

See discussions, stats, and author profiles for this publication at: <http://www.researchgate.net/publication/47617555>

Appointing Foxes to Guard Henhouses: The European Posted Workers' Directive

ARTICLE · SEPTEMBER 2008

Source: OAI

CITATION

1

READS

89

1 AUTHOR:



[Aravind Ganesh](#)

Max Planck Institute Luxembourg for Interna...

8 PUBLICATIONS 2 CITATIONS

SEE PROFILE

STUDENT NOTE

APPOINTING FOXES TO GUARD HENHOUSES: THE EUROPEAN POSTED WORKERS' DIRECTIVE

Aravind R. Ganesh*

This note addresses certain complications inherent in governance with regards to posted workers, i.e. workers posted on a temporary basis from one Member State of the Union to another, for the provision of services in the host Member State. In particular, this note attempts to explain how the current Directive 96/71/EC (the "Posted Workers' Directive") sets out mechanisms that produce socially inefficient levels of minimum protections for such posted workers that have to be provided by their employers. This note argues that none of the methods by which host Member States may set such levels of minimum protection (namely positive legislation, universally binding collective agreements, and other qualifying collective agreements) allow for real and credible participation by, and representation of, such posted workers, so much so that this is arguably a defining characteristic of the Directive. Whatever response the competent Community institutions may take, a way will have to be found to provide for sufficient outlets for the "voice" of posted workers, in order to achieve socially efficient levels of minimum protection. Finally, this note examines how such outlets for the "voice" of posted workers can be created within the mechanisms envisaged by the draft recommendation of the Commission issued on April 3, 2008.

I.	INTRODUCTION	124
II.	THE LAVAL, RÜFFERT, AND COMMISSION V. LUXEMBURG CASES.....	125
	A. Laval.....	126
	B. Ruffert	127

* LL.B (Hons), King's College, London, 2008; J.D., Columbia Law School, 2008. I would like to thank Professors George Bermann and Olivier de Schutter of Columbia Law School, as well as Mr. and Mrs. Ratnam Ganesh for their continued support, forbearance and Sisyphean patience. Thanks are also due to Ms. Dana Green for having suggested the title, and to the Law Faculty of the National University of Singapore for having extended me the use of their libraries. This note was originally written under the title "Posted Workers and Problems of Governance" for the Seminar on Governance in the European Union led by Professors Charles Sabel and Olivier de Schutter at Columbia Law School in the spring of 2008.

	C. Commission v. Luxemburg.....	128
III.	THE COUNTERVAILING INTERESTS.....	130
	A. Member State Concerns.....	130
	B. Community Concerns.....	131
IV.	THE HEART OF THE MATTER.....	132
V.	THE COMMISSION'S RESPONSE.....	138
	A. The Measures Taken.....	138
	B. Comments about the Commission's response.....	140
VI.	CONCLUSIONS.....	142

I. INTRODUCTION**

The recent *Laval*,¹ *Rüffert*,² and *Commission v. Luxemburg*³ cases before the European Court of Justice concerning Directive 96/71/EC (the “Posted Workers’ Directive”) and the freedom to provide services under Article 49 EC have highlighted the precarious position of posted workers—i.e. workers posted temporarily from one Member State of the Union to another for the provision of services—as well as the general thorniness that is presented by such workers with respect to regulation and governance. These issues arise partly out of conflicts between several important policy considerations and partly out of the legal and political limits on the ability of the Community to regulate employment and social issues.

In this note, I argue that the current mode of Community governance with respect to posted workers, dependent as it is upon a two-way dialogue between management and labor, does not adequately provide for the rights of participation and of representation of posted workers, as neither management nor labor has any real incentive to promote the interests of workers posted temporarily to the territory of another Member State for the purpose of providing services. I argue that the European Court of Justice recognizes this problem, having expressed its skepticism of claims put forward by both Member States and trade unions purporting to be primarily concerned for the welfare of posted workers in its recent case law, but is unable on its own to fashion a system that will create an atmosphere of fair competition by providing outlets for the “voice” of transnationally posted workers. Lastly, I argue that the Commission’s response to the recent case law of the Court, by calling for greater co-operation and exchange of information and best practices by the Member States, is useful, in that it promotes a certain kind of transparency with regards to the requirements posted workers and foreign service providers will be required to comply with in the host Member States, but does not address the root of the problem; i.e. the lack of representation of posted workers and of an outlet for their “voice.”

** The idea for this note was suggested by *ex officio* statements made by Advocate General Miguel Poiares Maduro, sitting as a judge at the European Law Moot Court Competition 2007/2008, held at the Court of Justice of the European Communities in Luxemburg on April 4, 2008.

¹ Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767.

² Case C-346/06, *Rüffert v. Land Niedersachsen*, 2 C.M.L.R. 39 (2008).

³ Case C-319/06, *Comm’n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109 (June 19, 2008).

II. THE LAVAL, RÜFFERT, AND COMMISSION V. LUXEMBURG CASES

Since handing down the *Rush Portuguesa* decision,⁴ the Court has recognized that “Community law does not preclude Member States from extending their legislation, or collective labor agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory”⁵ In doing so, the Court recognized the basic ground rules laid down by the Convention on the Law Applicable to Contractual Obligations of 1980 (hereafter the “Rome Convention”),⁶ which provides in Art. 6(2) that a contract of employment will be governed by the law of the country where the worker habitually carries out her work, even if she is temporarily posted to another country. However, Art. 7 of the Rome Convention provides that effect shall be given to the “mandatory rules” of another country, the host country in particular. For example, if the host country has a valid rule stipulating that no work may be done on Sundays, such a rule will have to be complied with, in the absence of any other factors invalidating such a law. As noted by Advocate General Bot in his opinion in *Rüffert*, the content of these “mandatory rules” was not sketched out by the Rome Convention, leaving the Community to enact the Posted Workers’ Directive in accordance with Art. 20 of the same (providing for the precedence of Community law) in order to designate at Community level some mandatory rules for transnational postings:⁷ i.e. a “nucleus of mandatory rules for minimum protection.”⁸ The Directive thus provides in Art. 3(1)(a)–(g) that Member States must ensure that workers posted to their territories are provided with guaranteed maximum work periods, paid annual holidays, and protective measures with regard to the terms and employment conditions of pregnant women, *inter alia*, such as are stipulated by positive law, or by collective agreements or arbitration awards which have been declared to be universally applicable, i.e. which must be observed by all undertakings in the geographical area *and* in the profession or industry concerned.⁹ For Member States (such as Sweden) which have neither positive minimum wage legislation, nor mechanisms for declaring collective agreements to be universally applicable, Article 3(8) provides for alternatives that the Member States “may, if they so decide, base themselves on.”¹⁰

⁴ Case C-113/89, *Rush Portuguesa v. Office National d’Immigration*, 1990 E.C.R. I-1417.

⁵ *Id.* ¶ 18 (appearing almost to have been included as an afterthought, to assuage French “concerns”). See also Case C-62/81, *Seco v. Etablissement d’assurance contre la vieillesse et l’invalidite*, 1982 E.C.R. 223, ¶ 14; Case C-164/99 *Portugaia Construções Lda*, 2002 E.C.R. I-787, ¶ 21. *But see Laval*, 2007 E.C.R. I-11767, ¶ 57 (noting that the application of national law or collective agreements must be appropriate for the purpose of posted worker protection, and must not go beyond what is necessary in order to meet that aim).

⁶ Convention on the Law Applicable to Contractual Obligations, Oct. 9, 1980, 1980 O.J. (L 266) 1.

⁷ See Opinion of Advocate General Bot, Case C-346/06, *Rüffert v. Land Niedersachsen*, 2007 WL 2726767 (Sept. 20, 2006); Council Directive 96/71, Concerning the Posting of Workers in the Framework of the Provision of Services, recitals 7–13, 1997 O.J. (L 18) 1 (EC) [hereinafter *Posted Workers’ Directive*].

⁸ *Posted Workers’ Directive*, *supra* note 7, recital 13.

⁹ *Id.* art. 3(1)(a)–(g).

¹⁰ *Id.* art. 3(8).

A. *Laval*

The *Laval* case concerned a preliminary reference under Art. 234 EC by the *Arbetsdomstolen* (Swedish Labor Court) in litigation between a Latvian contractor Laval un Partneri Ltd. (“Laval”), and a Swedish trade union. Laval un Partneri Ltd. was carrying out construction work in Vaxholm using Latvian posted workers who were being paid less than the minimum amount stipulated in a collective agreement that had neither been declared universally binding per Art. 3(8) of the Posted Workers’ Directive, nor came under one of the two alternative types of collective agreement listed in the first and second indentations of that Article. The Swedish union took collective action to force Laval into guaranteeing its workers the amount stipulated in the collective agreement, and into acceding to the collective agreement for the building sector. Such accession would have resulted in Laval being required to comply with a slew of obligations, such as making insurance payments, to the trade union. The questions referred to the Court of Justice of the European Communities (ECJ) included, first, whether a collective action taking the form of a blockade was compatible with, on the one hand, the EC Treaty rules on freedom to provide services and the prohibition of nationality discrimination, and on the other hand, the provisions of the Posted Workers Directive.¹¹ The second question referred in *Laval* concerned the Swedish *Lex Britannia*. This rule prohibited collective action by trade unions aimed at setting aside collective agreements already concluded between labor and management. However, this prohibition was generally not applicable to collective action against foreign service providers only temporarily active in Sweden. The ECJ was asked whether the *Lex Britannia* violated Article 49 EC, Article 12 EC, and/or the Posted Workers’ Directive.

The Court held that although Recital 13 of the Preamble to the Posted Workers’ Directive calls for the coordination of Member States’ laws in order to lay down a “nucleus of mandatory rules” for minimum protection of posted workers, the Directive did not intend to harmonize the material content of those mandatory rules. The material content of those rules could be determined freely by the Member States, insofar as those designations fell within the limits imposed by Community law,¹² i.e. they could not operate as obstacles to Community freedoms such as the freedom to provide services. Nevertheless, the Court held that the Swedish system was not in accordance with the Posted Workers’ Directive, because it effectively imposed on foreign service providers a requirement of negotiation on a case-by-case basis at the place of work. This system offended the Posted Workers’ Directive because the sort of wage rate that would be agreed upon out of such negotiations would not in any sense be a *minimum* rate of pay, which was all the Directive allowed Member States to require foreign undertakings to guarantee their workers.¹³ Drawing on the case of *Arblade and Others*,¹⁴ the Court held that the Swedish system also offended Art. 49 EC because it was not only unjustifiable with regard to the objective of the protection of workers, but also because it rendered it excessively difficult for foreign service providers to determine from the outset what obligations

¹¹ *Laval*, 2007 E.C.R. I-11767, ¶ 40.

¹² *Id.* ¶¶ 59–60.

¹³ *Id.* ¶¶ 69–70.

¹⁴ Case C-369/96, *Arblade and Others*, 1999 E.C.R. I-8453, ¶ 43.

they would have to comply with in the host Member State.¹⁵ With regard to the *Lex Britannia*, the Court held that it effectively meant that collective agreements concluded by parties in another Member State would not be afforded the same level of protection from collective action as those agreements concluded within the host Member State. As such, it constituted discrimination contrary to Arts. 49 and 50 EC, not justified by any of the Art. 46 EC derogations under public policy, public security, or public health.¹⁶ In general, a matter that appeared to weigh rather heavily in the minds of the judges was that the collective agreement the trade unions sought to impose on Laval contained many obligations that were either over and above the minimum protections enumerated in Article 3(8) of the Directive, or were more onerous than those imposed by positive Swedish legislation with respect to those minimum protections.

B. Rüffert

The *Rüffert* case concerned the legality of the *Landesvergabegesetz* of Land Niedersachsen which required public authorities, when awarding public contracts to successful tenderers, to require tenderers to agree to pay their workers, and the workers of their sub-contractors, a wage stipulated in a non-universally binding collective agreement, which was merely supplementary to the “TV Mindestlohn” collective agreement that had been declared to be universally binding across the Federal Republic of Germany. Moreover, the *Landesvergabegesetz* provided for penalties for violation of this agreement amounting to fines of one percent of the value of the contract awarded, in addition to termination of the contract.

The Court held that the provisions of the *Landesvergabegesetz* considered in the case were in violation of the Posted Workers’ Directive for two main reasons. Firstly, the use of non-universally-binding collective agreements to determine minimum rates of pay was permitted under the Directive only when the Member State had neither positive minimum wage legislation nor means of declaring collective agreements to be universally binding. The Federal Republic of Germany had in place such mechanisms of declaring collective agreements universally applicable, and as such was precluded from imposing non-universally binding collective agreements upon foreign service providers. Secondly, the Court held that the *Landesvergabegesetz* effectively meant that foreign service providers working on *public* projects would be required to pay their posted workers at the rate stipulated in the Niedersachsen collective agreement, while those working on *private* projects would not be so required. It could legitimately be asked if the pay rate stipulated in the collective agreement was really the bare minimum essential for a decent living standard in Niedersachsen when the law imposed it on only one sector of the profession. Importantly, the Court rejected a reading of Art. 3(7) of the Directive (providing that paragraphs 1–6 of that Article shall not be construed to prevent the application of terms and conditions of employment which are more favorable to workers)¹⁷ as meaning that the Directive only created a floor with regards to minimum protections which Member States were free to exceed. Such a reading was

¹⁵ *Laval*, 2007 E.C.R. I-11767, ¶ 110.

¹⁶ *Id.* ¶ 119.

¹⁷ See also Posted Workers’ Directive, *supra* note 7, recital 17.

impermissible as the Directive had to be read in the light of Article 49 EC, meaning that it could not be construed as authorizing hindrances and obstacles to the freedom to provide services.

C. *Commission v. Luxemburg*

Commission v. Luxemburg was brought as an infringement proceeding under Art. 226 EC. The case concerned the compatibility of the Luxemburg Law of 20 December 2002 with the Posted Workers' Directive, with particular regard to the scope of Member States to impose obligations on foreign service providers that do not derive from the mandatory rules for minimum protection in Article 3(1)(a)–(g) of the Directive, but from national “public policy” needs under Article 3(10) of the Directive.¹⁸

Article 1 of the Luxemburg Law of 20 December 2002 included four “mandatory” provisions that were not contained in Article 3(1) of the Directive, and were therefore derived from domestic public policy reasons.¹⁹ These were: firstly, the requirement of a written employment contract or other document pursuant to Council Directive 91/553/EEC;²⁰ secondly, the requirement of equal treatment part-time and fixed-term workers;²¹ thirdly, the requirement of indexation of wages to the cost of living;²² and fourthly, the requirement of compliance with all laws, regulations, administrative provisions and provisions of universally applicable collective agreements that “concern” collective labor agreements.²³

The Court held that the concept of “public policy” in Community law operates as a justification for derogations from the freedoms afforded by the Treaty, meaning therefore that it cannot be invoked unilaterally by Member States, and that it must be interpreted strictly.²⁴ Applied in the context of the Directive, this implies that Art.

¹⁸ *Id.* art. 3(10). This section of the Posted Workers' Directive provides that the Directive does not preclude the application by Member States to domestic undertakings and “the undertakings of other States” of “terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions,” if Member States are acting in compliance with the Treaty, and if the principle of “equality of treatment” is adhered to.

¹⁹ Other issues that were litigated in the case included the minimum rest periods imposed by Art. 1.1.3 of the Law of 20 December 2002 (Law of 20 December 2002, Memorial A 2002, p. 3722 (Lux.)); the requirement under Art. 7 thereof that foreign service providers furnish basic information to the *Inspection du travail et des mines* (Labor and Mines Inspectorate) to facilitate the monitoring of posted workers, and the requirement of an *ad hoc* agent of the foreign service provider resident in Luxemburg, from whom the Labor and Mines Inspectorate may obtain documents and information. *Id.* art. 8. With respect to the minimum rest periods, the Government of Luxemburg conceded that its regulations concerning that issue were too restrictive and that it had since amended them. *Comm'n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109, ¶¶ 70–71. Regarding the obligations on foreign service providers to furnish the Labor and Mines Inspectorate with information and to retain an *ad hoc* agent in Luxemburg, the Court held that the rules mandating the former were sufficiently vague and unclear as to discourage foreign undertakings from exercising their freedom to provide services, *id.* at ¶ 81, and that regarding the latter, Luxemburg had failed to show that the requirement of a resident agent was necessary in order to make the Inspectorate's work feasible. *Id.* ¶¶ 91–95.

²⁰ Law of 20 December 2002. Art. 1.1.1 says that Council Directive 91/553/EEC was enacted for the purpose of ensuring that employees are given notice of the conditions and terms of their employment.

²¹ *Id.* art. 1.1.8.

²² *Id.* art. 1.1.2.

²³ *Id.* art. 1.1.11.

²⁴ *Comm'n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109, ¶ 30.

3(10) of the Directive must be read as a derogation from the “exhaustive” list of mandatory rules contained in Art. 3(1) of the same,²⁵ and must therefore be interpreted strictly. In addition, by the very terms of Art. 3(10) of the Directive, the fact that Member States are allowed to designate as mandatory protections issues other than those in Art. 3(1) does not mean that they are relieved of the obligation to comply with Treaty provisions, such as Art. 49 EC (on the freedom to provide services).²⁶

Concerning the requirement of written employment contracts, the fact that it derives from Directive 91/553/EEC means that it is a protection already included in the legislation of the posted workers’ home Member States. As such, the Luxemburg legislation simply duplicated the burdens of foreign service providers, without adding to the protection of posted workers.²⁷ Similarly, the requirement of equal treatment of part-time and posted workers was held to be equally superfluous²⁸ and needlessly burdensome, since those obligations were already imposed on foreign service providers in their home Member States through the instrumentality of Directives 97/81/EC and 1999/70/EC.²⁹

With respect to the requirement of automatic indexation of wages to living costs, the Court held that the mischief lay not in Luxemburg’s indexation of *minimum* wages to living costs—Art. 3(1)(c) of the Directive expressly allows this³⁰—but in the indexation of *all* wages to living costs, even those wages that did not fall within the category of minimum wages.³¹ Art. 3(1)(c) had been enacted with a view to ensuring that minimum rates of pay would be in line with domestic living standards within the Member State. The extension of that notion to cover all wage rates would take any such legislation beyond the scope of the Directive. Therefore, such legislation could only be enacted under the Art. 3(10) public policy exception, which, as mentioned above, must be seen as a derogation that is to be interpreted strictly and which is invalid if in contravention of Treaty freedoms. The Court deftly disposed of the question by stating that Luxemburg had adduced no evidence to support its arguments that such legislation was a necessary and proportionate means to achieve the desired goal of promoting good labor relations within Luxemburg by maintaining the purchasing power of workers’ wages.³²

Lastly, with respect to the final issue, the Court analyzed all the possible meanings of Art. 1.1.11 of the Law of 20 December 2002. If it meant that all laws, regulations, administrative provisions and provisions in universally applicable collective agreements concerning the *drawing up* of collective labor agreements were mandatory provisions under Luxemburg law, then it would be clearly

²⁵ *Id.* ¶ 31.

²⁶ *Comm’n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109, ¶ 33.

²⁷ *Id.* ¶¶ 41–43.

²⁸ *Id.* ¶ 60.

²⁹ *See id.* ¶ 56 (describing the connection between the two Directives).

³⁰ Posted Workers’ Directive, *supra* note 7, recital 13, art. 3(1). The final paragraph of Art. 3(1) of the Directive provides that “[f]or the purposes of [the] Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted.”

³¹ *Comm’n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109, ¶¶ 47–48.

³² *Id.* ¶¶ 52–54.

incompatible with the Directive, as there was no reason why the procedural integrity of collective labor agreements should be an imperative issue of public policy, without more.³³ If it meant that the actual provisions of all Luxemburg collective labor agreements were to be mandatory provisions, then Art. 1.1.11 was even more plainly incompatible with the Directive, as the Directive allows that only for collective agreements declared to be universally applicable.³⁴

III. THE COUNTERVAILING INTERESTS

At present, according to estimates by the EU Commission,³⁵ there are within the EU around 1 million posted workers.³⁶ In order to simplify examination of the issues, it will be useful to differentiate the diverse concerns into those operating mainly at the Member State level, and those operating at the Community level. It is of course acknowledged that the two levels of concerns do not separate cleanly, and that they all ultimately call for resolution at the Community level.

A. Member State Concerns

At the Member State level, the influx of posted workers from the new Member States that may result from a liberalization of worker protection rules promises to alleviate the high cost of many primary sector services in the more affluent western European states (such as the construction industry). However, with unemployment levels relatively high at 7.5% in France³⁷ and 9.0% in Germany,³⁸ many of the older and more affluent Member States are wary of the undercutting of national wage levels by cheap labor from outside. Needless to say, the host Member States also have to deal with the public disaffection and political cost that is incurred by increasing numbers of posted workers coming in from the rest of Europe. Furthermore, these Member States have a legitimate interest in ensuring certain minimum standards of pay and working conditions for the workforce in their territory, such as will be congruent to the living standards and quality of life the citizens of those Member States generally expect. The posted workers who enter the host Member States will have to live there for the period of their posting, and these Member States quite legitimately wish to avoid situations where the posted workers have to resort to desperate measures to cope with the sometimes drastically reduced purchasing power of their home-Member-State wages in their host Member States.

Additionally, and more fundamentally, those Member States that play host to the posted workers have well-established and entrenched labor regulatory systems that may be overhauled only with considerable trauma. Linked to this is the

³³ *Id.* ¶ 65.

³⁴ *Id.* ¶ 66.

³⁵ Press Release IP/08/514, European Comm'n, EU Calls for Urgent Action to Improve Working Conditions for 1 Million Posted Workers, (Apr. 3, 2008), (quoting Vladimir Spidla, EU Employment, Social Affairs and Equal Opportunities Commissioner, discussing, "The estimated 1 million posted workers in the EU") [hereinafter EU Calls for Urgent Action].

³⁶ See Posted Workers' Directive, *supra* note 7, art. 2(1),

³⁷ U.S. Dep't of State, *Background Note: France* (2008), <http://www.state.gov/r/pa/ei/bgn/3842.htm> (last visited Dec. 1, 2008) (stating unemployment rate for the first quarter of 2008).

³⁸ U.S. Dep't of State, *Background Note: Germany* (2008), <http://www.state.gov/r/pa/ei/bgn/3997.htm> (last visited Dec. 1, 2008) (stating annualized average for 2007).

preservation of the integrity of the Member States' social welfare systems. At first glance, this last concern may not appear to be the foremost of policy concerns due to the fact that posted workers are in the host Member State only temporarily. However, where periods of "temporary" employment are substantial, such as when the posting is for two years, the host Member State's social welfare and healthcare systems may come under considerable strain. From the point of view of the posted workers' home Member States, it may not be desirable for their skilled workers to emigrate *en masse* to take on even unskilled jobs in more affluent host Member States,³⁹ as this might result in the formation of labor shortages in those home Member States. As a recent issue of *The Economist* notes, "the idea has taken hold across central and eastern Europe that the most pressing crisis is a shortage of people. Every day, newspapers and magazines report plans to ship in Vietnamese textile-workers, Ukrainian road-builders or Moldovan waiters to fill vacancies."⁴⁰

B. Community Concerns

From the Community's perspective, the regulation of posted workers presents a problem for Community integration and internal market development, in that the movement of cheap labor from the less affluent "new" Member States to the more affluent "old" Member States could potentially cause wages across the EU to fall dramatically, at least in the short term, resulting in a "race to the bottom" with respect to wages, especially in primary sector industries. According to Vladimír Špidla, EU Employment, Social Affairs and Equal Opportunities Commissioner, "The estimated 1 million posted workers in the EU play a vital role in addressing labour shortages in the European jobs market. The posting of workers directive aims to benefit service providers and workers alike, but Member States must improve cooperation if we are to effectively protect working conditions and avoid a race towards the lowest minimum rates of pay in the EU as a whole."⁴¹

The specific tool the Community may use to address this problem is Art. 136 EC, which provides the Community with the competence to legislate on social policy, via the Qualified Majority Voting mechanism, and obligates the Community to bring about improved living and working conditions, so as to make possible their harmonization while improvement is being made.⁴²

A second issue, which *Laval* and *Rüffert* made abundantly clear, is that the pursuit of Community integration and internal market development is often at odds with fundamental rights. Both cases involved a clash between fundamental Community freedom to provide services, as enshrined in Art. 49 EC, and the right of

³⁹ Brian Bercusson, *The Trade Union Movement and the European Union: Judgment Day*, 13 EUR. L. J. 279, 307 (2007).

⁴⁰ *The Dark Side of Globalization*, THE ECONOMIST: A SPECIAL REPORT ON EU ENLARGEMENT, May 31, 2008, at 5. The article proceeds to refute the idea of labor shortages as being credible, citing that "[e]mployment rates in Slovakia, Hungary and Poland hover at or below 60% of the working-age population, compared with Denmark's 77%." *Id.* at 7. However, the important point is that such perceptions do exist, and are likely to color the policy choices of these home Member States.

⁴¹ EU Calls for Urgent Action, *supra* note 35.

⁴² See Treaty Establishing the European Community, art. 2, Nov. 10, 1997 O.J. (C 340) 3 [hereinafter EC Treaty], which calls for promotion of "a harmonious, balanced and sustainable development of economic activities" and a "high level of employment and social protection."

collective action, which, according to established Strasbourg jurisprudence,⁴³ is an emanation of freedom of association, protected under Article 11 ECHR. This issue raises important questions about the role of social rights in the EU, and specifically about the historical evolution of the Community from an entity serving purely economic purposes to a quasi-federal polity charged with the protection and promotion of constitutional rights.

IV. THE HEART OF THE MATTER

There is some linkage between the first and second of the Community concerns mentioned in Part III(B), as the vindication of the right of collective action is arguably essential to the achievement of an efficient internal market for labor. “The rationale for free movement is market integration. Market integration is premised on market efficiency. Market efficiency requires collective action by workers and trade unions to ensure their voice is heard and their interests are taken account of.”⁴⁴ The rationale behind the importance of allowing the “voice” of labor to be heard is further developed by Poiares Maduro: “the system requires a set of social rights that can be said to guarantee participation and representation in market decisions and, by internalizing costs which tend to be ignored in those decisions, increase efficiency. These social norms are related to forms of voice and exit in the market Free movement of persons and rights of participation and representation such as the freedom of association, the right to collective bargaining, and the right to collective action should be considered as instrumental to a fully functioning integrated market which can increase efficiency and wealth maximization.”⁴⁵

One fact that might be of some interest is that the Court followed neither of the opinions of Advocates-General Mengozzi and Bot in *Laval*⁴⁶ and *Rüffert*,⁴⁷ which

⁴³ See, e.g., *Schmidt & Dahlström v. Sweden*, 21 Eur. Ct. H.R. (ser. A) (1976).

⁴⁴ Bercusson, *supra* note 39, at 290. The “market integration” rationale was recently affirmed in *Comm’n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109, ¶ 42 (internal citations omitted), where the Court held, that

although Community law does not preclude Member States from applying their legislation or collective labour agreements entered into by both sides of industry to any person who is employed, even temporarily, no matter in which Member State the employer is established . . . such a possibility is subject to the condition that the workers concerned, who are temporarily working in the host Member State, do not already enjoy the same protection, or essentially comparable protections by virtue of obligations to which their employer is already subject in the Member State in which it is established.

The next paragraph provides that the market integration rationale is especially applicable in the context of the freedom to provide services. *See id.* ¶ 43.

⁴⁵ Miguel Poiares Maduro, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, in *THE EU AND HUMAN RIGHTS* 470 (Philip Alston ed., 1999).

⁴⁶ In his opinion in *Laval*, 2007 E.C.R. I-11767, Advocate General Mengozzi concluded that the Swedish system of leaving determination of wages entirely to both sides of industry did not in itself constitute inadequate transposition of the Posted Workers’ Directive. Moreover, he opined that the Posted Workers’ Directive did not preclude any collective action in the form of a blockade and/or solidarity action, aimed at forcing a foreign service provider to guarantee its posted workers a minimum rate of pay in accordance with the terms of a collective agreement which was, for all practical purposes, applied very widely in that particular industry in the host Member State. However, such collective action had to be motivated by a suitable objective in the public interest, such as worker protection, and the combating of social dumping. Furthermore, in considering whether the collective action was proportionate, the national Court had to examine whether the terms and conditions therein really contributed to the social protection

both upheld the legality of the collective action and domestic legal provisions respectively. Two opinions that fared somewhat better were those of Advocate General Trstenjak in *Commission v. Luxemburg*, which was followed by the Court for the most part,⁴⁸ and that of the now Advocate General Poiares Maduro in the *Viking Line* case,⁴⁹ where he rehearsed and built upon his earlier arguments concerning voice and representation.

At ¶¶ 59 and 60 of the opinion in *Viking Line*, Advocate General Poiares Maduro states that

the European economic order is firmly anchored in a social contract: workers throughout Europe must accept the recurring negative consequences that are inherent to the common market's creation of increasing prosperity, in exchange for which society must commit itself to the general improvement of their living and working conditions, and to the provision of economic support to those workers who, as a consequence of market forces, come into difficulties *The right to associate and the right to collective action are essential instruments for workers to express their voice and to make governments and employers live up to their part of the social contract* Accordingly, the rights to associate and to collective action are of a fundamental character within the

of posted workers and did not simply duplicate the protection already afforded them by collective agreements in their home Member State.

⁴⁷ In his opinion in *Rüffert*, 2007 WL 2726767, Advocate General Bot concluded that the *Landesvergabegesetz* was not in violation of the Posted Workers' Directive because that Directive arguably only set a minimum "floor" which Member States were free to exceed, in accordance with Art. 3(7) of the Directive's provision that nothing should prevent the provision of more robust guarantees of minimum protection than those mandated in Art. 3(1). Moreover, he argued the *Landesvergabegesetz* did not violate the freedom to provide services under Article 49, because it was motivated by the objective justification of protecting workers and avoiding social dumping, and was moreover entirely proportionate, as no other less intrusive measure would have been able to achieve a level of parity between local and posted worker's salaries.

⁴⁸ Advocate General Trstenjak, in his opinion of September 13, 2007, provisionally concluded that the Luxemburg legislation was compatible with the Posted Workers' Directive, conditional upon an objective showing by the Luxemburg government that the automatic indexation of *all* wages to living standards worked to the advantage of minimum wage rates (¶ 54):

Sofern das Gesetz vom 20. Dezember 2002 nach objektiven Maßstäben nämlich dahin gehend auszulegen ist, dass eine allgemeine Anpassung der Entlohnung an die Entwicklung der Lebenshaltungskosten stattfindet, die sich gleichfalls zum Vorteil der Mindestlöhne auswirkt, erfüllt Art. 1 Abs. 1 Nr. 2 des Gesetzes vom 20. Dezember 2002 die gemeinschaftsrechtlichen Vorgaben in Art. 3 Abs. 1 Buchst. c der Richtlinie 96/71.

The Court declined to follow Advocate General Trstenjak in this regard, holding instead that only indexation of *minimum* wages to living standards was allowed by the Directive. See *Comm'n v. Luxemburg*, 2008 ECJ EUR-Lex LEXIS 1109, ¶ 47.

⁴⁹ Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union v. Viking Line ABP and OÜ Viking Line Eesti*, 2007 E.C.R. I-10779. Although this case did not concern the Posted Workers' Directive, it remains extremely pertinent to this discussion for the reason that it involved a Finnish trade union that was seeking to prevent a Finnish shipping company from reincorporating in Estonia, in order to take advantage of cheaper labor costs. As such, it involves similar questions of transnational migration, albeit of employers rather than of workers. Although it does not apply directly to posted workers, it is nevertheless important for the purposes of determining the balance between the right to collective action and fundamental Community freedoms.

Community legal order, as the Charter of Fundamental Rights of the European Union reaffirms. *The key question, however, that lies behind the present case, is to what ends collective action may be used and how far it may go.*⁵⁰

At this point, one must note that the Court did not follow Advocate General Poyares Maduro's opinion entirely. First, the Court held inadmissible the question about whether Art. 49 EC was horizontally directly effective against the ITF, the labor representative in the case. Second, and more importantly, the Court did not rule definitively on whether the collective action by the trade unions was motivated by overriding reasons of public interest such as worker protection and thereby objectively justified, but held that that question, as well as the proportionality of the collective action, was a factual matter the national courts had to decide on their own. Nevertheless, there are some indications that Advocate General Maduro's emphasis on "voice" did not leave the Court unmoved. In *Viking*, the Court observed that it was evident from the record that the FOC policy of the ITF required it to

initiate solidarity action against the beneficial owner of a vessel which is registered in a State other than that of which that owner is a national, irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees.⁵¹

In other words, the Court recognized that the ITF's FOC policy was not sensitive to the needs of unique groups of workers, and that such workers had no effect or influence over the ITF's conduct.

This leads us to ask whether the governance model envisaged by the Posted Workers' Directive, which is essentially centered on the concept of the social dialogue,⁵² can cater adequately for the realities of a 25-member EU in the context of the transnational provision of services. The rub in this system with respect to posted workers, is that it is difficult to determine who provides the legitimate "voice" of posted workers. On the facts in the *Laval* case, for example, one would have good reason to mistrust the claims of both the foreign undertakings on the one hand, and of the trade unions and Member State governments⁵³ on the other, purporting to be the voice of the posted workers. The former are clearly in a position of conflict due to their interest in extracting the maximum amount of labor from the posted workers at the minimum price, but the latter are also conflicted due to their interest in

⁵⁰ *Id.* ¶¶ 59–60 (emphasis added).

⁵¹ *Viking*, 2007 E.C.R. I-10779, ¶ 89.

⁵² See *Commission Communication on the European Social Dialogue, a Force for Innovation and Change*, at 6, COM (2002) 341 final (June 26, 2002) ("The social dialogue is rooted in the history of the European continent, and this distinguishes the Union from most other regions of the world."). Moreover, in *Laval*, 2007 E.C.R. I-11767, ¶ 105, the Court noted the duty of the Community under Art. 136 EC to promote "dialogue between management and labour."

⁵³ It is possible, though not likely, that a Member State government will actively promote the cause of posted workers against that of the trade unions. However, one such example might obtain in the UK, which, in its submissions in *Viking*, 2007 E.C.R. I-10779, argued that there was no fundamental right to take collective action under Community law. See, Bercusson, *supra* note 39, at 300. However, it is unclear whether the UK government's historical enmity with trade unions will extend so far as to promote the cause of posted workers.

ensuring that posted workers' wages are as high as possible, so that their members are not thrown out of work by the influx of cheap foreign labor. The awkwardness of the positions of the social partners with respect to posted workers is easily discernible from the *Laval* case. In *Laval*, a trade union purporting to seek increased social protection for posted workers instituted a blockade resulting in the foreign service provider becoming insolvent and the posted workers losing their jobs.

Leaving aside collective agreements and arbitration awards, the social dialogue model also fails to evolve positive legislation such as minimum wage laws that set efficient social protection levels, primarily because of the inapplicability of traditional methods of labor representation to posted workers. As established above, posted workers as a result of their transient nature, do not have the ability to unionize effectively. Consequently, they are unable to wield influence through political channels to effect changes in host Member State legislation to their benefit. As Poiares Maduro recognizes, "not all have the same capacity for mobility . . . not all have the same opportunities (*with respect to "voice"*): unemployed people have much less voice than unionized labour or organized capital, for example."⁵⁴ The same is true with regards to the relationship between posted workers and trade unions. A demonstration of this reality may be found in *Rüffert*, where the minimum wage set by the *Landesvergabegesetz* was even higher than what the Federal universally binding collective agreement provided for, such that the posted workers ended up being paid only forty-six percent of that wage.

For these reasons, this EU social dialogue model is not unlike sending two mutually ill-disposed foxes to guard a particular henhouse.⁵⁵ Thus the posted worker invariably finds herself buffeted between two extremes, as they find that their interests are represented by a predator on the one hand, and by a competitor on the other.

At first glance it might appear that these two countervailing forces could interact with each other in such a way as to result in an equilibrium, which will provide for a socially efficient level of protections for posted workers. However, this will not be the case because it is possible to make conditions of employment of posted workers costly for foreign service providers, without adding anything meaningful to the welfare of those posted workers. Clearly, the terms and conditions of collective agreements concluded under such conditions in the host Member State between management and labor may not be entirely germane to the needs of the posted workers. For example, in *Laval*, the collective agreement that was sought to be imposed upon the Latvian service provider contained many provisions that should not have been applicable to the posted workers, or which would have duplicated protections already available in the posted workers' home States. A good example would be the payment obligations under the collective agreement imposed upon the Latvian service provider, which were variously meant to enable the trade union to be able to carry out pay reviews, and for insurance premiums. The pay review is

⁵⁴ Poiares Maduro, *supra* note 45, at 470.

⁵⁵ The metaphor unfortunately requires some tweaking, such that rather than both the foxes battling each other in order to exclude the other from the chickens, one fox seeks to devour the chickens, while the other fox seeks to get run them off. Perhaps a more accurate illustration would be replacing one fox with the hated farmyard competitor of the chicken—the turkey.

something that would not have been of any use to the posted workers, due to the temporary nature of their stay in Sweden. The insurance policies envisioned in the collective agreement would have replicated insurance protections already provided the posted workers in their home Member State. Importantly, as the Court recognized in *Laval*, there is considerable concern over the precariousness of the posted workers' and foreign service providers' plights, because the Swedish system is productive of far too much uncertainty, in that the only way a foreign service provider or posted worker could determine their obligations and entitlements respectively under the head of a minimum rate of pay, was to actually turn up in the host Member State, endure case-by-case negotiations at the place of work, and run the risk of being thrown out of work or business by the disruption resulting from collective action. The procedure of collective action itself imposes forbidding costs on foreign service providers.

Of course, one does not deny that it is theoretically possible that there may be labor representatives who will be sincerely concerned about the protection of posted workers. However, as is generally the case with persons who are in positions of conflict, the selflessness of their conduct is not to be presumed. As a result, although there is some possibility that the two foxes will somehow cancel each other out, the plight of the chickens remains uncertain and decidedly unenviable.

At this point one may interpose questions about whether the provision of a "voice" and of avenues for representation and participation of posted workers are actually essential to proper determination of the adequate level of minimum protection. First, it may be asked if the current state of affairs under the Posted Workers' Directive is not acceptable, given the active policing of the ECJ. It is argued that this "negative integration" will not in itself be sufficient to ensure socially efficient levels of minimum protections. Certain sources of inefficiency, such as the duplication of protections among Member States can be avoided with relative ease and clarity by reference to the Court's jurisprudence. Other questions—generally pertaining to the material content of the minimum protections—involve proportionality analyses that the Court may not be best placed to answer. Although the Court has, since the handing down of the *Cassis de Dijon* case, carried out a risk assessment role via the doctrine of proportionality,⁵⁶ it is argued that the larger part of such risk assessment should be—and indeed is—carried out by committees, which will possess the requisite ability to provide scientific evidence and advice to the Commission.⁵⁷ Moreover, while it is true that the Court may strike down these Member State enactments for disproportionality as and when they come before it, the costs of litigation are prohibitively high, and the speed of resolution of the questions excruciatingly slow.

Second, one may ask whether "voice," representation, and participation are even useful ways of thinking about the problem. Let us consider a collective agreement arrived at in the home Member State between management and labor, setting out

⁵⁶ See Joseph H.H. Weiler, *Epilogue: "Comitology" as Revolution–Infrationalism, Constitutionalism and Democracy*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 337, 345 (Christian Joerges & Ellen Vos eds., 1999).

⁵⁷ Alexandra Gatto, *Governance in the European Union: A Legal Perspective*, 12 COLUM. J. EUR. L. 487, 503 (2006).

minimum rate of pay terms to be applied to workers posted to each and every host Member State. If the minimum rate of pay agreed upon in that collective agreement falls below the corresponding minimum wage for that sector or profession as set out either by positive legislation or qualifying collective agreement in the host Member State, would we prefer to see the home Member State collective agreement trump the minimum wage of the host Member State because the posted workers already had their say? Under the current Posted Workers' Directive, the terms of collective agreements concluded within the home Member State are irrelevant.⁵⁸ Instead, the Directive gives precedence solely to the mandatory requirements of the host Member State. It is submitted that this is indeed correct, but not because of formalistic conceptions of due process. It is the correct approach not least because of Arts. 6(1) and 7 of the Rome Convention, but also because it is doubtful that such collective agreements concluded the Member States that tend to produce posted workers will be very robust or credible. For example, the Commission noted, prior to the last enlargement, that "the system of social partnership and independent social dialogue in the candidate countries is relatively weak, particularly at sectoral level"⁵⁹ Instead, it is submitted that some mechanism be devised, by which posted workers may contribute to the host Member State's process of determining the "material content" of the minimum protections to be afforded them. It may be noted at this point that the Court in *Laval* held that Member States were free to determine the material content of the minimum protections as long as they were in compliance with the Treaty and General Principles of Community law.⁶⁰ Indeed, in the *Impact* judgment delivered on April 15, 2008, the Court re-emphasized this holding by stating that

the establishment of the level of the various constituent parts of the pay of a worker falls outside the competence of the Community legislature and is unquestionably still a matter for the competent bodies in the various Member States, those bodies must nevertheless exercise their competence consistently with Community law . . . in the areas in which the Community does not have competence."⁶¹

However, by reaching the decision it reached in *Rüffert*, the Court essentially held that while the Member States could determine the material content of their minimum wage provisions freely, the procedures to be taken in making such a determination could be fixed by the Community.

Third, would "transnationalizing" the trade unions cure the problem of posted workers not being given a "voice"? The concept of the European Social Dialogue, as understood in its strict sense, already includes the notion of "transnationalization." As noted by Smisman, for the purposes of the European Social Dialogue,

⁵⁸ Art. 3(1) of the Posted Workers' Directive provides that for "the purposes of this Directive, the concept of minimum rates of pay referred to in paragraph 1(c) is defined by the national law and/or practice of the Member State to whose territory the worker is posted." Posted Workers' Directive, *supra* note 7, recital 13.

⁵⁹ *European Social Dialogue*, *supra* note 52, at 6. See also THE ECONOMIST, *supra* note 40.

⁶⁰ *Laval*, 2007 E.C.R. I-11767, ¶ 60.

⁶¹ Case C-268/06, *Impact*, 2 C.M.L.R. 47 (2008), ¶ 129.

“Management and Labour’ are the *European* confederations of the social partners, organized either at cross-sectoral or sectoral level.”⁶² It is submitted that transnationalizing trade unions can only resolve the problem in certain of the Member States, because not all Member States allow for the determination of the material content of their mandatory protection rules via collective agreements. Even in those Member States where collective action is the main determining mechanism of minimum protections for labor, blockages can and do occur, as is evident from the *Viking* case. As noted again by Smisman, “[i]n practice, the principle of ‘mutual recognition’ has mainly led to negotiations between the general cross-industry organizations, namely, ETUC (European Trade Union Confederation), UNICE (European Confederation of Employers’ Organisations) and CEEP (Confederation of Public Sector Employers).”⁶³ Such transnational labor representative organizations do not have a uniform constituency; the interests of workers in the new Member States tend to be considerably different from those of similar sectors in the old Member States. Given the as yet relatively underdeveloped stature of the social partners in the new Member States, it is possible that the voices of the workers who tend to become posted workers are drowned out. Put differently, the use of transnational labor representatives has the effect of rarefying by one level the participation and representation of posted workers. This contravenes the stated aim of “maximi[zing] the use of existing instruments of concertation.”⁶⁴ Clearly, the subsumption of posted workers under the banner of traditional labor representation will not constitute maximization of the existing instruments of concertation. This is not to say that every single interest group should have representation as a social partner under the bipartite social dialogue. Instead, posted workers should have specific representation because to deny them such representation would lead to socially inefficient outcomes.

V. THE COMMISSION’S RESPONSE

A. *The Measures Taken*

On the same day the *Rüffert* judgment was handed down, the Commission issued a press release calling for “more effective exchange of information, better access to information and exchange of best practice.”⁶⁵ In the Draft Recommendation that accompanied the press release, the Commission focused on the pre-existing obligations in the Posted Workers’ Directive upon Member States to make information regarding the terms and conditions generally available, “not only to foreign service providers, but also to the posted workers concerned.”⁶⁶ The Draft Recommendation further states that “there are still justified concerns as to the way the Member States have implemented and/or apply in practice the rules on

⁶² Stijn Smismans, *The European Social Dialogue Between Constitutional and Labour Law*, 32 EUR. L. REV. 341, 342 (2007) (emphasis added).

⁶³ *Id.* at 343.

⁶⁴ Presidency Conclusions, Brussels European Council (Mar. 25–26, 2004), at 7.

⁶⁵ EU Calls for Urgent Action, *supra* note 35.

⁶⁶ *Commission Recommendation on Enhanced Administrative Cooperation in the Context of the Posting of Workers in the Framework of the Provision of Services* (Draft Apr. 31 2008), pmb. ¶ 2, available at http://ec.europa.eu/employment_social/news/2008/apr/postingworkers_en.pdf.

administrative cooperation as provided for by” the Posted Workers’ Directive.⁶⁷ The Draft Recommendation then stated that “Urgent action is required to remedy shortcomings in the implementation, application and enforcement of the legislation pertaining to the posting of workers,”⁶⁸ with respect to the exchange of information, and access thereto.

The actual recommendations of the Commission were: firstly, to set up an electronic information exchange system such as the Internal Market Information System (IMI); and secondly, to develop a specific⁶⁹ “application to support the administrative cooperation necessary to improve the practical implementation of the Posted Workers’ Directive.”⁷⁰ With respect to the development of an electronic information exchange system for the administrative cooperation, the Commission notes that one task for the Member States would be the identification of “the main issues and questions on which the information will have to be exchanged and which thus should be included in the exchange system,”⁷¹ and second, the identification of “the competent authorities and, if necessary, *other actors involved in the monitoring and control of the employment conditions of posted workers that will take part in the exchange system.*”⁷² With respect to access to information, in addition to increasing the ease of reference (i.e. through providing information in the local language), Member States should “take the necessary measures to make generally available the information on which collective agreements are applicable (and to whom), and which terms and conditions of employment have to be applied by foreign service providers”⁷³ Finally, the Draft Recommendation calls for Member States to “participate actively in a systematic and formal process of identification and exchange of good practice in the field of posting of workers through any forums of cooperation established by the Commission to that end, such as the envisaged High-Level Committee”⁷⁴

One of the “main issues and questions on which the information will have to be exchanged” should comprise surveys of, and consultations with posted workers or their local labor representatives within their home Member State.⁷⁵ This would be the most appropriate outlet for “voice,” as well as their best opportunity for representation and participation. For example, consultations by liaison officers of host Member States with posted workers or their unions would help determine the particular needs and interests of particular groups of posted workers, such as would be necessary in order for host Member States to determine what kinds of protections should be provided and at what levels these protections should be set.

It is also submitted that this scheme of including posted workers and/or their proper representatives in the bipartite social dialogue should have a number of

⁶⁷ *Id.* pmb1. ¶ 3.

⁶⁸ *Id.* pmb1. ¶ 10.

⁶⁹ *Id.* at 4. The use of hyphens around the word “specific” suggests that this might be up for revision in future drafts of the Recommendation.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* (emphasis added).

⁷³ *Id.* at 5.

⁷⁴ *Id.* at 6. With respect to the High-Level Committee, see *id.* annex.

⁷⁵ *Id.* at 4.

distinct advantages over the current model, where transnational and national trade unions are presumed to be able to speak for them. First, the end results of any determinations made by Member States as regards their determination of the material content of their mandatory requirements will appear more legitimate in the eyes of the Court, meaning that prediction of the results of proportionality review will not be excessively speculative and conjectural. At present, the Court has not provided any guidance on *how* determinations of the material content of mandatory rules can be made compliant with Article 49 EC and Directive 96/71/EC. Secondly, this method of consultation might perhaps provide a means by which Member States may insulate themselves from being found in violation of Article 49 EC; the freedom to provide services is presumptively safeguarded because foreign service providers will not be able to claim that the minimum rates of pay thus established constitute a hindrance to their freedom so to provide. It will be more difficult to prove a loss of comparative advantage. In the future, therefore, we should see fewer cases like *Commission v. Luxemburg*; i.e. of Member States being unable to produce sufficient evidence to support the claim of proportionality of their legislative measures. Thirdly, trade unions in the host Member States will be more knowledgeable about which demands would be appropriate to make via collective action with respect to any group of posted workers. Of course, this implies that they are provided the information produced as a result of the consultations between the posted workers and host Member State liaison personnel, in keeping with the principle of transparency.⁷⁶ As a result, collective actions will be more nuanced, and less likely to be found to be disproportionate to the overriding interest of the protection of workers.

B. Comments about the Commission's response

In order to understand the Commission's response, it would be useful to look at the Commission's competences and obligations with regard to social policy as provided by the Treaty, and at the Commission's general philosophy of governance. EC Treaty art. 138 provides that the Commission has a positive duty to consult with the social partners before it formulates social policy proposals. This has to be understood in the light of EC Treaty art. 137, which provides that the European social partners have a role in the implementation of Directives in the social policy area. Finally, EC Treaty art. 139 allows management and labor to conclude agreements in the area of social policy. Aside from its mandatory consultation obligations under EC Treaty art. 138, the Commission carries out "wide-ranging consultation with the European Social Partners in advisory committees on issues like health and safety at work, vocational training and social security issues for migrant workers."⁷⁷ One of the overarching purposes of these bipartite consultations is to "make a useful contribution to the Lisbon agenda . . ." which is to turn the EU, by 2010, into "the most competitive and dynamic knowledge-based economy in the

⁷⁶ See Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union* 46 (European Governance Papers, Paper No. C-07-02, 2007), available at <http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf>.

⁷⁷ Presidency Conclusions, *supra* note 64, at 3.

world capable of sustainable economic growth with more and better jobs and greater social cohesion.”⁷⁸

One observation that may be made is that the IMI appears essentially to be an informal measure, which does not set out any formal avenues for the participation of posted workers and/or their representatives. Although the recommendations are couched in imperative language⁷⁹ in a few places, no indication is given as to the particular legislative tools the Commission has in mind; indeed it rather appears that Article 4 of the Posted Workers’ Directive is the only legal basis for the IMI.⁸⁰ As such, it is probably more accurate to say that whatever compulsion the IMI has arises not out of legal obligation, but out of practical considerations. In other words, it is “soft” law. In this regard, the Commission recommendations are in line with the Commission White Paper on European Governance of 2001,⁸¹ in which the Commission sees itself as possessing the real “legislative initiative,”⁸² while the Community co-legislature, consisting of the European Parliament and the Council of Ministers, is “limited to defining the essential elements of legislative acts in the form of framework directives, [which] in turn, define the conditions and limits within which the Commission performs its executive role.”⁸³ The Draft Recommendation eminently proceeds from these general principles of governance: the broad underlying aspiration for the exchange of information is sketched out by the Parliament and Council in the Posted Workers’ Directive, and the concrete details are filled out by the Commission. However, an obvious concern here is one of constitutionalism: are the proposed measures too drastic and far-reaching to be carried out without the participation of the Community co-legislature? Does this not perhaps constitute an impermissible delegation of legislative authority to the Commission? Or does the direct participation of all the interested and affected parties provide the measures with a kind of legitimacy different from, but equal to, that which arises out of rigid constitutional formalism? These questions, however, are beyond the scope of this note.⁸⁴

⁷⁸ Presidency Conclusions, Lisbon European Council (2000) ¶ 5. The future of the Lisbon Agenda is looking increasingly dicey following the Irish “No” vote of June 2008.

⁷⁹ E.g., *Commission Recommendation on Enhanced Administrative Cooperation*, *supra* note 66, at 4 (“identifying the main issues and questions on which information will have to be exchanged and which thus should be included in the exchange system”) (emphasis added).

⁸⁰ *Id.* at 5 (“Member States should, on the basis of the results of these preliminary examinations, furthermore assess and decide, in cooperation with Commission services, whether IMI provides the most suitable support for the information exchange as set out in Article 4 of [the Posted Workers’ Directive].”).

⁸¹ *Commission White Paper on European Governance*, COM (2001) 428 final (July 25, 2001).

⁸² Gatto, *supra* note 57, at 497.

⁸³ *Id.* at 497–98.

⁸⁴ Interesting insights and parallels may be drawn from the legal mechanisms for pan-European collective agreements as envisaged under EC Treaty art. 139(2), which provides that collective agreements entered into by “management and labour” pursuant to EC Treaty art. 138(2)–(3) and “concluded at Community level shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or, in matters covered by Article 137, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.” Clearly, the Treaty envisages that where direct participation and representation obtains in the sphere of social policy, strict compliance with constitutional norms—i.e. passage of legislation by the European Parliament—is not needed. See Smismans, *supra* note 62. See also Case T-135/96, *UEAPME v. Council*, 1998 E.C.R. II-2335, ¶¶ 88–89. However, EC Treaty art. 139(2) makes clear that this applies only to agreements “concluded at community level,” which means that the population of the EU can serve as the

VI. CONCLUSIONS

The current state of the law concerning posted workers, as interpreted by the ECJ, contains many “black boxes,” in which there is a total lack of transparency, even though the Court recognizes the importance of that principle both in *Laval*⁸⁵ and in *Rüffert*.⁸⁶ The most important of these include the manner in which Member States may go about determining the material content of the mandatory rules of minimum protection to be afforded to posted workers. The Commission’s proposals calling for greater cooperation in the exchange of information about applicable terms and conditions and of best practices, and for greater access to information are to be commended insofar as they vindicate the principle of transparency, which Sabel and Zeitlin speak of as being a crucial procedural requirement for the legitimacy of the “directly-deliberative polyarchy” model of current EU governance.⁸⁷ However, the concept of transparency employed by the Commission, (and indeed by Advocate General Bot in his opinion⁸⁸) is an impoverished one, if all it means is that decisions made should be easily accessible and noticeable to all, and should not admit of excessive vagueness.⁸⁹ This is only one part of the concept. The principle of transparency should also protect the “interested parties’ right to information and to be heard at various stages of the decision making process.”⁹⁰ Instead, this should also imply the establishment of “procedural requirements for ensuring active participation by a broad range of stakeholders in regulatory decision making.”⁹¹ Sabel and Zeitlin⁹² note that this is already the case in a number of areas, such as those which concern the European Railway Agency. The inclusion of posted workers and/or their representatives in the determination of their own mandatory protections appears to be the next logical step.

necessary *demors*. There is yet much room for discussion where the agreements concerned are meant to operate purely within the confines of the Member States.

⁸⁵ Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnadsarbetareförbundet*, 2007 E.C.R. I-11767, ¶110.

⁸⁶ Case C-346/06, *Rüffert v. Land Niedersachsen*, 2 C.M.L.R. 39 (2008). Although this principle is not specifically enunciated in the judgment, it is apparent from a reading of the judgment as a whole.

⁸⁷ Sabel & Zeitlin, *supra* note 76, at 46.

⁸⁸ Opinion of Advocate General Bot, Case C-346/06, *Rüffert*, 2007 WL 2726767, ¶¶ 134–35.

⁸⁹ See generally *Commission Green Paper on European Transparency Initiative*, COM (2006) 194 final (May 3, 2006).

⁹⁰ Sabino Cassese, *European Administrative Proceedings*, 68 LAW & CONTEMP. PROBS. 21, 35 (2004); See also Sabel & Zeitlin, *supra* note 76, at 47.

⁹¹ Sabel & Zeitlin, *supra* note 76, at 48.

⁹² *Id.* (quoting Damien Geradin & Nicolas Petit, *The Development of Agencies at EU and National Levels: Conceptual Analysis and Proposals for Reform* (NYU School of Law, Jean Monnet Working Paper No. 01/04, 2004), available at <http://www.jeanmonnetprogram.org/papers/04/040101.pdf>).