Posting of workers and industrial relations

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1. Abstract

The main aim of my project is to study the relation between posted workers and the domestic system of industrial relations of the Host State. In fact an increased attention to the collective aspects of the posting of workers phenomenon in the European space is a pressing necessity in the aftermath of the *Laval*[1], *Rüffert*[2] and *Commission v. Luxembourg*[3] (and, partially, *Viking*[4], even if it doesn't involve a posting of workers' question) cases.

These cases have highlighted how the freedom to provide services through posted workers can have a "negative" impact on some deeply rooted practices in the industrial relations of the Host State. Fundamental freedoms have been used to restrict the recourse to collective action in order to combat social dumping. Furthermore, *Laval* and even *Rüffert* have shown that some systems of industrial relations are more "fit" to impose the precepts of collective bargaining to foreign service providers.

The ECJ has never indicated **if** and **how** posted workers relate to the systems of industrial relations of the Host state. The *alleged* temporary character of posting scenario's as well as the divergences between the various scenario's complicate the establishment of a relation with an existing working community (*communauté de* travail) in the Host State. The integration of posted workers in the system of industrial relations of the Host State might allow to construe the relationship between posted workers and systems of industrial relations in a more "constructive" way. Furthermore, it would be a steppingstone to define a "transnational" industrial relations' response to the imminent threat of social dumping that the freedom to provide services entails.

The research on industrial relation deals with phenomena such as trade unions, workers' involvement, collective bargaining, strikes which are intertwined with fundamental rights issues. Hence, it is crucial to assess whether the EC regulation of posted workers does not contradict these human rights and whether this does not amount to a clash between the EC legal order and constitutional orders of the Member States and indeed international legal orders.

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1 Case C-341/05, *Laval un Partneri Ltd v. Svenska Byggnadsarbetareförbundet*, judgement of 18 Dec 2007 [2008] IRLR 160 (hereinafter "*Laval*")

2 Case C-346/06, *Dirk Rüffert v. Land Niedersachsen*, judgment of 3 Apr 2008 [2008] IRLR 467 (hereinafter "*Rüffert*")

3 Case C-319/06, *European Commission v. Luxembourg*, judgement of 19 June 2008 [2009] IRLR 388 (hereinafter, "*Luxembourg*")

4 Case C-438/05, *Viking Line ABP v. The International Transport Workers' Federation and the Finnish Seaman's Union*, judgement of 11 Dec 2007 [2008] IRLR 14 (hereinafter "*Viking*")

2. Background of the research in a historic perspective

The transnational posting of workers' phenomenon came to the light into the EU labour market with ***Rush Portuguesa***[5], a decision rendered by the Court in **1990** in a case stemming from the 1986 enlargement to comprehend Spain and Portugal. A transitional period had been foreseen in the accession treaty concerning free movement of people but not provision of services; a Portuguese firm had then entered the French constructions market "posting" his workers to perform their job past the French borders.

The questions posed for preliminary ruling were re solved in favour of *Rush Portuguesa* but the Court added that "*Community law does not preclude Member States from extending their legislation or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does the Community law prohibit Member States from enforcing those rules by appropriate means*"[6].

This statement was to form the core of the the **Posted Workers' Directive**[7], adopted in **1996** as a statutory response and follow-up to *Rush Portuguesa.* The Directive, taking into account among many factors, that the "*promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers*", allows the Member States to impose enterprises posting workers on their territory some of their own rules, regarding minimum wages, holidays and work-place safety. However the point of view of the Directive is strictly that of individual working relationship without any reference to the industrial relations system.

With the decisions in ***Laval***, ***Rüffert*** and ***Luxembourg*** cases, delivered from the end of **2007** to the beginning of **2008**, the ECJ provided an interpretation of the PWD pushing forward a negative integration with the Host State's industrial relations system; the exercise of fundamental workers' rights thus, will need to be "balanced" against the need to respect the "fundamental freedoms" recognised by the EC legal order. What is more those decisions don't provide any step towards a more positive approach, leaving unanswered the question whether and to what extent posted workers can be integrated into the system of industrial relation of the Host State: the ECJ indeed tend to deliver a vision of the posted workers as "commandos dropped behind the enemy lines", unnoticed, untouched and hardly touchable by the industrial relations system of the Host State.

The last (as for now) chapter in our tale sees the European Court of the Human Rights as protagonist: in fact with ***Demir and Baykara v. Turkey***[8] and ***Enerji v. Turkey***[9] decisions (respectively in **2008** and 2009) the Court ruled that the freedom of collective bargaining and the right to take collective action constitute essential parts of the (human) freedom of association. The contrast of those decisions with the cited jurisprudence of the ECJ is then blatant.

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5 Case 113/89, *Rush Portuguesa* v. *Office national d'immigration*, 1990 ECR I-1417 (hereinafter "*Rush Portuguesa*")

6 *Rush Portuguesa*, par. 18

7 EC Directive 1996/71 of the European Parliament and of the Council, of 17 December 1996, concerning the posting of workers in the framework of the provision of services (hereinafter "PWD")

8 *Demir and Baykara v. Turkey*, Application No 34503/97, 12 November 2008 (hereinafter "*Demir and Baykara*")

9 *Enerji Yapi-Yol Sen v. Turkey*, Application No 68959/01, 21 April 2009 (hereinafter "*Enerji*")

3. Research questions

In *Rush Portuguesa* the ECJ stated that posted workers are considered not to gain access to the labour markets of the Host State; in this regard the Posted Workers' Directive doesn't answer to the question if and to what extent they gain access to the system of industrial relations of the Host State. This mutism, that can partially be explained by the precarious and temporary presence of the posted workers in the Host State, has now to be complemented by the ECJ case law. A number of observations flow from the analysis of the Posted Workers' Directive in the light of the ECJ case law . The EU level seems in fact to consider, in both legislation and case law, the outcome of some practices of industrial relations (collective agreements, effects of a strike). However, the "static" point of arrival is taken into account without facing the genesis and the dynamic aspect of those outcomes.

The genesis and the dynamics are seen as a matter for the Member States to be regulated. However, due to the negative integration which flows from the balancing exercise, the Posted Workers' Directive and ECJ case law do affect these processes of industrial relations. The Posted Workers' Directive is being criticized for not taking divergent cultures of industrial relations sufficiently into account. Furthermore, it entails a risk of regime competition.

In this regard it would be important to understand how the freedom of association relates to the posting of workers phenomenon. At the very beginning, the question arises if and how trade unions of the Host State can recruit posted workers. As far as the right to information and consultation is concerned, to what extent are posted workers considered to be a part of the working community in the Host Sate, and to what extent do they have the right to stand for designation or elections as workers' representatives in the Host State, and to what extent can they be represented by workers' representatives of the Host State? Indeed the relationship with the Home State's trade unions or elected workers' representatives can be complicated in the field of enforcement too, as it's not clear to what extent can trade unions (and eventually, workers) in the Host State have access to enforcement of applicable domestic labour standards. Furthermore, provided they can, to what extent would they need the formal consent of the posted workers?

However, other issues arise from the question how posting of workers relates with the freedom of collective bargaining and the right to take collective action. For the first, it will be necessary to determine if and to what extent can the law regarding collective bargaining of the Host State be applied to solve legal issues related to the application of collective agreements to the posted workers; furthermore, how should conflicts between competing collective agreements from the Host State and Home State be solved? For the latter the question is opened as to what extent can posted workers participate to a collective action organised within the Home State, or vice-versa, to what extent can domestic workers of the Host State participate to a collective action of posted workers? Finally, to what extent can workers and trade unions in the Host State engage in a a collective action to improve the working and labour conditions of posted workers?

In the end, is EC Law regarding posted workers in line with the freedom of association as interpreted within the *Council of Europe* by the European Committee on Social Rights (European Social Charter) and the European Court on Human rights (European Convention on Human Rights) ? Indeed, the conflict with the latter became apparent after *Demir and Baykara* and *Enerji* cases.

4. Methodological issues regarding Community labour law

In order to look for answers to those questions, I intend to put in place a comparative analysis both of the systems of industrial relations and of the transposition of the Directive 96/71, focusing on the Member States which would be more probably affected by the posting phenomenon (whether as Home country or Host country). **From a top down** perspective, it is now evident that the PWD has a divergent impact on the systems of industrial relations of the Member States. Some systems of industrial relations are more "fit" in the regime competition to impose their precepts of collective bargaining to foreign service providers.

Furthermore, form a top down perspective, the regulation of collective actions by the ECJ which interfere with free movement is similar or extremely different from the domestic regulation of purely internal collective actions. For example some countries are more familiar with the proportionality test and the *ultimum remedium* test, with teleological restrictions than others. For some countries which have restricted the means of collective action rather than the procedures and the objectives, the fact that the Court of Justice does not restrict collective action to the species of the strike (*grève-sciopero*) is innovative. The question of a spill over effect can be raised in this respect. It would be interesting then to see whether the ECJ case law will be recuperated in public debate as a source of inspiration for the domestic regulation of internal domestic strikes

On this basis I will try to identify the potential future threats to those systems created by the ECJ jurisprudence: in this regard I will study the regulation of the right to strike, along the two dichotomies freedom of aims/restriction of legitimate aims – freedom of means/restriction of legitimate means, looking for the feasibility of the strike in the posting of workers field.

Next I will use the results of this first layer of analysis to identify the actual space for the inclusion of the posted workers into the Host State's system of industrial relations: again I will try to point out as different systems are more or less suited to "penetrate" the posted workers' *monad*.

Another parallel path will be the one building on the ECtHR decisions; the inclusion of the freedom of collective bargaining and of the right to strike into the human rights' catalogue can represent another step on the creation of a "social supranational citizenship" that would offer a valuable "toolbox" to solve some of the questions arising from the transitional posting of workers. However, only time will say if and how the ECJ will take into account this jurisprudence. This conflict will probably be resolved due to the accession of the EU to the European Convention on Human rights, provided by the Lisbon Treaty.

Furthermore a conflict could even arise between EC law and the constitutional law of Member States recognizing "human rights". Thus we can argue that we are not just dealing with a clash between economic EC law and domestic labour law, but that the EC law intrudes on the constitutional protection granted by domestic Member States of fundamental rights. This approach can also highlight a clash between the EC legal order and other international legal orders, such as that of the Council of Europe and of the United Nations or the ILO.

5. Perspectives: improving the legal architecture for industrial relations in the European Union

The ECJ seems to be willing to promote a silently forced harmonisation of the collective bargaining systems, as the neo-corporatist systems elaborated at branch of inter-professional level rather than at plant level and providing for an institutionalised *erga omnes* coverage seem now to be more fit to impose their labour standards on foreign service providers. The case law of the ECJ can cause a deep change into the selection of the target for collective actions in some Member States, forcing the trade unions to put pressure on the government (instead of the given employer) in order to obtain a legislative regulation on the minimum standards, which is, after the ECJ decisions, the only (almost) safe way to fight social dumping. This dynamic deserve indeed a great attention: the reaction both of the Member States and the social actors will be a valuable inspiration in this analysis.

In order to avoid that the freedom to provide services does amount to regime competition between domestic systems of industrial relations, a reshape of EC law (primary and secondary) would be necessary. Indeed this is an issue of both vertical and horizontal subsidiarity. Posted workers should then be integrated into a domestic system of industrial relations: we could learn some lessons from the Regulation 1612/ 68. In fact, this regulation also deals with migration of workers, providing a type of collective labour law protection.

Furthermore , it would be necessary to strengthen the architecture to allow for the development of **trans-national** industrial relations At present, this architecture is poor : there is a framework for European Works Councils, but there are no tools for cross border collective agreements at enterprise or group level. Furthermore it is difficult to organize paneuropean strikes , indeed for legal reasons

In this regard, while studying the answers coming from the social actors I will try to take into account the possible use of the transnational collective bargaining, which importance in this field may be drawn from the principle of subsidiarity itself.

In the end I can identify the final aim of my research in setting up, with all due ambition, a legal framework which, from the negative side, would avoid the erosion of the Member States' system of industrial relations and, from the positive one, would allow some form of inclusion of the posted workers into the system of the Host State.