XVIII WORLD CONGRESS OF LABOUR AND SECURITY LAW

Paris, September 5th to 8th 2006

TOPIC 1
TRADE LIBERALIZATION & LABOUR LAW

NETHERLANDS

European Union law and Dutch labour law: The employment protection of posted temporary services workers

Dutch Contribution to Theme 1 on Trade Liberalization and the Labour

Mijke Houwerzijl [1]
M.S.Houwerzijl@uvt.nl

2. INTRODUCTION AND FOCUS OF THE REPORT

The liberalisation of trade in services is an important objective of the European Union. The proposal for the so called Services Directive on services in the internal market (the so called 'Services Directive', or 'Bolkestein Directive', named after its initiator) which caused a lot of political and societal unrest in the old Member States, is the most recent manifestation of the goal to further liberalize the internal market for services. [2] Within the context of the European Union, trade liberalization between the member States is based on the so-called four freedoms in the EC-Treaty.[3] During the last decade the ongoing development of a free internal market of capital, goods, services and persons, has, together with the possibilities of new technologies and the enlargement of the European Union, led to an increase of cross-border trade and movement in these four fields. As a result, it is no longer just manufacturing that is under pressure of foreign competition but also services. The fact that service provisions often include the movement of persons across international borders, either as service providers or employees of service providers, makes this a politically sensitive issue.

In the last five years a growing number of workers from (former candidate-) Eastern and Middle European Member States, predominantly from Poland, is active on the Dutch (labour) market, especially in the transport sector and in 'locally based' industries such as construction, agriculture, horticulture and cleaning. Their employment status has various legal, semi-legal and illegal appearances. Mostly, 'the Polish' do temporary jobs, either employed or on services (sub) contracts. In the transport sector a lot of workers from Poland

[1] Researcher and Lecturer at the Department of Labour Law, Faculty of Law, University of Amsterdam.
[2] This Directive is under consideration among the EU institutions since January 2004. See COM(2004) 0002.
[3] At the international level, the WTO also seeks to achieve a similar opening up of service provision internationally by widening the (Mode IV) scope of the General Agreement on Trade in Services (GATS).

and other Eastern European countries operate in fact as self-employed (without personnel) service providers.[4] In the other sectors temporary migrants (seasonal workers) often work directly as employees on a Dutch employment contract, sometimes via Dutch temporary employment agencies. In this case, in principal, all Dutch mandatory labour law is applicable to them. But next to this traditional construction, a growing use is made of so-called posted (seconded) workers, who are employed by their foreign employer but temporarily hired-out to a Dutch firm or put to work on a Dutch construction site, in the framework of the cross-border provision of services.

To posted workers not all national labour law provisions but only 'key provisions' of Dutch mandatory labour law are applicable, specified in the *Wet arbeidsvoorwaarden grensoverschrijdende arbeid* (Terms of Employment (Cross-Border Work) Act). The Act entered into force on 24 December 1999 and is based on the European Union Posting of Workers Directive (Directive 96/71/EC).[5] Almost exactly six years later, in December 2005, a revised edition of this Act was passed, in the light of the changed labour market situation after the enlargement of the European Union.

This report will mainly be devoted to an analysis of the contents of the Posting of Workers Directive and the Dutch (renewed) Act, taking into account, the political and social forces which determined its content. [6]

2. EVOLUTION OF EUROPEAN LAW ON FREE MOVEMENT OF WORKERS AND SERVICES

Services workers are a heterogeneous group. However, the EU Posting of Workers Directive and the Dutch Terms of Employment (Cross-Border Work) Act lump all posted workers together, irrespective of their long or short-term engagements abroad, strong or weak labour market positions. This is, however, not in line with the original distinction between two of the four pillars of the Common Market: The free movement of workers (Article 39 EC) and the free movement of services (Article 49 EC).

2.1 Original distinction

In the early 1960s when the Common Market goal of the then European Economic Community was to be established, the scope of the four freedoms (of workers, services, establishment and goods) had to be defined. With regard to the distinction between the free movement of workers and the free movement of services as a main rule it was stipulated that all workers, whether permanently or temporarily moving to another Member State, were covered by the free movement of *workers*. Although posting and temporary employment in general was not as popular at the end of the 1950s as it is today, it did take place on a small scale. In discussions about the boundaries between the freedom of workers and of services in the EEC Treaty, it was recognised that the provision of services actually involved specialised services workers. When they are needed to install a machine or to manage a new plant of a company established in another Member State, they are in fact part of the

[4] Either legally correct or not correct. Recently, February 2006, the main Dutch trade union in transport published a 'naming and shaming' report about the illegal or 'grey' constructions used by big transport firms to make use of self-employed Polish truck drivers.

[5] Directive 96/71/EC of 16 December 1996 (OJ 1997 L 18/1) concerning the posting of workers in the framework of the provision of services.

[6] This contribution is largely based on earlier articles and reports on the Posting Directive and the Dutch implementation, published in: Jan Cremers, Peter Donders (Ed.), *The free movement of workers in the European Union*, CLR Studies 4, Brussels: Reed Business Information, 2004, p. 105 – 114 and in: Roger Blanpain (Ed.), FREEDOM OF SERVICES IN THE EUROPEAN UNION, Labour and Social Security Law: the Bolkestein Initiative, Bulletin of Comparative Labour Relations – 58, 2006, Part II, Applicable law, nr. 15 and nr. 18, p. 179-198 and p. 225-234. See also my PhD thesis (defended at the University of Tilburg, January 2005): M.S. Houwerzijl, 'The Posting of Workers Directive: About the Background, Content and Implementation of Directive 96/71/EC' in: 'De Detacheringsrichtlijn', Deventer: Kluwer 2005, p. 377-396.

service and need to cross borders to provide the service. Hence, an exception to the main rule was created for this 'very specialised, technical or managerial key personnel': they could be posted to another Member State under the freedom to provide *services*.[7]

The strict limitation of this exception to key personnel can still be traced in secondary free movement of workers legislation as laid down in, e.g. EECs regulations 1612/68 and 1408/71 and Directive 68/630. This legislation concerns *all* workers in the Member States, irrespective of whether they are permanent, seasonal or frontier workers *or workers who pursue their activities for the purpose of providing services.* So, posted workers who do not belong to the above mentioned 'key personnel' and who are nationals of one of the Member States, used to be, exclusively, covered by the principle of the free movement of workers. Also in secondary legislation based on the free movement of services, there used to be a standard sentence referring to the free movement of workers where the mobility of *all* workers was concerned.[8]

In relation to the scope of national labour law this distinction between the free movement of workers and of services was a 'pleasant' status quo. Under the free movement of workers (art.39 EC) pay discrimination between nationals and non-nationals is not allowed. Migrant and domestic workers must be treated equally in their access to the labour market, wages and other working and employment conditions. This primary principle of equal treatment and non-discrimination on grounds of nationality is meant not only to entitle workers to a decent employment protection but also to prevent unfair competition (often referred to as 'social dumping'). In 1974 the ECJ confirmed the double intention behind the equal treatment provision in the free movement of workers legislation.[9]

2.2 New distinction

In 1990, the strict limitation of movement of workers to 'key personnel' under the title of the free movement of services, was abolished by a 'landmark' decision of the European Court of Justice (ECJ) in the case *Rush Portuguesa*.[10] The facts in this case were as follows. On the TGV Atlantique construction site in France, work was sub contracted to Rush Portuguesa, a Portuguese firm which brought its own workers from Portugal to perform the 'service'. According to the French immigration authority, Rush Portuguesa broke the law because no work permits had been issued for these posted workers and they were paid well below the French wage standards. In that time, Portugal was a new member of the EU. Just like the current situation for eight of the new Member States in Middle and Eastern Europe, for the first years of membership a transition period was agreed upon, in which the free movement of workers was not yet applicable to workers from Portugal (therefore they were seen as third-country nationals for whom work permits were required). Meanwhile, the other freedoms, among which the free movement of services, could already be invoked by firms or persons from the new Member State. So, Rush Portuguesa defended its position on the grounds of its right to the free movement of services.

The ECJ upheld this position. In contrast with the conclusion of Advocat-General Van Gerven, the ECJ rejected the argument of France that service providers could only use their freedom to provide services to post key personnel to another Member State. According to the ECJ the principle of free movement for workers was not involved because the posted workers returned to their country of origin after the completion of their work without at any time *gaining access to the labour market of the host Member State*. For this reason, the

[7] See about this discussion U. Everling, *Das Niederlassungsrecht im Gemeinsamen Markt*, Berlin: Verlag Franz Vahlen, 1963 and D. Vignes, 'Le droit d'établissement et les services dans la C.E.E.', *Annuaire Français de Droit International VII*, 1961, p. 668-725.

[8] See especially the, mostly technical, directives adopted in order of the 1961General Programme for the abolition of restrictions on the freedom to provide services, OJ 2/32 of 15 January 1962, for example Directive 64/220/EEC (fifth recital).

[9] Case 167/73 [1974] ECR 360, paragraph 45.

[10] Case C-113/89 [1990] ECR I-1425.

authorities of the host Member State may not impose on the supplier of services conditions relating to the obtainment of work permits. So, 'an undertaking established in one Member State providing services in the construction and public works sector in another Member State may move with its own work-force which it brings from its own Member State for the duration of the work in question.' In *Vander Elst* (1994) the ECJ repeated this.[11]

Here, the interest of service providers to post their workers to perform services in another Member State and the interest in a right to free movement of third country nationals who permanently reside in the EC, coïncided. As the right to free movement of workers in the EU is only granted to EU-nationals, the ECJ's decision to 'shift' posted workers to the free provision of services gives 'third-country workers' at least a passive right to free movement. This right only exists during the period that they are posted by their EU employers to perform a service in another Member State in the framework of the free movement of services. So, by determining that posted workers do not gain access to the labour market of the host Member State (because they are supposed to return to their country of origin immediately after the completion of their work) the ECJ constructed a way out of the conflict between the Community goal of a border-free EU internal market and the national interests in border controls to keep immigrants out.[12]

2.3 Consequences for the employment protection of posted workers

What did this shift from free movement of workers to services mean for the employment protection of posted workers? In *Rush Portuguesa* and *VanderElst* the ECJ stated 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.' Thus, host states may insist that all or a part of their national employment regulations and extended collective agreements must be applied to posted workers if such regulations and collective agreements are also applicable to domestic workers. With this 'employment-conditions-of-the-host-state-principle' the ECJ gave Member States the possibility (but did not oblige them!) to insist on equal treatment between posted and domestic workers on their territory.

However, this option for Member States to insist on equal treatment between posted and domestic workers exists only within the boundaries of the law of conflicts. Because of the private law character of employment law, parties are in principle free to choose the law applicable to their employment contract. In 1980, the Member States signed the Convention on the Law Applicable to Contractual Obligations (the 'Rome I Convention').[13] The Convention came into effect as of 1991. Articles 6 and 7 contain rules for international employment contracts. What mandatory statutory labour law and extended collective agreements are applicable to posted workers? Those of the host state or those of the home state, or perhaps of both? The basic rule can be found in Article 6(2)(a): the law of the country where the worker habitually carries out his work has predominance. However, Article 7 defines rules of a special mandatory character; these rules may apply even if a worker is only temporarily working in a country. Consequently, the employment contract of a posted worker may be influenced by more than one legal system: The law of the Member State where the employment contract is concluded (state of origin or home state), and the law of the Member State where performance takes place (host state) during the posting period. In practice, the existence of such complicated situations is reduced by the so-called favour

[11] Case C-43/93 [1994] ECR I-4221.

[12] The ECJ confirmed this case law in Commission v Luxembourg (Judgment of 21 October 2004, Case C-445/03) and in Commission v Germany (Judgment of 19 January 2006, Case C-244/04) by stating that the obligation in Luxembourg for services providers from another Member State to obtain work permits for posted workers with the nationality of third countries must be seen as un unjustified infringement on the freedom to provide services within the EU.

[13] Convention on the Law Applicable to Contractual Obligations, OJ L 266/1 of 9 October 1980.

principle which is contained in Article 6 and 7 of the Rome I Convention. This principle aims to protect the worker against the choice of the legal system with the worst employment conditions, by stating that the most favourable conditions must prevail.

In 1996 the European Council and Parliament adopted, after six years of intense political debates, the so-called Posting of Workers of Directive (Directive 96/71/EC) with the three-fold aim to facilitate the cross-border provision of services (1), to avoid unfair competition (2) and to protect posted employees (3).[14] According to the Preamble of the Posting Directive (Recital 7-11), the Directive makes the optional character of Article 7 of the Rome Convention obligatory, and defines what subjects of employment law must be seen as 'special mandatory'. In this way the gap that Article 6(2)(a) creates for the protection of posted workers is filled in. The Posting Directive also stipulates the favour principle, although neither the Rome Convention nor the Directive do specify the method of comparison. Depending on the circumstances in a particular situation, Art. 6 and 7 of the Rome Convention play an indispensable and 'residuary' role at the background for the effectiveness of the Posting Directive.

The Posting Directive consists of nine provisions that can be divided into four categories:

1) personal scope and definitions (Articles 1 and 2);

2) terms and conditions of employment for posted workers (Article 3);

3) measures to ensure information about and compliance with the Directive (Articles 4, 5 and 6);

4) 'organisational' and technical details (Articles 7, 8 and 9) that need no further explanation.

Underneath, a (not exhaustive) survey is given of the main features and problems of the Directive and the way it is implemented in the Netherlands. As the focus is on subjects that are relevant for the Netherlands some provisions that may be interesting for other countries, such as on optional derogations, alternatives for a system of collective agreements which have been declared universally applicable and special provisions for (full equal treatment of) posted temporary agency workers, are left aside.

3. WHO IS A POSTED WORKER?

3.1 Three definitions of cross-border posting

As mentioned above, since 1990 (*Rush Portuguesa*) an employer is allowed not only to post key personnel to perform a service in another Member State but service workers in the construction and public works sector as well. Article 1(3) of the Posting Directive defines *three* situations of posting in the framework of the provision of services:

(a) the sub contracting of workers (for example in the construction sector),

(b) intra-company or intra-group secondments (the ex patriation of workers, for example key personnel), and

(c) the cross-border hiring out of workers by temporary employment agencies.

However, this last situation, posting of workers via temporary agencies, was explicitly mentioned by the ECJ in *Rush Portuguesa* as not falling under the freedom of services but under the free movement of workers. Here, the ECJ drew the line where it can not longer be denied that the posted workers may indeed have access to (or at least influence) the labour market of the host country. So, in this respect the Posting Directive went beyond the settled

[14] See about the political circumstances of the early 1990s (in which the British Conservative Government tried to veto almost everything that had to do with social policy) that influenced the political fate of the posting directive, M. Biagi, 'The 'Posted Workers' EU Directive', in R. Blanpain (ed.), *The Bulletin of Comparative Labour Relations in the European Union,* 1998 p.175.

case law of the ECJ. This third possibility may further open the door to more mobility of 'cheap labour', although it is not clear yet which conditions the ECJ will accept for the free movement of posted temporary agency workers, especially for those with a third country nationality. A work permit system is not in line with EC law but the ECJ left room for an equivalent form of control (a notification system) to prevent abuse of this potentially most exploitable category of posted workers.[15]

The Dutch implementation

The definitions of the three possible posting situations in Article 1(3) of Directive 96/71 are not transposed precisely in the Terms of Employment (Cross-Border Worker) Act. In the Terms of Employment (Cross-Border Worker) Act (Art. 1) the posted worker is defined as someone who works temporarily in the Netherlands and on whose employment contract foreign law is applicable. No other words are used to implement Article 1 and Article 2 of Directive 96/71.

Still, as the responsible Minister assured members of Parliament, the Act is meant to apply for all three types of posting. Explicit implementation in the Act was not deemed necessary. Problem in practice with this 'implicit' method of implementation is that the posting definition of Art.1 (3) does not correspond to the Dutch domestic definition of posting.[16] In Dutch (legal) usage only posting types b (posting in multinational companies) and c (posting through temporary agencies) are understood as posting, while type a (temporary cross-border working in the framework of the employer's subcontract) is normally seen as something different.[17] Moreover, the definition in the Terms of Employment (Cross-Border Worker) Act may be confusing because it includes more workers than only temporary service workers who usually work in another Member State: It also includes workers who carry out their work in other Member States on a temporary basis. In this situation no Member State can be seen as the permanent work place of a worker. Examples are international truck drivers and tour guides. Because art. 1(1) Directive 96/71 is not explicitly transposed; the Terms of Employment (Cross-Border Worker) Act is not limited to companies that post workers in the framework of a provision of services.

In contrast, it can be deduced from a jointly-published leaflet in the construction industry that social partners, while not mentioning the three types either, have at least limited the scope of the applicable provisions of their collective agreements to workers who 'normally work for their employer in another country of the EU'.[18] Art. 1a (a) in the collective agreement for the Construction sector repeats the definition of the Terms of Employment (Cross-Border Worker) Act, but in addition stresses that a 'posted worker' means in this respect every worker who *usually* works in another Member State, not being the Netherlands. This provision of the social partners is more accurate than the definition in the Terms of Employment (Cross-Border Worker) Act, although here the necessity of posting in the framework of a cross-border provision of services (as mentioned in Art. 1 of the Posting Directive) is absent as well.

3.2 What is temporary?

[15] The ECJ refers to the problem that these workers may have acces to the labour market of the receiving State in paragraph 39 of its judgment in Case C-445/03 of 21 October 2004. The ECJ seems to suggest control mechanisms as proposed in COM (1999) 3 /COM (2000) 271, which could mean that it implicitly rejects the proposal (in Art. 25 (1) in the draft Services Directive.

[16] See 'Kamerstukken II, 1998-1999, 26 524, nr. 5, p. 3 and nr. 6, p. 3'.

[17] A judgment of kantonrechter Heerlen, 24 sept. 2003 (JAR 268/2003) shows that this confusion has already occurred in practise. See annotation M.S. Houwerzijl, AI 2004/2, p. 39-41.

[18] See Brochure 'Posting to the Dutch construction sector. Collective labour agreement for the Construction Sector, Collective labour agreement for Site Management, Technical and Administrative personnel in construction companies,' September 2003, published on behalf of the parties to these collective agreements, especially p. 2/3.

If we consider the definition of 'posted worker' in Article 2, the non-defined, open character of 'posting' in Article 2(1) draws attention. The Directive defines a posted worker as a worker who, for a limited period, carries out his or her work in the territory of a Member State other than the state in which he or she normally works. Although this certainly promotes the use of the freedom to provide services, it is at the same time problematic in the light of the protection of workers. The temporary character of posting is only linked to the duration of the service abroad. But what if providing the service lasts more than one or two years? When does the temporary character of posting change into a more permanent type of migration? The potentially unlimited duration of the posting complicates the distinction between situations falling within the freedom of establishment and the free movement of workers on the one hand, and situations falling within the freedom to provide services on the other hand.

Therefore, it would have been better if the Posting Directive had referred - at least for the postings mentioned under (a) and (c) - to the time limit with regard to social security (in Regulation 1408/71 and – in the future - Regulation 883/2004).[19]

No Member State appears to have taken the initiative to repair this explicitly at the national level. Probably this is in conformity with the intention of the Posting Directive. Still, the text seems to leave some room for Member States to introduce a fixed time limit. From a legal certainty perspective, the introduction of a fixed time limit can only be done at EU level by an adjustment of the Posting Directive or by an adjustment of Article 6(2) of the Rome I Convention.[20]

In the Dutch Terms of Employment (Cross-Border Worker) Act the 'allowed' length of posting is not determined either. It would have been a breach of the 'neutral implementation attitude' to develop a Dutch policy on this point, even if we refrain from the question whether the Directive would permit a national determination of the period of posting at all.

3.3 Definition of a worker

The definition of a 'worker' in the Posting Directive, is determined by the legislation of the Member State to whose territory the worker is posted (Article 2(2). This differs from the posting provisions on social security schemes in Regulation 1408/71. In 2000 the ECJ ruled that the question whether a posted worker is an employee or 'self-employed' is in fact determined by the statutory social security law of the sending Member State (the state in which the worker habitually works).[21] Sometimes a posted person may be regarded as self-employed within the framework of social security and as employee when labour conditions are concerned. In practice this may cause many misunderstandings and a lack of clarity in sectors like construction, transport and agriculture. Therefore, clear references to the definition of an employee (in this contribution referred to as 'worker') and a self-employed person in the implementing legislation of the Member States are necessary. Some Member States have realized this already, others not yet.

In the Netherlands, Art. 1 of the Terms of Employment (Cross-Border Worker) Act makes no explicit distinction between a posted worker and a (posted) self-employed worker. But Parliamentary documents and the applicable legislation for posted workers under Dutch law show that only the Dutch definition of an employee is to be taken into account in case a question should arise about the status of the worker.[22] The practical problem underneath is

[19] Now 12 months (with the possibility of another 12 months) and in the future 24 months.

[20] The European Commission is already preparing a Regulation that is to replace the Rome Convention, but did not seize this opportunity to introduce a fixed time-limit to posting situations. See COM (2005) 650 and Greenbook COM (2002) 654 of 14 January 2003.

[21] See ECJ judgments in cases nr. C 178/97 from 30 March 2000 [2000] ECR I-2005 (Banks) and nr. C-202/97 from February 2000 (Fitzwilliam).

[22] See Art. 1:1 Arbeidstijdenwet, art. 1 Arbeidsomstandighedenwet 1998 and art. 4 jo. art. 2 WMM for a definition of an employee under Dutch law. It would have been more clear if art. 610 , 610 a and b BW and also 690 of book 7 BW had been mentioned in art 1 of the Terms of Employment (Cross-Border Worker) Act. About the last mentioned provision the Explanatory Memorandum makes clear that this also applies to posted temporary

not easy to tackle: Although certain branches prefer to work with self-employed workers who would surely be unveiled as employees if all facts were known, in practice it is very difficult to prove this. How does one recognise a posted worker and as a result apply the Terms of Employment (Cross-Border Worker) Act? First of all these workers are difficult to find because they often work quite insulated from the Dutch workers.[23] And when they would be found, language problems and a lack of interest occur, because (most of the) posted workers have nothing to gain with a judicial procedure about their status.

So, the clarification of national definitions is not enough. The only real solution for the posting of foreign 'self-employed' (e.g. in the construction industry) whose work performance is the same as that of traditional 'employees' alongside whom they work, but who have arranged their affairs (for tax or other reasons) so that they move in the shadows between employment and self-employment, lies beyond the legal framework of the Posting Directive. In fact, the possibility that self-employed persons can 'post' themselves under the framework of Regulation 1408/71 (Art. 14a (1)) should be reconsidered, even though this would conflict with the interests of genuine self-employed persons.

4. TERMS AND CONDITIONS OF EMPLOYMENT OF A POSTED WORKER

With regard to the terms and conditions of employment for posted workers, the Directive coordinates Member States' legislation in such a way as to provide a core of

mandatory rules on minimum protection with which employers who post workers to the Member State in which the service is to be provided must comply in the host country. This is laid down in Article 3.

4.1 Equal treatment (Art. 3(1)and 3(10)

Article 3(1) states that Member States are to ensure that undertakings, falling within the scope of the Directive, guarantee workers posted to their territory the terms and conditions of employment laid down by mandatory law including collective agreements which have been declared universally applicable insofar as they concern the construction sector referred to in the Annex of the Directive. This equal treatment principle regards the duration of the work, rest periods and holidays, minimum rates of pay, health, safety and hygiene at work, the conditions of hiring-out of workers, protective measures for pregnant women, for women who recently gave birth, for young people and children, and equality of treatment between men and women. Hence, the Directive determines the nature of the labour standards which the Member States must apply but not the substance of these standards. This key provision states the standards for the minimum protection of posted workers; it furthers 'fair competition' by guaranteeing equal treatment between posted and domestic workers in the host country as far as the mentioned subjects of employment protection are concerned. Especially the inclusion of minimum rates of pay and paid holidays in the subjects regulated by the host country is important to prevent unfair competition. Next to this, Article 3(1) enhances the legal certainty of service providers by the formulation of subjects regulated minimally by the host country and by leaving the other subjects of an employment contract to be decided on by the contracting parties.

However, legal certainty is not served by Article 3(10). This paragraph gives the Member States two important options: first of all, they may make more working conditions applicable to posted workers than stated in Article 3(1) as long as these can be seen as public policy provisions. As explicitly stated, the application of public policy provisions has to be carried out in compliance with the Treaty and on the basis of equal treatment between

workers from abroad. See Kamerstukken II, 1998-99, 26 524, nr. 3, p. 3.

[23] For instance on a building site. A practical reason for this 'insulation' is that working together in a team with different nationalities would lead to much more communication problems for the managers of the teams on a building site.

posted and domestic workers. Member States are limited to imposing all their mandatory law provisions on service providers established in another Member State.[24] As a second option, Member States may decide to apply the Posting Directive also to collective agreements in sectors other than the construction sector. The political compromise to limit the obligatory part of the Posting Directive to extended collective agreements in the construction sector (see the Annex) cannot logically or legally be defended. It leads to quite arbitrary differences in the protection of posted workers and does not enhance the legal certainty and transparency of the applicable rules either. Except for the Netherlands, all other Member States that have *and* frequently make use of a system of erga omnes collective agreements implemented the second option. The first option is applied by seven Member States, which was reason for concern in the evaluation of the European Commission. However, if we look closely at the working conditions added to the obligatory working conditions stated in Article 3(1), it seems that most of these national public policy provisions only contain rather modest national provisions meant to strengthen the compliance to the terms and conditions listed in Article 3(1).[25]

The political debate on Art. 3(10), second intend, in the Netherlands

In the Netherlands, the second option of Art. 3(10) was first put aside, but quite recently, after six years had gone by, it was used after all. A brief account of the parliamentary history of the *Wet arbeidsvoorwaarden grensoverschrijdende arbeid* (Terms of Employment (Cross-Border Work) Act): The Bill was sent to the House of Representatives in the Spring of 1999. In the parliamentary debate, the central motto of the Government became clear: 'We do not want to transpose more or less than necessary.' Thus, none of the optional provisions in the PWD were considered in the Bill. This neutral attitude corresponds with the general Dutch conduct concerning the implementation of EU Directives. Nevertheless, the majority of the House of Representatives were not satisfied. These politicians objected to the limitation of the collective agreement part of the Directive to the construction sector. They stated that companies in other sectors would also want equal treatment at this point. The system of universally applicable collective agreements is widely spread in the Netherlands. Thus, not broadening the scope of the Bill through Article 3(10) of the Directive would mean that Dutch companies and workers outside the construction sector would not be able to compete with their foreign colleagues on an equal footing. This discussion dominated the parliamentary debate about the Bill, but did not lead to its amendment. Thus, the Bill was passed on.

In the autumn of 2003, the topic was raised again. This time it was related to a debate about a transitional arrangement for the free movement of workers from Eastern European countries after their accession to the EU on the first of May 2004. At first, the government kept defending its 'neutral' position and the majority of the House of Representatives still accepted this, despite continuing attempts by supporters of 'scope broadening' to put the item on the legislative agenda again. In the summer of 2004, however, the Government has made a U turn, because Dutch employers had complained about unfair competition related to the influx of cheap posted workers. In the autumn of 2004, a Bill was sent to the House of Representatives with the proposal to broaden the scope of the Terms of Employment (Cross-Border Worker) Act to all universally applicable collective agreements. This Bill was finally adopted on 1 December 2005. The renewed Act entered into force on 14 December 2005.[26]

[24] See Case C-164/99 [2002], ECR p. I-787 and Case C-165/98 [2001], ECR p. I-2189.

[25] See *Report from the Commission services on the implementation of Directive 96/71/EC*, January 2003: http://europa.eu.int/comm/employment_social/labour_law/docs/07_postingofworkers_implementationreport_en.pdf.

[26] See 'Kamerstukken II, 2005/06, 29 983, Stb. 2005, 626.

4.2 Which Dutch rules apply to cross-border posted workers?

Statutory terms and conditions

Applicable national rules corresponding to the subject matter covered by Art. 3(1) of the Posting Directive are partly identified by the Terms of Employment (Cross-Border Worker) Act. Art. 1 of the Act makes sure that a couple of provisions in Book 7 (about employment contracts) of the Civil Code are applicable to posted workers in the Netherlands. Herewith (all) mandatory civil provisions about minimum paid annual holidays, equal treatment of men and women and other provisions on non-discrimination, health and safety at work (employers' liability in case of work related accidents or diseases) and one of the protective measures for pregnant women (prohibition to dismiss someone because of pregnancy) are implemented.

Although not clear when one only reads the text of the Terms of Employment (Cross-Border Worker) Act, several provisions of Dutch administrative law are applicable to posted workers as well. All special mandatory law with a 'public order' character is applicable under art.7 of the Rome Convention. This concerns provisions of the Minimum Wages Act, the Working Time Act, the Health and Safety Act, the Temporary Employment Agencies Act and the Equal Treatment Act.

Terms and conditions laid down in (extended) collective agreements

Since the end of 2005 all collective agreements may be applied to posted workers, under the condition that they are declared universally binding.[27] The Dutch method of extension of collective agreements results in an 'erga omnes' scope during the period of extension. Therefore the system fits into the definition in the first subparagraph of Art. 3 (8) of the Posting Directive: 'Collective agreements which have been declared universally applicable' means collective agreements or arbitration awards which must be observed by all undertakings in the geographical area and in the profession or industry concerned.

In the Netherlands, bargaining provisions can only be made when statutory provisions leave room for derogation. In most cases derogation from a legal provision is only possible for social partners. If a bargaining provision proves to be inconsistent with (mandatory) legal provisions, this bargaining provision must be considered as null and void**.** Art. 2(6) of the Act of Extension of Provisions of Collective Agreements transposes the hard core of labour standards, specified in art.3 (1) of the Posting Directive. As part of the collective bargaining process Dutch social partners in some industries (foremost the construction sector, but recently the temporary agency sector as well) have labelled the applicable provisions in their collective agreements, following the seven categories mentioned in the Posting Directive and in the Terms of Employment (Cross-Border Worker) Act: work and rest time (a), holiday (b), rates of pay (c), workers for a temporary employment agency (d), health and safety (e), protective measures (only with regard to the terms and conditions of employment for young people) (f) and (equal treatment (g). A special appendix in the collective agreements stipulates which parts of the applicable provisions are meant for posted workers. Sometimes, the text of the applicable parts of the provisions is rewritten to adjust it to the situation of posted workers (references to Dutch provisions and situations have been deleted). In addition, in one collective agreement a special explanation is given about the job-related pay system and guaranteed gross wages.

On average, only about half of the total extended provisions applicable to domestic employees, apply to posted workers. Although practically all basic working and employment conditions are included, the exclusion of fringe benefits and other provisions in the collective agreements meant for 'permanent workers' (such as vocational training and stipulations

[27] See under par. 4.1. Until 14 December 2005, to posted workers in the Netherlands only extended collective agreements in the construction industry were applicable (as no use was made of the second paragraph of Art. 3(10) of the Posting Directive).

about the end of an employment contract), makes posted workers up to 25 % cheaper for employers in labour costs than domestic workers.[28]

5. THE FAVOUR PRINCIPLE

5.1 The Posting Directive and case-law of the ECJ

The favour principle is stated in Article 3(7) of the Posting Directive as a guarantee that the 'host-country principle' only applies when working conditions in this country are better than in the 'home country' of the posted worker. But how are we to decide which working conditions are the most favourable? Should we compare each provision on its own, or a group of rules about the same subject or all working conditions as a whole? Up to now, each Member State is allowed to develop its own method. However, no national implementation legislation specifies the method of comparison. Although in theory this complex situation may cause a lot of problems, in practice social partners (mainly in the construction industry) have developed some interesting solutions for problems of comparison in states with a more or less similar socio-economic level. This development was triggered by the judgment of the ECJ in *Guiot* and boils down to application of the (ECJ) principle of mutual recognition.[29]

In the *Guiot* case, a service provider protested against double charges in both the host state and the state of origin for contributions to so-called social funds in the construction sector. In *Guiot*, the ECJ ruled that the service provider only had to pay contributions in his country of origin. Social partners in the construction sector criticised this judgment because the ECJ had only considered the type of social funds, not the level of payment that workers could derive from the funds and thus not the equivalence of the schemes. Therefore, the Belgian and Dutch social partners took the initiative to repair this judgment: a comparison of their social funds led to the conclusion that workers in both countries were provided employment conditions at an equivalent level. This led to an agreement on the suspension of the application of the social fund of the host state. As a result, Belgian and Dutch service providers only had to contribute to the funds in their own countries and were no longer confronted with unjustified double charges. The German ULAK took a similar initiative, and has concluded bilateral agreements with, e.g., French, Dutch, Belgian and Austrian holiday funds. These bilateral agreements are a positive development, as it is a good way of avoiding double charges without creating undue pressure on funds with high levels of protection. They could also give an incentive to collective bargaining at the European level, which would be advantageous for the social dimension of the EU.

After *Guiot* there have been four other judgments of the ECJ on conflicts in which wages and working conditions of posted workers were involved: *Arblade*, *Mazzoleni*, *Finalarte* and *Portugaia*.[30] In this 'posted workers saga' the main approach starts with a comparison of protection in the host state and that in the state of origin. If protection is the same or almost the same, the social protection of the state of origin has priority. From a provision of services perspective, this makes sense, because the service provider should not be more restricted in his movement than necessary. In the first phase the case law showed a tendency to overlook relatively small differences (approx. 10 %) in social protection and wage levels between Member-States that are more or less on the same socio-economic level. Except for *Rush Portuguesa*, in all the judgments about the posting of workers until

[28] This estimation was made by a union spokesman of the construction union, whom I interviewed for a country report of a CLR Study. See Jan Cremers and Peter Donders, *The free movement of workers in the EU. Directive 96/71/EC on the posting of workers within the framework of the provision of services: its implementation, practical application and operation*, CLR Studies 4, Brussels: Reed Business Information 2005.

[29] Case C-272/94 [1996] ECR p. I-1915.

[30] Joined cases C-369/96 and C-376/96 [1999], ECR p. I-8453, Case C-165/98 [2001], ECR p. I-2189, joined cases C-49/98, C-50/98, C-52/98, and C68/98 to C-71/98 [2001] ECR p. I-7831 and Case C-164/99 [2002], ECR p. I-787

2001, the parties were established in the 'original' six Member States. Especially Belgian (*VanderElst, Guiot, Arblade, Mazzoleni*), French (*Arblade*) and Luxembourg (*Guiot*) labour law regulations were involved and only superficially compared. The judgments in *Finalarte* and *Portugaia* changed this picture. Here, 'high-level' German labour law was compared to its 'low-level' Portuguese and English counterparts. What guideline did the Court develop in these cases, in which the gap between the wages in the host country and the wages in the home country is much wider?

The ULAK, the social fund that regulates and maintains the German paid-leave scheme in the construction sector, requires foreign service providers to pay contributions to the scheme to finance the holiday entitlements of their construction workers. It also demands them to provide information for the calculation of those contributions. In this respect, the ECJ deemed it necessary to check whether the German paid-leave scheme provides posted workers with 'a genuine benefit, which significantly adds to their social protection'. This should be the case not only on paper be the case but also in practice. Firstly, it is important to check that the worker is entitled to more holidays and a higher holiday allowance under the German rules than under the law of the home country. Secondly, it is also important to check that the workers concerned are really able to assert their entitlement to holiday pay from the fund. In this light, the formalities and procedure for payment and language problems must not be too difficult for the average posted worker. Finally, the ECJ adds the condition that, given the 'genuine benefit' for the posted worker, the application of the German rules must be proportionate to their public-interest objective. This means that the increased social protection should be balanced against the administrative and economic burdens that the rules impose on the foreign employers. Is it possible to achieve the increased protection by less restrictive rules, for example by imposing a duty on foreign employers to pay the higher holiday allowance directly to posted workers, instead of the indirect payment through the ULAK? It is up to the national judge in the Member State to decide on such important details.

5.2 Implementation of the favour principle in the Netherlands

Art.3 (7) of the Posting Directive is not implemented explicitly in the Dutch Terms of Employment (Cross-Border Work) Act. Some Members of Parliament asked in vain for codification of the favour principle, especially because in Dutch law no legal base exists for the favour principle. Moreover, Members of Parliament asked the Minister what method has to be followed in the Netherlands to compare the applicable labour conditions of the host country and the country of origin. Art. 3(7) gives posted workers a right to the most favourable terms and conditions of employment, but no method of comparison to determine this is prescribed. Is a comparison preferable on the level of each provision, or between units of provisions covering the same subject, or is a comparison of the whole package of working and employment conditions the right point of departure? According to the Minister, the Dutch legal system prescribes a comparison on the level of each provision because, in the case of posted workers only (a minimum level of) mandatory law is at stake. The mandatory character of provisions does not allow the exchange of one provision for another, depending on the arbitrary preference of an individual worker.[31]

In this regard, the Minister also mentioned the existing agreement between the Dutch and Belgian social partners in construction to acknowledge each other's collective agreements as equivalent. As a result of this agreement, the Belgian collective agreement applies to a posted worker that usually works in Belgium during the period of posting in the Netherlands and vice versa. According to the Minister this agreement can be prolonged. But if a posted worker from Belgium appeals to more favourable extended Dutch provisions, the Belgium provisions have to yield as far as minimum entitlements are concerned. As long as posted

[31] See 'Handelingen II, 1998-99, nr. 104, p. 5980, 5987'. This statement is confirmed in a judgment of the Hoge Raad (Supreme Court) , JAR 2000/43.

workers are satisfied with the agreement, no objections against a prolongation exist.[32] This pragmatic attitude leaves enough room for collective bargaining to make the favour principle more workable in practice. The only reverse side of the coin is that it does not guarantee 100 % legal certainty for employers. But when only very few or even no individual appeals for deviance have to be expected, this may not be considered a problem.

5.3 Method of comparison: Minimum wage

The core of mandatory rules on minimum protection for posted workers in the host country covers, inter alia, the provisions relating to the minimum wage. Thus, if a Member State provides for such a wage, this will also apply to posted workers. Although the concept of a minimum wage is defined by the national legislation and practices of the host Member State, Art. 3(1)(c) and the second paragraph of Art. 3(7) provide some guidelines. Art. 3(1)(c) gives posted workers an entitlement to the same minimum wage level and to the same payment for overtime as domestic workers. Contributions to supplementary occupational retirement schemes are explicitly kept out of this equal treatment provision on minimum wages. Next to this, Article 3(7) states that allowances specific to the posting are to be considered part of the minimum wage, unless they are paid in reimbursement of expenditure on travel, board and lodging.

In my view, this last provision is not strong enough to guarantee a decent treatment of posted workers. A solution more in line with the intentions behind the Posting Directive would be to oblige service providers to pay traveling and lodging costs for their posted workers. Moreover, is it not entirely normal that every 'ex pat', working for a respectable multinational company, is compensated for expenses actually incurred by reason of his posting? Why should this be less normal for posted worker with weaker labour market positions? Apparently these things are not so self-evident anymore as they once used to be.

Last year, in a case of the European Commission against Germany,[33] the ECJ even had to make clear that 'it is entirely normal that, if an employer requires a worker to carry out additional work or to work under particular conditions, compensation should be provided to the worker for those additional services without its being taken into account for the purpose of calculating the minimum wage' (paragraph 40). In this case the Commission defended a method to compare the minimum wages in the host state and the country of origin that would have undermined the equal treatment between posted and domestic workers. According to the Commission, Germany failed to recognise, as constituent elements of the minimum wage, *all* of the allowances and supplements paid by foreign service supplier to their posted workers in the German construction sector, with the exception of the bonus granted to workers in that industry. Indeed, not taking all these elements into account resulted in higher wage costs for foreign service providers, which made it less attractive for them to offer their services in Germany. In its judgment the ECJ chose, in accordance with the combined goals behind the Posting Directive, a more balanced approach. The ECJ ruled that quality bonuses and bonuses for dirty, heavy or dangerous work need not be taken as component elements of the minimum wage for purposes of calculating and comparing.

Furthermore, the ECJ confirmed in this case that the comparison of wages should be made between gross minimum wage levels. This is in line with Recital 21 of the Preamble of the Posting Directive, from which it can be deduced that employment conditions on the one hand and social security on the other are, as a rule, to be handled separately. Taxation law is excluded from the Posting Directive as well. The view that gross wages should be decisive is supported by practical considerations: Net earnings are essentially dependent upon the

[32] See 'Handelingen II, 1998-99, nr. 104, p. 5980, 5987' and 'Kamerstukken II, 1998-99, 26 524, nr. 6, p. 4-5.' See also Sengers and Donders, SR 2001/5, p. 143. They speak of 'gentlemen's agreements'.
[33] Case C-341/02, Judgment of 14 April 2005.

worker's personal situation. An overall comparison of the national regimes involved creates uncertainty about the outcome in each individual case.[34]

6. MEASURES TO ENSURE COOPERATION ON INFORMATION AND COMPLIANCE

6.1 Provisions on information

Accessible and transparent information is a condition sine qua non for an effective application of the Posting Directive.[35] Under Article 4(3), a Member State acting as a host country is obliged to give information to the general public about the working conditions applicable to posted workers. But simply stating which statutory employment legislation and extended collective agreements are applicable is by no means sufficient. Member States should translate their labour conditions, laid down in legislation and extended collective agreements, into an accessible package of conditions that corresponds with the conditions mentioned in Article 3(1). Herewith transparency and legal certainty for service providers are served and also the protection of posted workers. Whether fair competition will be furthered is more difficult to say: bona fide companies will be stimulated to provide more cross-border services with posted workers if clear information about the employment conditions in the host country is easily available. Another advantage of good information is that mala fide companies can no longer hide behind the argument that they were not able to find information about the host country's conditions.

In what way is the information on the terms and conditions of employment in the Netherlands made generally available for workers and employers from other Member States (as required in Article 4(3) of the Posting Directive)? Although it is not easily found on the website of the Ministry of Social Affairs (www.szw.nl), the Dutch version of the site refers to a free phone number (+31 800 9051) that can be dialled by individuals and companies to obtain information. Furthermore, it provides the possibility of submitting questions by e-mail. The strong recommendation in the Evaluation of the Posting Directive in 2003 has not yet led to improvement of the accessibility of the information to the general public.[36] In September 2003 social partners in the construction sector published a special leaflet in the English language, aimed at posted workers and their employers. This leaflet gives rather detailed and comprehensive information about the provisions applicable to posted workers.

Most other Member States do not seem to be very active either in making their information available to foreign service providers and their posted workers. In its evaluation, the Commission proposes to solve the lack of easily accessible information by electronic means: an EC website is to contain links to all country information. At present, this EC website has become operational,[37] but many Member States still have no website of their own. And if websites are operational they are sometimes difficult to find and the available information is not very comprehensive and/or only in the home language. The many languages in the EU are a problem when it comes to accessible information to the general public. Valuable initiatives are the establishment of direct information points in some Member States. Networks like EURES and competent institutions for social security provide a network that may contribute to the accessibility of information as well.[38]

---

[34] This interpretation confirms that the chosen method of comparison on the level of net wages in the *Mazzoleni* case (Case C-165/98 [2001], ECR p. I-2189) must be seen as an exception to the main rule. Here, the distinction between posting and frontier labour was blurred.

[35] This was stated by the ECJ in joined cases C-369/96 and C-376/96 [1999], ECR p. I-8453, referring to Art. 4 of the Posting Directive and Directive 91/553/EEC (on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship).

[36] See COM (2003) 458 of 25 July 2003, p.19/20.

[37] See www.europa.eu.int/comm/employment_social/labour_law/postingofworkers_en.htm#7.

[38] For more details see Cremers/Donders, o.c. 2005, p. 23-33.

The reluctant attitude on the part of Member States when it comes to information, undermines the protection of posted workers as well as the bona fide performance of cross-border services. It also makes a protectionist impression, which does not serve fair competition. To serve both ends transparent, reliable and easily accessible information is needed. How can a Member State require fair competition from cross-border service providers if it does not act 'fair' itself in its information role as a host country? However, supplying reliable information will not deter companies from trying to post workers on a cheaper basis than legally possible. To combat this 'unfair' and often illegal competition only measures to ensure compliance with the Posting Directive will help.

6.2 Provisions on compliance

With regard to compliance, Article 4(1) of the Posting Directive obliges the Member States to designate one or more liaison offices or one or more competent national bodies. One of the tasks of these national bodies, stated in Art. 4(2), is to reply to reasoned requests from equivalent authorities in the other Member States 'for information on the transnational hiring-out of workers, including manifest abuses or possible cases of unlawful transnational activities'. Furthermore, Article 5 states that Member States are to take 'appropriate measures in the event of failure to comply with this Directive'. However, except for the jurisdiction rule in Article 6 no concrete measures are required or recommended. This is definitely a lost opportunity: At least the responsibility - or better still liability - of the service provider and the receiver of the service for the payment of wages and other employment conditions of the posted workers should have been included.

According to the ECJ, a liability clause does not run counter to the free movement of services in the EC Treaty: In the *Wolff & Müller v Pereira Félix* case the main contractor's liability for the unpaid minimum wages of a posted worker by the subcontractor was questioned.[39] According to the main contractor, this liability clause in the German Posting Act was an infringement of the freedom to provide services, as it made necessary intensive control mechanisms with more administrative burdens for foreign subcontractors. This would make it less attractive for foreign building companies to carry out construction activities in Germany. The ECJ ruled, however, that the liability clause in the German Posting Act could be seen as an appropriate measure that Member States have to take according to Article 5 of the Posting Directive in the event of failure to comply with this Directive.

This German example of an effective enforcement method shows that the main problem behind the enforcement rules in the Directive is the lack of political commitment to lay down concrete sanction mechanisms. It looks as if the Posting Directive is mainly concerned with adding to the promises which must be made to posted workers rather than with securing that the promises are actually kept.[40] Much therefore depends on the way in which the Member States implemented Art. 4 and 5 of the Posting Directive: Did they all (like Germany) ´repair´ this potential imperfect balance between the protection of workers and the obligations of the service providers when it comes to compliance measures or not?

Dutch measures aimed at compliance

According to Article 5 of the Posting Directive the host country is responsible for supervising compliance with the Terms of Employment (Cross-Border Worker) Act and the other mandatory provisions applicable. Therefore, the government is to ensure in particular that adequate procedures are available to workers and/or their representatives for the enforcement of obligations under this Directive. But because the Dutch enforcement system

[39] Case C-60/03, Judgment of 12 October 2004

[40] See already the predictions of Paul Davies, 'Posted Workers: Single market or protection of national labour law systems?', *CMLR* (34) 1997, p. 571-602 and W. Däubler, 'Posted Workers and the Freedom to Supply Services', *ILJ* 1998, p. 264-268.

is mainly based on private law, the Dutch government does not have special control mechanisms to prevent fraud and to assure the correct application of the Directive. It is left to the posted workers and the social partners involved, to ensure the Directive's correct application and, if possible, to prevent fraud.

In this respect, Article 4 of the Terms of Employment (Cross-Border Worker) Act transposes Article 6 of the Posting Directive (on jurisdiction) in the Code of Civil Procedures. Thus, it is safeguarded that the Dutch judge has jurisdiction to decide in judicial proceedings started by a posted worker. Unions are entitled to start judicial proceedings on behalf of posted workers or on the basis of their own interest in enforcement of the Directive. This is laid down in Articles 3:305a and 305b of the Dutch Civil Code. Especially for the statutory provisions of the Terms of Employment (Cross-Border Worker) Act and of the other legislation applicable, this may be helpful. Where collective agreement provisions are concerned, Article 3 of the Collective Labour Agreements (Declaration of Universally Binding and Non-Binding Status) Act) entitles unions and employers' organisations to institute proceedings in their capacity as parties to the collective labour agreement.

It depends on the provisions applicable to posted workers of Dutch labour and employment law whether for instance the 'user undertaking' of posted temporary agency workers can be held liable when the agency does not fulfil its duties to pay wages etc. to the posted worker. Article 7:658 (4) of the Civil Code provides for such a liability of the user undertaking, namely in cases of industrial accidents or work-related disease. The user undertaking is normally not liable for the compliance of other statutory employment conditions, like minimum wages and paid holidays. In some situations, however, the user undertaking might be held liable through tort law (Art. 6:162 of the Civil Code). In some industries, such as the construction sector, user undertaking liability is laid down in collective agreements.

Government intervention with regard to the Posting Directive may only come from the Labour Inspectorate, in its capacity of liaison office. The Inspectorate is allowed to check the pay slip of a posted worker. In practice this probably only happens in the course of an investigation that is targeted at illegal workers. Special attention is paid to some so-called risk-sectors, such as the construction industry and the agri- or horticulture industry. Within the Labour Inspectorate a special intervention teams aiming at the risk-sectors exist (since 2002). They carry out inspections to check if illegal employment, moonlighting and other forms of fraud are taking place.

Implementation in the other Member States

As far as the compliance provisions in Articles 4 and 5 are concerned, the legal implementation measures taken by the Member States differ greatly. Some States implemented these by introducing special, often (too) severe control measures, others did nothing at all. In its evaluation, the European Commission focused only on the former group, in its warning that the national control measures might be disproportional limiting the free provision of services if administrative burdens were to turn out higher for cross-border service providers than for domestic companies.[41] The other group of States, including the Netherlands, not only leaves room to bona fide service providers but also to their mala fide colleagues as they do not have to be afraid for sanctions in the host state whatsoever. That this 'laisser-faire' attitude does not serve the protection of workers and leads to distortions in competition does not seem to bother the European Commission. This (again) reveals unbalanced attention for only the free provision of services goal in the Posting Directive.

Apart from the strict or more 'laisser faire' attitude towards compliance on paper, all Member States are confronted with more or less the same enforcement problems in practice:

[41] In this respect it cannot be a coincidence that the original draft of the services directive tried to cut down in Art. 24 the power of the host country to exercise its inspection tasks.

Most liaison offices in the Member States seem to suffer from understaffing and lack of adequate information. Alarmingly, these liaison offices scarcely receive requests for information from service providers or workers. The mutual cooperation among liaison offices needs improvement as well, although there are some good initiatives like mutual cooperation agreements between some Member States. Here again, one of the complications for direct communication is the language problem.[42]

1. CONCLUDING REMARKS

In the previous sections the contents and Dutch implementation of the Posting Directive were analysed. The analysis shows problems on both levels which, all in all, diminish the effectiveness of the Directive and let the sought balance between the protection of workers and the promotion of the free provision of services swing through to the side of the latter. What, if anything, should be done about this?

To restore the balance and enhance the impact of the Directive in practice, the text of the Posting Directive should be modified as regards the Article 4 and 5 measures. These should be much more concrete and should oblige Member States to take the enforcement of the working conditions of posted workers on their territory more serious. A liability clause for the user undertaking would probably be most effective, and would, at the same time, limit the costs of enforcement for the state. Next to this, at least as a kind of last resort instrument, a time limit to postings should be introduced and an obligation for service providers to pay for the expenses on travelling, board and lodging of their posted workers.

As we have seen, the Dutch implementation legislation and the Dutch enforcement practice are not without problems either. Unfortunately, this conclusion applies to most Member States. So, from a pragmatic point of view, priority should be given to the creation of a better balance via national implementation measures and to a better practical application and operation of the Posting Directive as it is today. As far as the Netherlands are concerned, all the competent actors should work towards improving this situation, not only the government, but also the social partners, that could start by employing all the current possibilities of the Terms of Employment (Cross-Border Worker) Act and the Posting Directive.

More in general, a better application in practice of the (albeit imperfect) current national and European posting rules can start today if only the political will is present in both sending and receiving Member States. Simultaneously, also the European Commission should be more genuinely concerned about this practical application and about reaching a balance between the goals of the Directive. This would be in contrast to its current interest, which focuses too much on removing the obstructions to the internal market and on promoting the free provision of services, regardless of whether these service activities increase through bona fide or through mala fide service providers and/or temporary employment agencies.

As mentioned in the introduction, a clear example of this attitude is the proposal for an EU Services Directive. In the original proposal, specific provisions were included on the posting of workers, which would make the monitoring of working conditions in the host state even more difficult than today and would only give rather weak guarantees on the EU level in return. On 16 February 2006 the European Parliament adopted, by a large majority, a first-reading report on the services directive in which Articles 24 and 25 of the original proposal concerning the posting of workers were deleted.[43] This text must now be used by the European Commission as a basis for producing a modified proposal for the Services Directive. However, the Commission already announced that it will quickly come up with

[42] See for details and examples Cremers/Donders, o.c. 2005, p. 25-33 and 41-45.

[43] See: http://www.europarl.eu.int/news/public/story_page/056-5374-093-04-14-909-20060220STO05373-2006-03-04-2006/default_en.htm.

'guidance' to address any undue administrative burdens which may hinder the opportunities for enterprises to avail of the Posting Directive.[44]

Of course, the European Commission is right in wanting to tackle the protectionism in too rigid administrative procedures. And the promotion of mobility and intra-state provision of services in itself is a legitimate and a desirable goal as well. Still, the Commission must show at the same time that it cares about enforcement and letting control mechanisms really work; For instance by financially supporting initiatives to make information about working conditions accessible through an EU database of collective agreement provisions. And why does it take so long, not only at the national level but at the EU-level as well, to build a really informative website that links to national sites and perhaps even compares the working conditions in the various Member States both in a statutory respect and with regard to collective agreements?

The conclusion must be that policy-makers do not give priority to these things. In the long term, however, it will be in the interest of all parties involved that only bona fide mobility is promoted. Only then will European citizens in their respective roles as workers, entrepeneurs, citizens and consumers, stay or become convinced that further European integration (and a European constitution) is in their interest. Perhaps Dutch and French voters will then vote 'Yes', if they are ever asked again to give their opinion about further political integration of the European Union, for instance through a European Constitution.

[44] See Commissioner Charlie McCreevy's Statement on the Services Directive at the European Parliament Plenary session of February 2006, Strasbourg, 14 February 2006, SPEECH/06/84.