfortunate. While negotiations about the proposal are still ongoing, the recommendations put forward in this chapter could perhaps provide food for thought for future deliberations.

Conclusion: the search for a more social dimension

This thesis has researched to what extent the Commission's proposal for revision of the Posted Workers Directive will strengthen the Directive's social dimension to protect workers. Chapter 1 set the scene for that research by describing the development of the Union's social policy and the ongoing discussion on the Union's social dimension and social deficit, of which the Directive is an eminent example. Chapter 2 then showed how the Directive is currently primarily seen and interpreted as an internal market instrument, whilst its effectiveness as a social policy measure is only limited. This showed, in the words of Barnard, 'the precedence of the economic over the social' in the specific context of posting.[195] Chapter 3 then zoomed into the Commission's proposal for revision of the Directive. It showed that the proposal raises some hopes for a stronger social dimension in posting. But the Commission could have also done more, however, as the recommendations put forward in the second section of that chapter showed. It can therefore be concluded that the Commission's proposal for revision of the Directive strengthens its social dimension to a certain extent, albeit in a limited way only.

That conclusion should not perhaps come as a surprise. Under the current Treaty framework, the Union aspires to be a 'social market economy'.[196] According to Azoulai, the desire behind this is that European integration should not be detrimental to the social systems of the Member States, and that 'economic benefits should not be obtained by sacrificing social benefits'.[197] He also recognizes, however, that that ambition contains an inherent contradiction, since the Union's toolkit to pursue a more social Europe is only limited. As described in chapter 1, this illustrates the disequilibrium between the Union's economic and the social pillars.[198] Bearing that in mind, it is understandable that the economic is likely to take a superior position, also in the specific case of posting.

The conclusion of this thesis compels us to wonder whether this is an undesirable outcome or not. Regarding posting, this thesis has shown that the current legal framework enables competition on the basis of labour costs only, which means that there is no equal pay for equal work guarantee between posted and local workers, and that cheap posted workers might displace local workforces. The adverse consequence is in particular that posting practices puts downward pressure on labour wages and standards in the Union which may

[195] Catherine Barnard, 'Social Dumping or Dumping Socialism?' (2008) 67 Cambridge Law Journal 262, 264.
[196] Consolidated Version of the Treaty on the European Union [2016] OJ C202/13 art 3.
[197] Azoulai (n 112) 1337.
[198] Garben (n 103) 43.

ignite a 'race to the bottom'.[199] The way this has set migrant workers against local workers, Novitz writes, may even lead us to conclude that it 'generated or exacerbated forms of resentment which may have influenced the Brexit vote.'[200] So yes, we should indeed be worried about the social deficit in posting, at the very least because it has played and continues to play an important role in the waning popularity of the European Union. Council negotiations on the Directive's revision however show the great divide between Member States on posting. While some find these outcomes disturbing, others reap the competitive advantages posting provides them. Monti illustrates this strikingly as a 'divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level.'[201]

Putting this debate in its wider context, the question that looms is whether the Union needs a stronger social dimension in general. It is particularly in light of the social impact of the Euro-crisis and of the measures adopted as a response thereto[202] that many scholars do call for that stronger social dimension, for 'resocialising Europe'[203] or for a 'manifesto for Social Europe'.[204] According to Countouris and Freedland, the Union is namely at a crossroad: it can 'either rediscover and embrace a 'social dimension' based upon the promotion of social justice and social progress, as explicitly advocated by Article 3 of the [TEU], or it is destined to grind to a halt and decay.'[205] These calls have not gone unnoticed in the Commission's headquarters. It is not only the revision of the Posted Workers Directive and the European Pillar of Social Rights that prove this, but also a recent reflection paper on the Union's social dimension, which discusses 'how to (...) galvanise Europe's social spirit.'[206] And so, the desire to realize the Union's aspiration to become a 'social market economy' continues. In that search for a stronger social dimension, the revision of the Posted Workers Directive, if adopted as it currently stands, will be a first important step forward.

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[199] Barnard, '50 Years of Social Dumping' (n 5) 312.
[200] Tonia Novitz, 'Collective Bargaining, Equality and Migration: The Journey to and from Brexit' (2017) 46 Industrial Law Journal 109, 129.
[201] Mario Monti, 'A New Strategy for the Single Market' (Report to the President of the European Commission, 9 May 2010) 68.
[202] See Garben (n 103) 44-47.
[203] N Countouris and M Freedland, 'Resocialising Europe - looking back and thinking forward' in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 495.
[204] Ulrich Mückenberger, 'Towards a post-*Viking/Laval* manifesto for Social Europe' in Moreau M (ed), *Before and After the Economic Crisis: What Implications for the 'European Social Model'?* (Edward Elgar Publishing 2011) 247.
[205] Countouris and Freedland (n 203) 493-494.
[206] European Commission, 'Reflection Paper on the Social Dimension of Europe' COM (2017) 206 final, 3.

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