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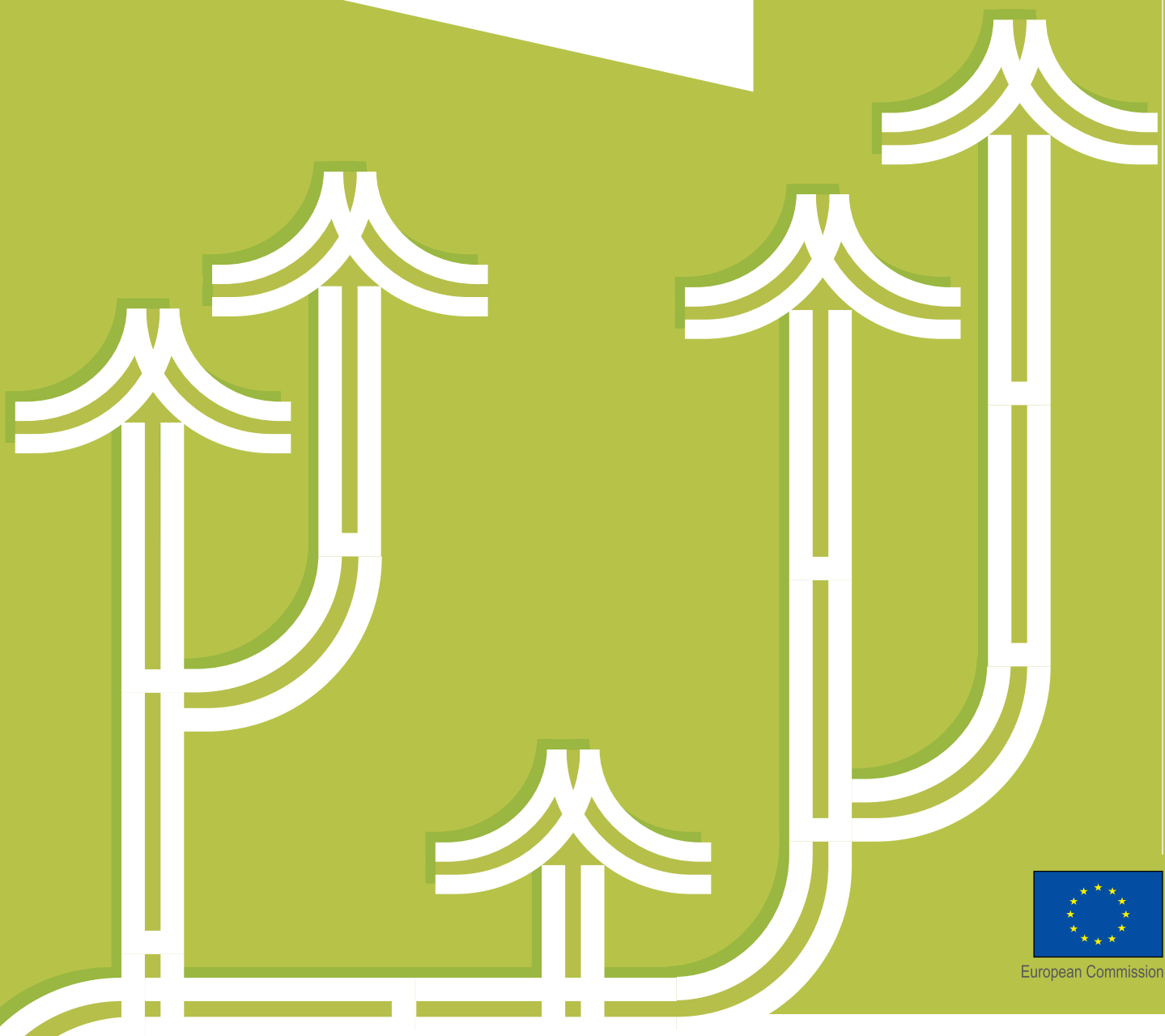

European Commission

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FOREWORD

The floor is open

By Jackie Morin, DG Employment, Social Affairs and Equal Opportunities

Head of Unit, coordination of social security systems and free movement of workers

Why launch, in 2010, a new online publication on free movement of workers? This fundamental freedom has existed since the foundation of the European Community. Half a century later, is there still room for academic debate? As professor Mario Monti stated in his report to the President of the European Commission earlier this year, "free movement of workers is a success from a legal point of view", but "a number of legal and administrative barriers still remain". Tackling these obstacles to free movement is not a minor task.

To draw the picture through a metaphor, we could apply the famous economics law of diminishing marginal returns, or increasing relative cost. Back in 1957, the Treaties introduced the fundamental right for workers to move freely within the European Community. This initial "input" yielded a proportionally enormous "output": a first stride towards European integration; the first inclusion of citizens in what was then a globally economic project. Then the principle was elaborated through secondary law Regulation (EEC) No 1612/68. In the 1970's the coordination of social security systems was further developed, ensuring migrant workers would not be put at a disadvantage when exercising their right to free movement. Then Directive 2004/38/EC brought clarity to residence issues. And earlier this year new regulations (EC) N° 883/2004 and N° 987/2009 modernising social security coordination entered into force. The case-law of the Court of Justice of the European Union has itself fed into the process.

Despite the progress that has been made, there is still a great deal of work to do. A recent report on the application of the Directive 2004/38/EC showed that its transposition was disappointing. The European Year of Workers' Mobility in 2006 led to the conclusion that, in addition to the legal and administrative obstacles on which recent efforts had generally focused (e.g. recognition of professional qualifications and portability of supplementary pension rights), other factors influence trans-national mobility. These include housing issues, language, the employment of spouses and partners, return mechanisms, historical 'barriers' and the recognition of mobility experience, particularly within SMEs.

This is no time to rest on our laurels. Going back to our law on increasing relative cost, further steps forward will certainly prove to be proportionally harder to achieve. As professor Monti underlines, the outstanding obstacles are the hardest to overcome.

So, yes, there is room for academic debate. There is room for further progress to make free movement a concrete reality, to develop understanding and support to this essential freedom. Yes, there is still a need to reinforce free movement of workers as the human face of the European Union. There is a need for creative thinking and new ideas. We hope that, in the coming years, FMW on-line journal will develop academic interest and stimulate debate on this area of EU law.

CONTENTS

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Freedom of movement of workers and recognition of professional qualifications in the case law of the European Court of Justice*

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This paper aims to contribute to the discussion about possible changes in the regulatory framework for the recognition of professional qualifications in the EU by providing a brief overview on the case law of the European Court of Justice regarding the compliance of qualification requirements with the freedom of movement of workers. In addition, some open questions regarding the relationship between freedom of movement and the recognition of professional qualifications, which in the author's view should be subject of further research and discussion, are addressed.

1. Introduction

The recognition of professional qualifications currently seems to be one of the most difficult issues in the field of freedom movement of workers (and in the field of freedom of establishment). In recent years, the European Commission has initiated numerous infringement proceedings against Member States due to non-compliance with EU legislation on recognition of professional qualifications.[1] The Member States in particular all failed to meet the deadline for the transposition of Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications (Directive 2005/36/EC).[2] The difficulties regarding the recognition of professional qualifications also were identified as a 'second major obstacle standing in the way of enhanced cross-border labour mobility' in the 'Monti-report' on a 'New Strategy for the Single Market' of May 2010.[3] In addition, it is apparent from recent reports by the SOLVIT-network[4] and the EU advice service 'Your Europe Advice'[5] that the recognition of professional qualifications is one of the major areas of concern for EU citizens who wish to work in another Member State.

As a consequence, the European Commission has initiated an evaluation of Directive 2005/36/EC, which currently is the main instrument in EU legislation for overcoming obstacles for the cross-border mobility of EU citizens resulting from different qualifications requirements in the Member States. The Directive has simplified and consolidated 15 previous directives and contains detailed provisions on the mutual recognition of professional qualifications of EU citizens in the field of regulated professions.[6] A final evaluation report will be

* All views expressed in this paper are strictly personal and do not reflect the position of the author's current employer.

(1) See http://ec.europa.eu/internal_market/qualifications/infringements_en.htm

(2) Commission staff working document on the transposition and implementation of the Professional Qualifications Directive, 22 October 2010, http://ec.europa.eu/internal_market/qualifications/docs/evaluation/staff-working-doc_en.pdf, p. 6

(3) See http://ec.europa.eu/bepa/pdf/monti_report_final_10_05_2010_en.pdf, p. 58.

(4) SOLVIT 2009 report, http://ec.europa.eu/solvit/site/docs/solvit_2009_report_en.pdf, pp. 8, 10-11.

(5) The mobility of professionals in practice, A report by the Citizens Signpost Service (CSS) on the recognition of professional qualifications, 26 February 2010, http://ec.europa.eu/citizensrights/front_end/docs/css_report_on_prq_220310.pdf, section 2.1.

(6) See the definition for 'regulated profession' in Art. 3.1 lit. a of Directive 2005/36/EC ('…a professional activity or group of professional activities, access to which, the pursuit of which, or one of the modes of pursuit of which is subject, directly or indirectly, by virtue of legislative, regulatory or administrative provisions to the possession of specific professional qualifications; in particular, the use of a professional title limited by legislative, regulatory or administrative provisions to holders of a given professional qualification shall constitute a mode of pursuit…').

published in autumn 2011, which will be followed by a Green Paper outlining possible options for a review of the Directive in 2012.[7] As a complementary measure, the European Commission has also published a contract notice for a study aimed at evaluating Directive 2005/36/EC against recent educational reforms in EU Member States (in particular the Bologna process and the development of national qualifications frameworks linked to the European qualifications framework).[8]

Taking into account these developments, this paper aims to contribute to the discussion about possible changes in the regulatory framework for the recognition of professional qualifications in the EU by providing a brief overview on the case law of the European Court of Justice (ECJ) regarding the compliance of qualification requirements with the freedom of movement of workers. The according overview is by no means exhaustive, but aims to summarize the most important general principles which were developed by the ECJ in its according judgments. In addition, some open questions regarding the case law of the ECJ and the relationship between freedom of movement and the recognition of professional qualifications, which in the author's view should be subject of further research and discussion, are addressed.

2. General significance of recognition of professional qualifications for exercising the right to freedom of movement of workers

The text of the Treaties (both in its previous and current versions) explicitly addresses the topic of recognition of professional qualifications in the context of freedom of establishment only. Art. 53 TFEU (formerly Art. 47 TEC) states that the European Parliament and the Council 'shall issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions ... concerning the taking-up and pursuit of activities as self-employed persons', in order to make it easier for EU citizens to carry out self-employed work in other Member States. Accordingly, the topic of recognition of professional qualifications in earlier decisions of the ECJ was mainly linked to the right to freedom of establishment.[9] A direct link to the freedom of movement of workers was firstly made by the ECJ in the *Heylens* case (1987) regarding a Belgian football trainer who carried out his profession in France even though his Belgian football trainer's diploma had not been recognized, and therefore was summoned before a criminal court in France. In this judgment the ECJ declared that – in the absence of harmonization of conditions of access to a particular occupation – the Member States are entitled to lay down according conditions, but need to 'reconcile the requirement as to the qualifications necessary in order to pursue a particular occupation with the requirements of the free movement of workers', and that the procedures for the recognition of foreign diplomas therefore need to meet certain standards.[10]

Referring to the *Heylens* case, the ECJ in later decisions consequently declared that 'national requirements concerning qualifications, even if applied without any discrimination on the basis of nationality, may have the effect of hindering nationals of the other Member States in the exercise of their right of establishment or right to freedom of movement of workers',[11] and that 'the analysis does not differ according to whether it is freedom of movement for workers or the freedom of establishment which is relied upon' if the national rules at issue fail to take account of the qualifications already acquired by the person concerned in another Member State.[12]

The right to freedom of movement of workers as well as the right to freedom of establishment therefore generally lead to a duty of Member States to offer fair procedures which take account of the knowledge and qualifications already acquired by a person from another Member State when requiring certain qualifications for the access to a particular profession.[13] In addition, it follows from these rights that

(7) Press release IP/10/1367, 22 October 2010, see http://europa.eu/rapid/

(8) Contract notice 2010/S 119-179359, 22 June 2010, see http://ted.europa.eu/

(9) See http://ec.europa.eu/internal_market/qualifications/docs/judgments/list_en.pdf

(10) ECJ, judgment of 15 October 1987, C 222/86, *Heylens a. O.*, paras. 12-13.

(11) ECJ, judgment of 7 May 1991, C 340/89, *Vlassopoulou*, para. 15; judgment of 31 March 1993, C 19/92, *Kraus*, para. 32; judgment of 10 December 2009, C 345/08, *Pesla*, para. 36.

(12) ECJ, judgment of 22 March 1994, C 375/92, *Commission v. Spain*, para. 18; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 61; judgment of 10 December 2009, C 345/08, *Pesla*, paras. 35, 38.

(13) ECJ, judgment of 7 May 1991, C 340/89, *Vlassopoulou*, paras. 15-16; judgment of 7 May 1992, C 104/91, *Aguirre Borrell*, para 12; judgment of 8 July 1999, C 234/97, *Fernández de Bobadilla*, para. 33; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 62.

the 'assessment of the equivalence of the foreign diploma must be effected exclusively in the light of the level of knowledge and qualifications which its holder can be assumed to possess in the light of that diploma, having regard to the nature and duration of the studies and practical training to which the diploma relates',[14] that is only reasons which are significant for the comparison of qualifications may be considered in decisions about the admission to according professions.

On a general level, the ECJ in its relevant decision has also repeatedly pointed out that the duty by Member States to offer recognition procedures in the field of regulated professions and the criteria developed in the ECJ's case law for the recognition of qualifications are inherent in the fundamental freedoms of the Treaties.[15] Provisions of national law on the qualifications needed in order to pursue a particular qualification therefore must not constitute an unjustified obstacle to the effective exercise of the fundamental freedoms guaranteed in the Treaties, that is they must meet the general conditions for compliance with fundamental freedoms as regards non-discrimination and the principle of proportionality.[16]

Since the principles and criteria regarding the recognition of qualifications developed by the ECJ are inherent in the fundamental freedoms of the Treaties, they also apply when specific requirements set out in existing directives on the mutual recognition of qualifications are not satisfied, that is in situations which are not covered by such directives.[17] As pointed out in the *Dreesen* judgment (2002) and the *Commission v Spain* judgment (2002), it would be contradictory to the purpose of according directives if they had the effect to make the recognition of professional qualifications more difficult in situations falling outside their scope.[18]

(14) ECJ, judgment of 15 October 1987, C 222/86, *Heylens a. O.*, para. 13; judgment of 7 May 1991, C 340/89, *Vlassopoulou*, paras. 16-17; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 68; judgment of 10 December 2009, C 345/08, *Pesla*, para. 39.

(15) ECJ, judgment of 14 September 2000, C 238/98, *Hocsman*, paras. 23-24; judgment of 22 January 2002, C 31/00, *Dreessen*, para. 25; judgment of 10 December 2009, C 345/08, *Pesla*, para. 38.

(16) See in particular ECJ, judgment of 30 November 1995, C 55/94, *Gebhard*, para. 37; see also judgment of 31 March 1993, C 19/92, *Kraus*, paras. 28, 32; judgment of 10 December 2009, C 345/08, *Pesla*, para. 35.

(17) ECJ, judgment of 14 September 2000, C 238/98, *Hocsman*, paras. 33-34; judgment of 7 October 2004, C 255/01, *Markopoulos a. O.*, para. 62.

(18) ECJ, judgment of 16 May 2002, C 232/99, *Commission v. Spain*, para. 25; judgment of 22 January 2002, C 31/00, *Dreesen*, paras. 25-26.

3. Standard of comparison for the recognition of professional qualifications

As stated above, the assessment of the equivalence of foreign diplomas according to the ECJ generally must be carried out 'in the light of the level of knowledge and qualifications which its holder can be assumed, by virtue of that diploma, to possess, having regard to the nature and duration of the studies and practical training to which the diploma relates'.[19] At the same time, the ECJ has declared that the host Member State in the course of an according assessment may 'take into consideration objective differences relating to both the legal framework of the profession in question in the Member State of origin and to its field of activity'.[20] In the case of the profession of lawyers, a Member State may therefore carry out a comparative examination of diplomas, taking account of the differences identified between the national legal systems concerned and require the applicants to show that they have acquired the knowledge and qualifications which are lacking.[21]

In the *Pesla* case (2009), the ECJ pointed out that the knowledge to be taken as a reference point for the purposes of assessing the equivalence of training is that attested by the qualifications required in the Member State in which the applicants seek admission to the according profession. It is therefore 'in relation to the professional qualification required by the rules of the host Member State that the knowledge attested by the diploma granted in another Member State and the qualifications and/or work experience obtained ... must be examined'.[22] The claimant in the main proceedings for this case was a Polish national who was refused admission to serve as a legal trainee ('Rechtsreferendar') in Germany without first taking an aptitude test in the compulsory legal subjects under the German first state examination in law, even though he had obtained a Polish university degree

(19) ECJ, judgment of 15 October 1987, C 222/86, *Heylens a. O.*, para. 13; judgment of 7 May 1991, C 340/89, *Vlassopoulou*, para. 17; judgment of 7 May 1992, C 104/91, *Aguirre Borrell*, para 12; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 68.

(20) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 44; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 69; judgment of 7 May 1991, C 340/89, *Vlassopoulou*, para. 18.

(21) Ibid.

(22) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 45; see also judgment of 13 November 2003, C 313/01, *Morgenbesser*, paras. 57, 67; judgment of 7 May 1992, C 104/91, *Aguirre Borrell*, para 11; judgment of 22 January 2002, C 31/00, *Dreesen*, para. 24.

in law as well as a Bachelor's and Masters' degree in German-Polish legal studies at the University of Frankfurt/Oder and provided additional evidence of professional experience in Germany. Mr. Pesla had taken the view that account must be taken primarily of the knowledge and qualifications which have been acquired in the Member State of origin, since a foreign diploma (in the case of legal professions) otherwise could never satisfy the criteria for equivalence as regards the specific qualifications required in the host Member State.[23] But the ECJ held that the mere fact that studies relating to the law of Member State of origin may be regarded as comparable, from the point of view of the level of training received and the time and effort invested, to the required studies in the host Member State, cannot of itself lead to an obligation to give priority to knowledge which relates to the law of the Member State of origin, since the according argument in its ultimate conclusion would lead to the admission of applicants to serve as a legal trainees without having any knowledge of the law of the host Member State.[24]

In addition, the ECJ in this case on a general level rejected the claimant's view that the right to freedom of movement would in practice be meaningless if the host Member State could require of candidates the same level of knowledge of its national law as that attested by the professional qualification required in that Member State to enter the legal professions. According to the ECJ, the right to freedom of movement 'does not, in order to be given practical effect, require that access to a professional activity in a Member State be subject to lower requirements than those normally required of nationals of that State'.[25] Instead, the 'fact that a host Member State must … take account of knowledge which corresponds only in part to that attested by the professional qualification required by the national rules of that Member State, without requiring that examinations be passed before such a qualification is granted, already contributes to facilitating the freedom of movement of persons as laid down in particular in Article 39 EC'.[26]

4. Significance of professional experience for the comparison of qualifications

The ECJ's starting point for comparing professional qualifications of applicants with the qualifications required in the host Member State is the foreign diploma of the concerned applicants. The comparison generally must be carried out 'in the light of the level of knowledge and qualifications which its holder can be assumed, *by virtue of that diploma*, to possess, *having regard to the nature and duration of the studies and practical training to which the diploma relates*'.[27] If the comparative examination of diplomas reveals that the knowledge and qualifications attested by the foreign diploma and those required by the national provisions correspond only partially, the host Member State is entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking.[28]

The foreign diploma (and the knowledge and qualifications attributed to that diploma) therefore are to be seen as the most significant part of the relevant qualifications, but the ECJ in its case law has established that professional experience acquired by the applicant must be considered when the comparison reveals that the knowledge and qualifications certified by the foreign diploma and those required by the national provisions correspond only partially. The most important decisions regarding this issue are the *Vlassopoulou* judgment (1991), the *Fernandez de Bobadilla* judgment (1999), and the *Morgenbesser* judgment (2003).

In the *Vlassopoulou* case, the Court for the first time addressed the significance of professional experience for the comparison of professional qualifications. The claimant in the main proceedings for this case was a Greek lawyer registered with the Athens bar, who was refused admission as an attorney at law ('Rechtsanwältin') in Germany, even though she had worked as a legal advisor ('Rechtsbeistand') in a law firm in Germany for five years and had also acquired a doctorate in law from a German university.[29] In its judgment, the ECJ declared that 'the competent national authorities must assess whether the knowledge acquired in the host Member State,

(23) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 42.
(24) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 56.
(25) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 50.
(26) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 53.
(27) See above, ns. 14, 19.
(28) ECJ, judgment of 7 May 1991, C 340/89, *Vlassopoulou*, para. 19; judgment of 7 October 2004, C 255/01, *Markopoulos a. O.,* paras. 64-65; judgment of 10 December 2009, C 345/08, *Pesla*, para. 40.
(29) ECJ, judgment of 7 May 1991, C 340/89, *Vlassopoulou*, paras. 3-5.

either during a course of study or by way of practical experience, is sufficient in order to prove possession of the knowledge which is lacking', and that they 'must determine whether professional experience acquired in the Member State of origin or in the host Member State may be regarded as satisfying' the requirement of a period of preparation or training for entry into a profession by the rules applying in the host Member State in full or in part.[30] According to this decision, professional experience therefore in any case needs to be taken into account if the rules for admission in the host Member State require practical training periods, but at this point it was not entirely clear whether professional experience could generally compensate lacking qualifications.[31]

In the *Fernandez de Bobadilla* case (1999), the ECJ in general terms confirmed the duty of the competent national authorities to assess whether the knowledge acquired by the candidate, either during a course of study or by way of practical experience, is sufficient to show possession of knowledge which is lacking and 'to investigate whether the diploma obtained by the candidate in another Member State, together, where appropriate, with practical experience, is to be regarded as equivalent to the qualification required'.[32] The claimant in the main proceedings for this case was a Spanish citizen who had obtained a Master of Arts degree in the United Kingdom and had worked as a restorer of works of art on paper in Italy and Spain for several years. Her application for a post as a restorer at the Prado museum in Madrid was rejected on the grounds that her degree from the United Kingdom had not been recognized as equivalent to the Spanish degree required for the according post.[33] Since the ECJ stated the duty of national authorities to take account of practical experience when assessing the equivalence of qualifications in this decision in general terms, without reference to a period of preparation or training such as a legal traineeship, it made clear that the duty to take account of practical experience cannot be limited to compensating such practical training periods.[34]

In the *Morgenbesser* case (2004), the ECJ in addition explicitly declared that the examination of the academic equivalence of a foreign diploma in relation to the diploma normally required of nationals of the host Member State by itself cannot be decisive for the recognition of professional qualifications. Instead, the 'taking into account of the diploma of the person concerned … must … be carried out in the context of the assessment of the whole of the training, academic and professional, which that person is able to demonstrate'.[35] The Court in this judgment also stated that it is 'the duty of the competent authority to examine, in accordance with the principles set out by the Court of Justice in *Vlassopoulou* and *Fernández de Bobadilla*, whether, and to what extent, the knowledge certified by the diploma granted in another Member State and the qualifications or professional experience obtained there, together with the experience obtained in the Member State in which the candidate seeks enrolment, must be regarded as satisfying, even partially, the conditions required for access to the activity concerned'.[36] Since the claimant in the main proceedings for this case (Mrs. Morgenbesser) had applied for admission to serve as legal trainee in Italy, these statements clearly did not relate to the possibility of compensating a preparation or training period by evidence of professional experience only, but again confirmed the duty of national authorities to take account of professional experience in recognition procedures in general terms.

5. Significance of professional qualifications acquired in third countries

In the *Hocsman* case (2000), the ECJ declared that the competent authorities of Member States 'must take into consideration all the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience',[37] and made clear that this duty also extends to diplomas acquired in third countries. Mr. Hocsman was a Spanish (and later on French) citizen, who had acquired a diploma as a doctor of medicine in Argentina. After his Argentinean diploma had been recognized by the Spanish authorities, he completed a training as a specialist in urology and

(30) ECJ, judgment of 7 May 1991, C 340/89, *Vlassopoulou*, paras. 20-21.
(31) See also ECJ, judgment of 9 February 1994, C 319/92, *Haim I*, paras. 26-28.
(32) ECJ, judgment of 8 July 1999, C 234/97, *Fernández de Bobadilla*, paras. 33-34; see also judgment of 13 November 2003, C 313/01, *Morgenbesser*, paras. 58, 62; judgment of 10 December 2009, C 345/08, *Pesla*, para. 41.
(33) ECJ, judgment of 8 July 1999, C 234/97, *Fernández de Bobadilla*, paras. 3-8.
(34) See also the according affirming statements in the ECJ's judgment of 14 September 2000, C 238/98, *Hocsman,* paras. 23, 36.
(35) ECJ, judgment of 13 November 2003, C 313/01, *Morgenbesser*, paras. 65-66.
(36) ECJ, judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 67
(37) ECJ, judgment of 14 September 2000, C 238/98, *Hocsman*, paras. 23, 40

practiced in Spain for several years. He then moved to France and held posts as assistant or associate specializing in urology in a number of French hospitals. His application for authorization to practice medicine in France was rejected on the grounds that the Argentine diploma he held did not entitle him to practice medicine in France.[38] Even though the ECJ in this decision did not explicitly state that diplomas and qualifications acquired in third countries need to be considered, it clearly related the duty of Member States to take account of '*all* the diplomas, certificates and other evidence of formal qualifications of the person concerned and his relevant experience' to the specific situation of Mr. Hocsman and thereby implied that this duty also encompasses third country diplomas - at least when they were already recognized in another Member State.[39]

In the decisions *Commission v. Spain* (2002) and *Morgenbesser* (2004), the ECJ then explicitly confirmed that the obligation of national authorities to take into consideration the qualifications of a person who requests authorization to exercise a regulated profession 'extends to all diplomas, certificates and other evidence of formal qualifications as well as to the relevant experience of the person concerned, *irrespective of whether they were acquired in a Member State or in a third country*, and … does not cease to exist as a result of the adoption of directives on the mutual recognition of diplomas'.[40] The significance of a prior recognition of third country diplomas in another Member State was not addressed in these decisions.

In the *Hocsman* case, the ECJ had stated that 'it will be necessary to verify whether recognition in Spain of Dr Hocsman's diploma from Argentina as equivalent to the Spanish university degree in medicine and surgery was given on the basis of criteria comparable to those whose purpose, in the context of Directive 93/16, is to ensure that Member States may rely on the quality of the diplomas in medicine awarded by the other Member States'.[41] The Court thereby made clear that a special significance needs to be attributed to a prior recognition in another Member State in the context of national recognition procedures.[42] But due to the according general statements in the *Commission v. Spain* (2002) and *Morgenbesser* decisions, a prior recognition in another Member State cannot be seen as a general precondition for the duty of member states to take such qualifications into account in recognition procedures.

6. Possibilities for partial recognition

Since the *Vlassopoulou* case, the ECJ has repeatedly stated that Member States are 'entitled to require the person concerned to show that he has acquired the knowledge and qualifications which are lacking', if the comparison of qualifications reveals that the knowledge and qualifications attested by the foreign diploma and those required by the national provisions correspond only partially.[43] The Court also declared that the according examination of equivalence must be carried out in the light of the academic and professional training as a whole which the person concerned is able to demonstrate, in order to assess whether the according qualifications may be regarded as satisfying, even in part, the conditions required for access to the activity concerned.[44] As a consequence, the competent authorities need to take account of knowledge which corresponds only in part to the professional qualification required in the host Member State, without requiring that examinations be passed before such a qualification is granted[45] - that is they need to provide a possibility for a partial recognition of according professional qualifications.[46]

In the *Pesla* case, the ECJ in addition pointed out that the 'possibility of partial recognition ... should be more than merely notional',[47] and that the 'host Member State is not necessarily entitled to require that the same type of aptitude test be taken in every case, irrespective of the extent to which the partial knowledge established may vary among the candidates'.[48] If candidates have to demonstrate in such

(38) ECJ, judgment of 14 September 2000, C 238/98, *Hocsman*, paras. 13-19.
(39) ECJ, judgment of 14 September 2000, C 238/98, *Hocsman*, para. 35.
(40) ECJ, judgment of 16 May 2002, C 232/99, *Commission v. Spain*, paras. 21-22; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 58.
(41) ECJ, judgment of 14 September 2000, C 238/98, *Hocsman*, para. 39.
(42) For the (conditional) applicability of Directive 2005/36/EC to third country diplomas, see Art. 3 section 3 of Directive 2005/36/EC.
(43) ECJ, judgment of 7 May 1991, C 340/89, *Vlassopoulou*, para. 19; judgment of 7 May 1992, C 104/91, *Aguirre Borrell*, para 14; judgment of 8 July 1999, C 234/97, *Fernández de Bobadilla*, para. 32; judgment of 13 November 2003, C 313/01, *Morgenbesser*, para. 70.
(44) ECJ, judgment of 13 November 2003, C 313/01, *Morgenbesser*, paras. 66-67; judgment of 10 December 2009, C 345/08, *Pesla*, para. 52.
(45) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 53; see also ECJ, judgment of 13 November 2003, C 313/01, *Morgenbesser*, paras. 64-67.
(46) See ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 58.
(47) Ibid.
(48) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, para. 59.

tests that they have not only acquired the knowledge which is lacking, but also the knowledge which is apt to be recognised, a partial recognition of the qualifications acquired according to the Court is in practice ruled out.[49]

In order to enable the possibility of partial recognition of professional qualifications, the host Member State therefore is required to carry out a sufficiently detailed breakdown of the subjects covered by the comparative examination regarding the qualifications acquired by the person concerned and the professional requirements laid down by national rules. In regard to the German first state examination in law / aptitude test for admission to the legal traineeship in Germany, the Court declared that according national regulations are acceptable if they offer persons with sufficiently broad and in-depth knowledge of a significant subset of topics the possibility of being exempted from the obligation to take all of the examinations normally required in the host Member State.[50]

An additional possibility for partial recognition of professional qualifications was addressed by the ECJ in the *Colegio de Ingenieros de Caminos, Canales y Puertos* case (2006). In the main proceedings for this case, the Spanish *Colegio de Ingenieros de Caminos, Canales y Puertos* (Institution of Civil Engineers) had challenged a decision by the Spanish Ministry of Development to recognize the diploma of an engineer specialized in hydraulics from Italy and grant him unconditional permission to take up the profession of a civil engineer in Spain. The national court had asked the ECJ whether (1) the relevant directive on the recognition of professional qualifications could be interpreted as to permit restricted recognition of professional qualifications in according cases, and (2) whether the right to freedom of movement of workers and the right to establishment in according cases prevent the host Member State from excluding the possibility of partial taking-up of a regulated profession, restricted to the pursuit of one or more activities covered by that profession.[51]

Referring to the first question, the ECJ pointed out that compensation measures (adaption periods or aptitude tests) which are authorized by relevant directives on the recognition of professional qualifications 'must be restricted to those cases where they are proportionate to the objective pursued'. In cases such as those at issue in the main proceedings, partial recognition, granted at the request of the person concerned and allowing her to take up immediately professional activities for which she is already qualified without completing compensation measures, therefore does not contradict the objectives pursued by according directives.[52]

Referring to the second question, the ECJ declared that it is for the competent national authorities to determine – in each specific case – whether the differences between the training required in the host Member State and the training of the person concerned is so great that the application of compensation measures would in effect amount to requiring the applicant to complete a whole new programme of education and training.[53] In addition, the competent national authorities in according cases need to determine whether the professional activity which the applicant wishes to pursue in the host Member State can be separated from the rest of the activities covered by the corresponding profession in that state - that is whether the according professional activity generally can be pursued independently or autonomously.[54]

When the differences between the fields of activity are so great that in reality a full programme of education and training is required for compensation, the freedom of movement of workers and the freedom of establishment according to the ECJ preclude a Member State from not allowing partial recognition, unless the refusal is justified by overriding reasons based on the general interest. When the activity in question can be separated from the rest of the activities covered by the profession in question in the host Member State, the negative effect caused by the preclusion of any possibility of partial recognition for the applicant according to the ECJ generally cannot be offset by objectives such as the protection of consumers and other recipients of services. Instead, these objectives may be achieved through less restrictive means in according cases, particularly

(49) Ibid.

(50) ECJ, judgment of 10 December 2009, C 345/08, *Pesla*, paras. 59-63; for the requirements for compensation measures under the 'general system' in Directive 2005/36/EC see Art. 3 section 1 lit. g, h, Art. 14 of the Directive

(51) ECJ, judgment of 19 January 2006, C 330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos*, paras. 10-15

(52) ECJ, judgment of 19 January 2006, C 330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos*, para. 24

(53) ECJ, judgment of 19 January 2006, C 330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos*, para. 36

(54) ECJ, judgment of 19 January 2006, C 330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos*, para. 37

through the obligation to use the professional title of origin or the academic title both in the language in which it was awarded and in its original form, and in the official language of the host Member State.[55]

7. Recognition of qualifications which are not a prerequisite for access to a profession

The principles for the recognition of professional qualifications summarized above were developed by the ECJ in relation to regulated professions or – as in the case of *Fernandez de Bobadilla* – in relation to very similar situations. But the ECJ has applied the according principles – at least in part – also to the recognition of qualifications which are not a prerequisite for access to a particular profession.

In the *Kraus* case (1993), the ECJ declared that 'although a postgraduate academic title is not usually a prerequisite for access to a profession … the possession of such a title nevertheless constitutes … an advantage for the purpose both of gaining entry to such a profession and of prospering in it'.[56] Consequently, the right to freedom of movement and the right to freedom of establishment preclude national regulations governing the conditions under which an academic title obtained in another Member State may be used, if they are liable to negatively affect the exercise of these rights, unless they meet the requirements of the principle of proportionality.[57] Referring to the *Heylens* and *Vlassopoulou* cases, the ECJ then declared that the according requirements include the duty of national authorities to carry out the verification of academic titles in accordance with a procedure which is in conformity with the fundamental rights conferred by the Treaty, and therefore 'any refusal of authorization by the competent national authority must be capable of being subject to judicial proceedings'.[58]

The applicability of the according principles for the recognition of professional qualifications to qualifications which are not a prerequisite for access to a particular profession was again confirmed and stated more clearly by the ECJ in the *Aranitis* case (1996). The according judgment concerned a geologist from Greece, who had moved to Germany and – after the employment office had classified him as an 'unskilled assistant' - asked the competent authority in Germany to issue a declaration that his Greek diploma was equivalent to the German diploma awarded on completion of a comparable course. This claim was rejected and he was only authorized to use the title attaching to his diploma in its original Greek form. On the certificate of authorization, the literal translation 'Geologist with a Diploma' was added.[59]

After explaining why the profession of a geologist in Germany could not been seen as a regulated profession in the sense of Directive 89/48/EEC (one of the predecessors of Directive 2005/36/EC), the ECJ firstly pointed out that, despite of the inapplicability of the Directive, any discrimination by Member States on grounds of nationality is prohibited, and that the Member States are required to secure freedom of movement for workers as well as their freedom of establishment in according situations. And secondly, the Court explicitly declared that the principles regarding the recognition of professional qualifications established in the *Vlassopoulou* case and later cases are also applicable to 'professional activities which are not subject by virtue of legal provision to the possession of a diploma, so far as concerns the conditions for taking them up or pursuing them.' Therefore 'the competent authorities of the host Member State responsible for classifying the nationals of other Member States, which will affect their chances of finding work on the territory of the host Member State, are required when carrying out that classification to take into consideration the diplomas, knowledge, qualifications and other evidence of qualifications that the person concerned has obtained in order to pursue a profession in the Member State of origin or from which he comes.'[60]

8. Language requirements

The topic of language requirements for the exercise of regulated professions in the host Member State was addressed by the Court in the *Haim II* case (2000). Mr. Haim was a dental practitioner from Italy who had obtained a permission to practice as a dental practitioner in Germany ('Approbation') and subsequently applied to the Association

(55) ECJ, judgment of 19 January 2006, C 330/03, *Colegio de Ingenieros de Caminos, Canales y Puertos*, paras. 38-39.
(56) ECJ, judgment of 31 March 1993, C 19/92, *Kraus*, para. 18.
(57) ECJ, judgment of 31 March 1993, C 19/92, *Kraus*, paras. 32-39.
(58) ECJ, judgment of 31 March 1993, C 19/92, *Kraus*, para. 40.
(59) ECJ, judgment of 1 February 1996, C 164/94, *Aranitis*, paras. 9-13.
(60) ECJ, judgment of 1 February 1996, C 164/94, *Aranitis*, paras. 30-32.

of Dental Practitioners of Social Security Schemes ('Kassenärztliche Vereinigung') to be enrolled in the register of dental practitioners so that he could then be eligible for appointment as a dental practitioner under a social security scheme. After the denial of his application had been declared unlawful following the ECJ's judgment in the *Haim I* case (1994),[61] Mr. Haim brought a further action against the Association of Dental Practitioners of Social Security Schemes in order to obtain compensation for the loss of earnings which he had suffered due to the unlawful decision. Since the Association in the according proceedings, inter alia, argued that Mr. Haim in any case would not have obtained his appointment as an approved dental practitioner because of his insufficient knowledge of German, the national court asked the ECJ whether the competent authorities of a Member State may make an appointment conditional upon language requirements in according cases.[62]

In its according judgment, the ECJ declared that 'the reliability of a dental practitioner's communication with his patient and with administrative authorities and professional bodies constitutes an overriding reason of general interest such as to justify making the appointment as a dental practitioner under a social security scheme subject to language requirements'.[63] At the same time, the ECJ pointed out that according language requirements may not go beyond what is necessary to attain the according objectives. The Court also remarked that 'it is in the interest of patients whose mother tongue is not the national language that there exist a certain number of dental practitioners who are also capable of communicating with such persons in their own language'.[64] Regarding the relation between language requirements and recognition of professional qualifications, it should be noted that the Court discussed the issue of language requirements independently of the question of equivalence of professional qualifications in this judgment. Accordingly, the question of proportionality of language requirements generally needs to be separated from the question of proportionality of professional qualification requirements.[65]

(61) ECJ, judgment of 9 February 1994, C 319/92, *Haim I*.
(62) ECJ, judgment of 4 July 2000, C 424/97, *Haim II*, paras. 7-24.
(63) ECJ, judgment of 4 July 2000, C 424/97, *Haim II*, paras. 57-59.
(64) ECJ, judgment of 4 July 2000, C 424/97, *Haim II*, para. 60.
(65) see also the according provision in Art. 53 of Directive 2005/36/EC, which is part of the title concerning 'detailed rules for pursuing the profession' and not of the titles concerning the recognition of professional qualifications in the Directive.

9. Summary and open questions

The ECJ in its case law has made clear that the right to recognition of professional qualifications is inherent in the fundamental freedoms guaranteed in the Treaties. The right to freedom of movement of workers and the right to establishment do not generally preclude Member States from requiring specific qualifications for the pursuit of particular professions, but the according national regulations must in any case meet the general conditions for compliance with fundamental freedoms as regards non-discrimination and the principle of proportionality. Most important consequences of the principle of proportionality are (1) a general duty of Member States to offer fair procedures for the recognition of professional qualifications of EU citizens, (2) a duty of Member States to take account of all relevant qualifications which the persons concerned have acquired prior to their application for admission to a particular profession, including professional experience, and regardless of whether applicants have acquired these qualifications in the host Member State, another Member State or in a third country, and (3) a duty of Member States to provide possibilities for a partial recognition of professional qualifications in the context of recognition procedures.

Two main open questions regarding the relation between freedom of movement and the recognition of professional qualifications remain:

Firstly, it is not entirely clear to what extent the according principles apply to the exercise of professional activities which are not qualified as regulated professions by the ECJ and the according EU legislation. In the *Aranitis* case, the ECJ on the one hand declared that the principles regarding the recognition of professional qualifications established in the *Vlassopoulou* case and later cases generally are also applicable to the classification of qualifications in the field of non-regulated professions. On the other hand the Court did not explore in more detail to which extent the distinction between regulated and non-regulated professions is significant for the application of the according principles to national procedures concerning the classification of qualifications acquired abroad. In this context, it also remains to be discussed whether the distinction between regulated and non-regulated professions as drawn by the ECJ and Directive 2005/36/EC is sufficiently clear, and whether the limitation of the applicability of according provisions in EU

legislation to regulated professions is reasonable and consistent with the case law of the ECJ.

Secondly, the ECJ so far has not addressed the question of the applicability of the according principles to third country nationals who reside in the EU.[66] Since Directive 2004/38/EC and various directives in the field of migration and asylum contain equality clauses regarding the access to employment and the recognition of qualifications,[67] the recognition of professional qualifications of third country nationals in any case is a topic to be discussed under EU law. In addition, it needs to be considered that Art. 15 of the Charter of Fundamental Rights of the EU guarantees the right to engage in work and to pursue a freely chosen or accepted occupation, and that the prohibition of discrimination and the principle of proportionality are to be seen as general principles of EU law.

It therefore does not seem consistent with EU law to generally limit the application of the principles developed by the ECJ regarding the recognition of professional qualifications to EU citizens who have made use of their right to freedom of movement inside the EU. Since the according principles – at least in part – ultimately rely on the principle of proportionality, they in any case need to be considered when regulating the recognition of professional qualifications on the level of the EU as well as the national level. As a consequence, it should be discussed whether and to what extent the according principles need to be extended to third country nationals and to qualifications acquired in third countries, in order to avoid unjustified discrimination and to ensure that the principle of proportionality is generally observed in the field of recognition of professional qualifications.

(66) For the only decision touching on this issue so far see the ECJ's order of 21 January 2008, C 229/07, *Mayeur*.

(67) See Art. 23 a. 24 of Directive 2004/38/EC; Art. 11.1 lit. c of Directive 2003/109/EC; Art. 27.3 of Directive 2004/83/EC; Art. 12 lit. a of Directive 2005/71/EC; Art. 14.1 lit. d of Directive 2009/50/EC.

Equal treatment of workers under EU law and remedies against violations by employers

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This article deals with two questions. First, the question of what rights are granted by Union law to non-national workers in the relationship with their employer. And, second, what remedies are available if the employer does not comply with his obligations and violates Union law?

1. Introduction

The legal literature on free movement of workers tends to focus on the relationship between EU nationals employed or looking for a job in another Member State and the authorities of that state. Most publications deal with the right to reside and work in that state, the unlawfulness of nationality requirements, other forms of open or indirect discrimination in the law or barriers to equal treatment caused by practices of public authorities.

In this article I intend to deal with two other questions. first, the question of what rights are granted by Union law to non-national workers in the relationship with their employer. And, second, what remedies are available if the employer does not comply with his obligations and violates Union law? These questions are not new, but they have acquired a new relevance with accession of new Member States to the Union. Over the last years national reports on the application of free movement rules in many Member States have mentioned the issues of substandard payment and unequal working conditions of workers from Member States that acceded to the EU in 2004 and 2007.

2. Equal treatment of foreign workers as basic principle

From the very outset, the EEC Treaty stated, in its Article 48 (the present Article 45 TFEU), that the freedom of movement for workers entails "the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment." This is a specification of the general non-discrimination clause in the present Article 18 TFEU.

This basic rule was specified in 1961, in Regulation no. 15, the first regulation on free movement of workers.[1] In 1968 it was extended in Article 7 of Regulation 1612/68.[2] According to Article 7(1) a national of another Member State may not be treated differently from national workers by reason of his nationality "in respect of any conditions of employment and work, in particular as regards remuneration, dismissal and should he become unemployed, reinstatement or re-employment." This provision covers all four stages of employment: (1) selection and recruitment, (2) remuneration and other conditions of employment, (3) dismissal and other forms of ending the employment relationship, and (4) re-employment

(1) Article 8 of Regulation No. 15, OJ of 28 August 1961, p. 1073-1084.
(2) Regulation 1612/68, OJ 1968 L 257 of 19 October 1968.

with the same or another employer. Moreover, Article 7(4) stipulates: "Any clause of a collective or individual agreement or of any other collective regulation concerning eligibility for employment, employment, remuneration and other conditions of work or dismissal shall be null and void in so far as it lays down or authorizes discriminatory conditions in respect of workers who are nationals of the other Member States." This provision directly and automatically determines the illegality of any discriminatory clause in individual or collective employment contracts.

These central provisions of free movement law remained in force after the entry into force of the new Directive 2004/38 on the free movement of Union citizens and their family members.[3]

At first sight, these provisions were not revolutionary. Similar equal treatment provisions can be found in Article 6 of the ILO convention on migrant workers adopted in 1949[4] and in Article 19(4) of the European Social Charter (ESC) signed in 1961. The ILO rules were used as a model when drafting the first EEC Regulations.[5] Similar provisions are included in later international instruments, adopted within the UN and the Council of Europe. It is appropriate to mention here, that Cyprus was among the first states that ratified the ILO Convention no. 97 and the ESC.[6] Cyprus also is one of the five EU Member States that has ratified the Twelfth Protocol to the ECHR with the general anti-discrimination clause similar to Article 26 of the ICCPR. The Cyprus government over the years has shown concern for the treatment of foreign workers, at least on paper. Cyprus is one of the five Member States that has ratified ILO convention no. 143 adopted in 1975.[7] That convention explicitly guarantees the equal rights of undocumented foreign workers arising out of past employment. Illegal employers are obliged to pay the same salary and provide equal benefits even to undocumented workers. The draftsmen of that convention, apparently, were concerned about the application of those rules in practice. Their attention to effective remedies is reflected in the following provision: "In case of dispute about the rights referred to in the preceding paragraph, the worker shall have the possibility of presenting his case to a competent body, either himself or through a representative."[8]

3. Two differences between intergovernmental law and Community law

In my view the equal treatment clauses in Community free movement law differ from similar rules in other international instruments in two important ways. *First*, the EU rules are more specific and they extend to areas not covered by the other instruments. Article 7(2) of Regulation 1612/68 extends the equal treatment to "the same social and tax advantages as national workers." Over the past decades, in the case law of the Court of Justice this short clause has been interpreted as covering a wide range of issues, from reduction of train fares, compensation for victims of serious crimes to the right to live together as non-married partners.[9] Article 8 extends the equal treatment to trade union membership, the right to vote and be elected in the management of trade unions and the right to vote and be elected in workers' representative bodies. [10] This was the first clause in EU law granting political rights to nationals of other Member States. It can be seen as the nucleus of the future union citizenship.[11] In certain Member States, e.g., Germany, the visible large-scale participation of immigrant workers in trade unions and in the workers' councils of large companies has clearly contributed to their integration in the country of residence.

The *second* major difference between equal treatment provisions in international instruments and in Community law relates to the external controls on the implementation of the agreed rules in the states bound by those rules. Both systems to a large extent entrust the national authorities and national courts with the interpretation and enforcement of the rules. Sometimes the national implementation

(3) Article 38(1) of Directive 2004/38/EC, OJ 2004 L 158 and L 229/35.
(4) ILO Migration for Employment (revised) Convention no. 97.
(5) S. Goedings, *Labor Migration in an Integrating Europe*, The Hague 2005 (Sdu), pp.263, 308 and 338.
(6) Cyprus ratified ILO Convention no. 97 in 1960 and the European Social Charter in 1968.
(7) Cyprus ratified ILO Convention no. 143 in 1977. The other Member States having ratified that convention are Italy, Portugal, Slovenia and Sweden.
(8) Article 9(2) of ILO Migrant Workers (Supplementary Provisions) Convention no. 143.
(9) D. Martin and E. Guild, *Free Movement of Persons in the European*, London/Edinburgh 1996 (Butterworths).
(10) The equal access to management functions in trade unions was added in 1976 by Regulation 312/76, OJ 1976 L 39.
(11) M. Condinanzi, A. Lang and B. Nascimbene, *Citizenship of the Union and Freedom of Movement of Persons*, Leiden 2008 (Martinus Nijhoff), pp. 65-104.

is supplemented by a system of supervision that is triggered by individual complaints. Within the EU there are at least two major institutions, the Commission and the Court, that provide for external control and do not depend only on action of the individual citizens concerned. Their presence and activities greatly enhance the actual application of the agreed common rules.

4. Workers from countries outside the EU

So far we have discussed workers who are nationals of a Member State. Although the EEC Treaty uses a wider term, "workers of the Member States," in the regulations just mentioned the scope of free movement was restricted to EU nationals and their family members.[12] However, over the past decades a range of Union law provisions have been adopted that grant equal treatment with respect to conditions of work and employment to large categories of workers who are nationals of third countries. Such clauses are included in the agreements the EU has concluded with future Member States,[13] with the Maghreb countries[14] and with other third countries.[15] A similar clause in Article 9 of Decision 1/80 of the EEC-Turkey Association Council is of great relevance in practice, since almost one quarter of all third country nationals in the EU are nationals of Turkey. The Court has held that national legislation in Austria that excluded lawfully employed Turkish workers from eligibility for the public law workers representative bodies did violate the equal treatment clause in Decision 1/80.[16]

Over the last six years the Council adopted 15 directives concerning the status of different categories of third-country nationals. In many of those directives there is a provision granting equal access to employment, equal working conditions, equal remuneration or equal treatment regarding dismissal, health and security. Such provisions are to be found in the directives on family reunification, on long-term residents, on students, on refugees and beneficiaries of subsidiary protection, on the rights of asylum seekers and in the recently adopted directive on admission of highly qualified workers from third countries (the so-called Blue Card Directive).[17] The wording of those provisions varies. They are not as broad and as detailed as Articles 7 and 8 of Regulation 1612/68 on EU workers. Neither is it explicitly provided that discriminatory clauses in individual or collective agreements are null and void. But, the relevant provisions in the new directives, without any doubt, create an obligation to provide equal treatment. But an obligation for whom: the Member State, the employer or both? This raises the issue of the implementation of EU law.

Before I turn to that issue, I would like to remind you that the EU Charter of Fundamental Rights, which has become part of primary Union law with the entry into force of the Lisbon Treaty, contains a number of provisions that are relevant for the protection and equal treatment of workers. The Charter provides in Article 15 that " everyone has the right to engage in work and to pursue a freely chosen or accepted occupation" and that "nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union."[18] Of course, 'equivalent' is not the same as 'equal.' But this clause in the Charter at least requires public authorities and other employers to justify unequal treatment of third country workers in the cases not covered by the new directives or other EU law equal treatment rules.

Article 21(2) of the Charter stipulates that "within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited." Originally the clause in the present Article 18 TFEU that prohibits any discrimination on the grounds of nationality within the scope of the Treaty was meant to protect the nationals of the Member

(12) See Article 1(1) of Directive 1612/68.

(13) Art. 37(1) of the Association Treaty EC-Poland and similar clauses in the Europe Agreement concluded with other candidate Member Sates in 1993.

(14) Art. 64 of the Mediterranean Association Agreements between the EC and Algeria, Morocco and Tunisia, OJ 2000 L 70.

(15) E.g., in the Partnership Agreements between the EC and Russia, Ukraine, Moldova, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan and Uzbekistan.

(16) ECJ 8 May 2003,C-171/01 (Birlikte/Wählergruppe Gemeinsam, ECR 2003, I-4301 and ECJ 16 September 2004, C-465/01 (Commission/Austria) ECR 2004, I-8291. See also Article 9 of the 1963 Association Agreement EEC-Turkey.

(17) Article 14(1) of Directive 2003/86, Article 11(1)(a) and Article 21(1) of Directive 2003/109, Article 26 of Directive 2004/83, Article 11 of Directive 2003/9 and Article 14(1) of Directive 2009/50; see also K. Groenendijk, Access of Third-Country Nationals to Employment under the New EC Migration Law, in: F. Julien-Laferrière, H. Labayle and O. Edström (eds.), *The European Immigration and Asylum Policy: Critical Assessment Five Years After the Amsterdam Treaty*, Brussels 2005 (Bruylant), pp. 141-174.

(18) Article 15(1) and 15(3) of the Charter, OJ 2007 C 303, p. 1-16. The official Explanations to Article 15(3) of the Charter explicitly refer to Article 19(4) of the European Social Charter, OJ 2007 C 303, p. 23.

States. After extension of the scope of the EC Treaty by the Treaty of Amsterdam, covering admission, residence and rights of third country nationals as well, it is not easy to justify why Article 18 would not protect third country nationals with regard to new issues that are now within the enlarged scope of the Treaty.[19] Of course, not every difference in treatment amounts to discrimination. Certain difference are provided for in the Treaty itself, e.g., free movement is restricted to Union citizens and their family members. But other differences in treatment on the grounds of nationality will have to be justified by Member States and by employers.

Finally, the Charter also provides that every worker "will be entitled to protection against unjustified dismissal and has the right to fair and just working conditions, such as limited working hours and annual paid leave".[20]

5. Different forms of application of EU law within Member States

A *first* way to implement EU law is by amending the national legislation in order to make it compatible with EU law. No such amendment is necessary if the national law was already in conformity with the EU rule. If the national legislation provided for equal treatment of workers irrespective of their nationality and declared discriminatory clauses null and void, no change in that legislation is required. The employer will be bound and can be sued on the basis of the national law.

The *second* way in which EU law is applied is on the basis of the direct effect of the EU rule. If that rule is directly applicable a worker can invoke that rule before the authorities and the national courts. According to the constant case law of the Court of Justice non-discrimination and equal treatment clauses are directly applicable.[21]

If the rule is codified in primary Union law (the TFEU or a treaty between the EU and a third country) or in a regulation, the Union law rule can be relied on both against public authorities and against third parties. Thus, Article 7 of Regulation 1612/68 can be invoked by workers or their family members having used their free movement rights against their employers. The professional football player Bosman could invoke Article 48 EC Treaty against his former employer the Royal Club Liégois SA.[22] The Slovak handball player Kolpak could rely on the equal treatment clause in Article 38 of the Association Treaty between the EC and Slovakia, in his case against the German Handball Federation.[23] The Russian football player Simutenkov did successfully rely on a similar clause in the EC-Russia Partnership Agreement, in his case against the Spanish Football Federation and the Spanish Minister of Culture.[24] A similar clause in the Treaty of Cotonou,[25] concluded in 2000 between the EC and what used to be called the Lomé countries in Africa, Asia and the Americas, so far has never given rise to a case before the Court of Justice. I am unaware of the actual application of this last equal treatment clause in the Member States.

Workers from third countries with whom the EU has not concluded a similar agreement and who are within the personal scope of one of the new migration and asylum directives just mentioned, can directly rely on the access to employment and equal treatment clauses in those directives in cases where a national or other public authority is or has been their employer or is the prospective employer. The Court has repeatedly held that directives cannot create obligations for individuals. Private employers, individual or companies, are not directly bound by a directive. They can only be bound by the national law implementing the directive.[26]

However, in those cases the employer may be bound to grant equal treatment because the clause in the directive (or in other EU law instruments) is implemented at the national level in a *third* way. According to the case law of the Court, national authorities and courts are obliged to interpret the national legislation to the extent possible in such a way that it is in conformity with EU law.[27] This form of implementation is especially relevant with regard to clauses in the directives that cannot be relied on

(19) C. Hublet, The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last? European Law Journal 2009, pp. 757-774.

(20) Articles 30 and 31 of the Charter.

(21) E.g., ECJ 30 September 1987, 12/86 (Demirel) ECR 1987, 3719, point 14 (EEC-Turkey), ECJ 31 January 1991, C-18/90 (Kziber) ECR 1991, I-199 point 15 (EEC-Morocco), ECJ 4 May1999, C-262/96 (Sürül) ECR 1999, I-2685, point 65 (EEC-Turkey) and ECJ 29 January 2002 (Pokrzeptowicz) C-162/00 ECR 2002, I-1049 points 19-30 (EC-Poland).

(22) ECJ 15 December 1995, C-415/93 (Bosman), ECR 1995, i-4921.

(23) ECJ 8 May 2003, C-438/00(Kolpak) ECR 2003, I-4135.

(24) ECJ 12 April 2005, C-265/03 (Simutenkov), ECR 2005, I 2579.

(25) Article 13(3) of the Treaty of Cotonou, OJ 2000, L 317/10.

(26) ECJ 26 February 1982, 152/84 (Marshall I), ECR 1986, 723.

(27) ECJ 4 July 2006 C-212/04 (Adeneler) ECR 2006, I-6057 and ECJ 23 April 2009 C-378/07 (Angelidaki) not yet in ECR.

directly against a private employer. It can be used in cases where the applicable national norms contain vague or general terms, such as 'good faith,' 'proper behavior' or 'public order.' A good example is the case of a Dutch company that decided to give each of its Dutch employees a number of shares in the company as a bonus. The foreign workers did not get any shares because the national law of the French mother company did allow non-EEC nationals to be owners of its shares. Several foreign workers sued the company and a Dutch labor court held that the general obligation of an employer under Dutch labor law 'to behave as a proper employer' should be interpreted in conformity with the equal treatment clauses in international treaties. Hence, the company was ordered to give an equal number of shares to the foreign workers or, if this was not possible, to pay them the value of the shares.[28] The case concerned Turkish and Moroccan workers. But the same reasoning would apply with regard to discrimination of EU workers or with regard to third country workers under the new migration and asylum directive. The case dates back to 1986. Today such a case would be decided on the basis of the more recent Dutch General Equal Treatment Act that entered into force in 1994.[29]

In a similar way the national equal treatment legislation of Member States should be interpreted, to the extent possible, in such a way as to live up to the obligations of the Member State under Union law. This obligation to interpret national law in conformity with EU law also applies to official national Equal Treatment Commissions or similar bodies established in most Member States. This brings me to my second question: the available remedies.

6. Effective remedies against discriminatory treatment by employers

Lawyers often are inclined to think that recourse to courts is the appropriate reaction in cases of discrimination by employers. Workers, however, seldom perceive approaching lawyers or courts as an attractive alternative. Visible reliance on the law may well be the end of their employment relationship. Courts are perceived as expensive and slow. Moreover, national courts often have a defensive attitude against Union law. Lack of knowledge or experience with Union law, an attitude to 'defend' the national law that is better known against 'invasion' by Union law or other reasons mean that national courts, at least in the first years after its adoption, have a tendency to disregard EU law or interpret it in such a way that existing national law can be applied in the way it always has been.

A typical example of this defensive attitude in my view is the 2008 judgment of the Supreme Court of Cyprus in the Motilla case on the (non-) application of Directive 2003/109/EC on the status of third country nationals who are long-term residents[30] to third country workers employed in Cyprus. Cyprus has a policy of granting residence and employment permits to low skilled workers from third countries that are explicitly restricted to two years and are non-renewable. However, in real life, at the end of the two years many of those workers are not required to leave the country, but are given a new two-year, non-renewable permit. Only highly skilled and managerial workers receive a permanent residence permit. The central question in this case was whether a worker who has been lawfully employed for more than five years on the basis of such temporary permits is within the personal scope of the Directive. The majority of the Supreme Court in the first judgment on this directive by the highest court of a Member State, considering the text of the directive, the policy of the government and the explicit temporary character of the permits, held that the worker was not entitled to long-term resident status.[31] With all due respect I hold this conclusion to be incorrect, since it would leave the Member States free to exclude whole categories of workers from the scope of the directive and thus severely restrict its effect, by simply stating that their employment is temporary whilst in reality it is not. The Commission´s Explanatory Memorandum on the proposal for this directive makes it clear that one of the purposes of the directive is to grant equal treatment to third country workers lawfully employed for five years in a Member State. Exception was made for the

(28) Kantonrechter Gorinchem 8 December 1986, Rechtspraak vreemdelingenrecht 1986, no. 79.

(29) Act of 2 March 1994, Staatsblad 1994, no. 230.

(30) Directive 2003/109/EC was adopted on 25 November 2003 and published in OJ 2004 L 16/44. The Directive had to be implemented in the national legislation of Member States by 23 January 2006.

(31) Supreme Court of Cyprus Second Instance Jurisdiction 21 January 2008 (Motilla v. Republic of Cyprus, case No 673/2006). Four of the thirteen judges dissented with the majority.

workers admitted ¨solely on temporary grounds¨ for inherently temporary jobs.[32] This defensive attitude is not exclusive to Cyprus. It can be observed in other Member States as well. The Netherlands government applies the same reasoning as the Cyprus Supreme Court with regard to ministers of religion (read: imams) who have been lawfully admitted for more than five years.[33]

7. Alternative remedies

In practice a worker has at least four alternatives to going to court: do nothing, resign and let the violations of his rights continue, try to get support of a trade union against the discriminatory behavior of the employer, file a claim with an Equal Treatment Commission or with an Ombudsman. I will conclude with a few words on each of the latter three alternatives.

Whether *trade unions*, the workers council or another workers' representation are perceived as an attractive alternative depends on the membership, the accessibility and the past activities of those bodies on behalf of migrant workers. In some Member States trade unions have succeeded in organizing large numbers of immigrant workers, not only as simple members but also in their governing bodies. In Germany and Sweden trade unions have visibly acted on behalf of migrant workers. In other Member States trade unions have been more ambivalent regarding migrant workers (e.g., Netherlands and France), or are perceived as being mainly active for their predominantly white, male and middle-aged members.[34]

Under Union law trade unions may act on behalf of workers, irrespective of their nationality and irrespective of the lawfulness of their residence and work. The new directive on sanctions against employers of illegally staying third country nationals, adopted by the Council in June 2009, provides the legal basis for activities of trade unions on behalf of undocumented workers.35 Article 13 of that directive stipulates:

"Member States shall ensure that there are effective mechanisms through which third-country nationals in illegal employment may lodge complaints against their employers, directly or through third parties designated by Member States such as trade unions or other associations or a competent authority of the Member State when provided for by national legislation."

Moreover, it is provided:

"Member States shall ensure that third parties which have, in accordance with the criteria laid down in their national law, a legitimate interest in ensuring compliance with this Directive, may engage either on behalf of or in support of an illegally employed third-country national, with his or her approval, in any administrative or civil proceedings provided for with the objective of implementing this Directive."

The national legislation of Member States will have to give trade unions and NGOs, acting for undocumented migrant workers, ways to effectively enforce the rights of these migrant workers. This new directive even provides for the possibility of granting the undocumented worker a temporary residence permit pending the proceedings of the worker against his (former) employer.36

From the national reports of the Network on Free Movement of Workers on developments in recent years it appears that in several Member States the national Equal Treatment Body or Ombudsman has been active on behalf of EU migrants. Because the Commission has published the annual report on its website, they have become a valuable source for researchers and policy makers.[37]

The recent report on Cyprus mentions the activities of the national *Anti-Discrimination Authority* not only with regard to the long delays in issuing residence

(32) COM(2001) 127 of 13.3.2001, p. 14-15 and Article 3(2)(e) of Directive 2003/109. In a letter of 12 October 2009 to the Cypriote organisation KISA – Action for Equality, Support, Antiracism in Nicosia the European Commission states: "Indeed it is not the purpose of this provision to allow for consecutive prolongations of residence permits for periods of validity of less than five years each time to exclude third-country nationals from eligibility for long-term resident status, despite their legal and continuous stay of more than five years."

(33) The Aliens Chamber of the District Court of Amsterdam held that this position is incompatible with Directive 2003/109/EC in a judgment of 3 June 2009, LJN: BI8797.

(34) R. Penninx and J. Roosblad (ed.), Trade Unions, Immigration, and Immigrants in Europe, 1960-1993, A Comparative Study of the Actions of Trade Unions in Seven West European Countries, 2000 (Berghahn). The editors observe that Turkish workers are highly organized in Belgium and Sweden, but have a relatively low trade union membership in France, Switzerland and the Netherlands (p. 200).

(35) Directive 2009/52 of 18 June 2009, OJ 2009 L 168/24.

(36) Article 13(4) explicitly refers to a similar clause on temporary residence permits for victims of trafficking in Directive 2004/81.

(37) The reports of the Network can be accessed via http://ec.europa.eu/social/main.jsp?catId=475&langId=en

documents to EU nationals, but also on the discriminatory refusal of heating benefits, health care, and the potential discrimination against EU nationals in the recruitment for employment in the public sector.[38] The Dutch report on 2008/09 refers to an opinion of the Dutch Equal Treatment Commission that, after an extensive investigation, established the indirect wage discrimination of EU-8 workers.[39] In earlier years that Commission has published opinions on the use of language requirements to exclude EU workers from jobs in cases were the required level of knowledge of Dutch language (speaking without a foreign accent) was not relevant for the job.

The reports on 2008/09 on several Member States mention the activities of the national *Ombudsman* or comparable institutions providing a remedy against discriminatory treatment of EU workers. The Greek Ombudsman was active on the issue of the exclusion of EU nationals from study grants in 2008 and in earlier years against the substandard employment conditions of EU-8 workers. In Latvia the Ombudsman denounced the illegality of the permanent residence requirement excluding EU workers from social security benefits. The Portuguese Ombudsman acted against discriminatory registration fees for the transfer of football players from other Member States. The reports on 2007 mention activities of the Czech Defender of Public Rights against substandard working and payment of temporarily employed Polish nationals, and of the Ombudsmen in Hungary and Luxembourg with regard to the social security rights of EU workers.

The relatively easy access and low costs of the Equal Treatment bodies and Ombudsmen and their competence and capacity to conduct independent investigations means that those institutions have become an attractive and possibly effective remedy against violations by employers of the rights of EU and third country workers under EC equal treatment rules.[40] This applies with regard to violations by private employers, by companies and by public authorities acting in the capacity of employer. Of course, appeal to a court may still be necessary, if the employer does not comply with the opinion of the Ombudsman or the Equal Treatment Body. But the number of employment discrimination cases before those bodies clearly tends to exceed the number of such cases before the courts. Moreover, the courts often lack the investigatory competence or are less inclined to use their investigatory powers in discrimination cases than the alternative bodies. Interestingly, the two alternative bodies in several Member States appear to take Community law more seriously – or at least at an earlier stage – than some national courts. Maybe this more open attitude can be explained by their institutional perspective. Ombudsmen and Equal Treatment bodies tend to pay more attention to the position of the individual person irrespective of his or her nationality. National courts may have a tendency to start reasoning from the perspective of the state. Courts, after all, are state institutions. But their judgments in a democratic state are binding for the state and other public authorities.

(38) The 2007 report on Cyprus can be accessed via http://ec.europa.eu/social/keyDocuments.jsp?type=3&policyArea=24&subCategory=458&country=26&year=2007&advSearchKey=&mode=advancedSubmit&langId=en

(39) Commissie Gelijke Behandeling Opinion 2008, no. 128.

(40) A. Brenninkmeijer and P. Nikiforos Diamandouros,The role of ombudsmen and similar bodies in the application of EU law, report on the 5th Seminar of the National Ombudsmen of EU Member States and Candidate Countries 11-13 September 2005, The Hague 2006.

The UK and Posted Workers: the effect of *Commission v Luxembourg* on the territorial application of British labour law*

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A. Introduction

Just when it looked like things could not get much worse for trade unions in the 'old' Member States following the European Court of Justice's decisions in Case C-438/05 *Viking* [2008] IRLR 14, Case C-341/05 *Laval* [2008] IRLR 160 and Case C-346/06 *Rüffert* [2008] IRLR 467 (noted by Anne Davies (2008) 37 ILJ 125 and Paul Davies (2008) 37 ILJ 293 respectively) along comes the Court's decision in Case C-319/06 *Commission* v *Luxembourg*, judgment of 19 June 2008. At first sight, *Commission* v *Luxembourg* appears to have little to say to the UK. Enforcement proceedings brought under Article 226 against a defaulting Member State tend to be confined to the specific circumstances of that state. Yet this case emphasises that *Viking* and *Laval* are no flash in the pan and that the Court is serious about facilitating free movement of services under Article 49 of the EC Treaty. This will particularly benefit businesses from the 'new' Member States, even if this comes at the expense of labour laws in the host 'old' Member States. More significantly for a number of Member States, including the UK, *Commission* v *Luxembourg* casts serious doubts on the territorial application of national labour laws.

It has long been a rule of British law that, provided the individual falls within the personal scope of the relevant provision and has worked the relevant period of service, UK employment rights will apply, irrespective of the individual's nationality and the duration of his or her employment in the UK. As the analysis below shows, the Rome Convention 1980, soon to be replaced by the Rome I Regulation[1] (Regulation 593/2008 (OJ [2008] L177/6) which applies from 17 December 2009) appears to endorse this position in respect of migrant workers and possibly in respect of posted workers. However, the Posted Workers Directive 96/71 (OJ [1997] L18/1) casts serious doubt on the territorial application of national labour law to posted workers.

I will argue that *Commission* v *Luxembourg*, as well as the earlier cases such as *Laval,* highlight the tension between the 'labour law' perspective traditionally adopted by national law and the Rome Convention on the one hand, and the 'single market' perspective adopted by the Court of Justice on the other. The UK, together with a number of other Member States including Ireland, has taken a labour law approach, applying national labour laws to all those working in its territory. It does this in the name of equality, fairness and good industrial relations. By contrast, the ECJ sees the application of national labour law by a host state as a barrier to the provision of services under Article 49 and therefore presumptively unlawful. The Court of Justice has mitigated this position somewhat by allowing the host state to apply to posted workers its laws in those areas listed in Article 3(1) of the Posted Workers' Directive. However, since Article 3(1) is a derogation to the basic rule that home state laws apply, Article 3(1) is narrowly construed. This means that the list of areas in

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(1) There is, however, a complicating factor when relying on the Rome I Regulation in the UK: the UK (unlike Ireland) has exercised its powers under Articles 1 and 2 of the Protocol on the position of the UK and Ireland not to take part in the adoption of the Rome I Regulation and so not to be bound by its provisions (Recital 45 of the Rome I Regulation). The UK has, nevertheless, declared its intention to opt-into the Regulation (2887th Justice and Home Affairs Council, 24-5 July 2008). So from December 2009 the Rome I Regulation will apply to the UK and not the Rome Convention (Article 24 of the Rome I Regulation)). For the sake of clarity, in this article I will refer mainly to the provisions in the revised Rome I Regulation.

Article 3(1) is exhaustive. Therefore, following *Commission* v. *Luxembourg* and *Laval,* the UK's assumption that all of its laws apply to all those working on the territory should be reversed, at least in the case of posted workers, and that the UK should apply only those laws in the areas listed in Article 3(1) to posted workers, subject possibly to public policy arguments made under the Rome Regulation.

In order to understand how this conclusion has been reached the article begins by considering the position under the Rome Convention/Regulation before turning to consider the Posted Workers' Directive 96/71, as interpreted by the Court of Justice. We then examine whether there are any remaining possibilities for the UK to continue to apply its national laws to posted workers. Finally, we consider the actual likelihood of the Commission bringing proceedings against the UK under Article 226 and conclude that they are remote, at least until after any future Irish referendum on the Lisbon Treaty.

B. The Basic Conflicts of Laws rules on Employment Law

As far as individual employment contracts are concerned, the Rome I Regulation envisages two situations: (1) where the parties have chosen the applicable law and (2) where they have not. Where the parties have *not* chosen the applicable law, Article 8(2) applies. This says:

To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, *from which* the employee habitually carries out his work in performance of the contract. *The country where the work is habitually carried out* ***shall*** *not be deemed to have changed if he is temporarily employed in another country.* (emphasis added to show the major changes from the language of the original Article 6(2)(a) of the Rome Convention)

So, in the case of a Polish worker who has come to the UK as a *migrant* worker under Article 39 EC but without a choice of law clause in his contract, Article 8(2) says that English law will be the objectively applicable law. However, in the case of a Polish worker *temporarily* posted to the UK by a Polish company under Article 49 EC, the objectively applicable law will be Polish. According to the 36th Recital of the Rome I Regulation, work is regarded as temporary 'if the employee is expected to resume working in the country of origin after carrying out his tasks abroad'. In an attempt to deal with evasion techniques, it continues 'The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer should not preclude the employee from being regarded as carrying out his work in another country temporarily'.

Where, on the other hand, the parties have chosen the applicable law (which they are permitted to do under Article 3 of the Rome I Regulation: 'A contract shall be governed by the law chosen by the parties'), Article 8(1) of the Rome I Regulation says 'An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3.' However, Article 8(1) continues that 'Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to [Article 8(2)] ….'. So if the parties have chosen English law to govern the employment contract and the English workers are posted temporarily to Poland then English law is likely to be the objectively applicable law under Article 8(2) as well as the chosen law. Furthermore, even if, in this situation, the parties have chosen Polish law to apply this will be subject to the provisions of Article 8(1) which say that the choice of law cannot deprive the employee of the protection afforded to him by the '*provisions* that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to [Article 8(2)], namely mandatory provisions of English law. So generally English law would remain the objectively applicable law, provided that English law is more favourable to the employee and it is suitable to apply English law under the principles laid down in *Lawson* v. *Serco* [2006] UKHL 3, [2006] IRLR 289 (Dicey, Morris & Collins, *The Conflicts of Law* (Sweet & Maxwell, 2006), 33-069-33-071). Similarly, where the Polish employer, posting Polish workers to the UK, has chosen Polish law to govern the contract, the chosen law will be and the objectively applicable law is likely to be Polish.

This analysis shows that when considering the position of the Polish worker temporarily posted to the UK, with or without Polish law being the choice of law, Polish law may well apply to the contract. Even

if the parties have chosen a different law, such as English law, the contract will remain subject to mandatory provisions of Polish law which cannot be derogated from. English courts will be able to apply English law only if (1) English law applies as an overriding mandatory rule of the forum under Article 7(2) of the Rome Convention, now Article 9(2); or (2) on the basis of the foreign law being contrary to UK public policy under Article 21 of the Rome Regulation. We shall consider Article 7(2)/Article 9(2) now; we shall return to Article 21 later.

Under Article 7(2) of the Rome Convention 'Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.' In the UK it seems that the Employment Rights Acts 1996 is a 'mandatory rule'. Section 204(1) ERA 1996, headed 'Law governing employment', provides 'For the purposes of this Act it is immaterial whether the law which (apart from this Act) governs any person's employment is the law of the United Kingdom, or of a part of the United Kingdom'. The leading text in the field, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 14th edition, 2006, para. 33-090) says that the ERA 1996 applies '*prima facie* to all contracts of employment, whatever their governing law, and will be treated as a mandatory provision for the purposes of Art. 6 and Art. 7(2) of the Convention'. They also suggest (paras 33-096-33-103) that the Equal Pay Act 1970, the Sex Discrimination Act (and by implication the other discrimination statutes), TULR(C)A 1992, the National Minimum Wage Act 1998 and the Public Interest Disclosure Act 1998 will also be regarded as mandatory under Articles 6 and 7(2) of the Rome Convention. If Dicey, Morris and Collins are correct then, under Article 6 and 7(2) of the Convention, Polish posted workers, working in the UK, are likely to benefit from all the employment protection laid down by these statutes, provided they fall within the personal scope of the provision and satisfy any qualifying period.

However, some doubt may be cast on this analysis in the light of the revision to Article 7(2) of the Rome Convention by Article 9(2) of the Rome I Regulation. This provides: 'Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.' 'Overriding mandatory provisions' are defined in Article 9(1) as 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.' (emphasis added) As the Commission's explanatory memorandum says (COM(2005)650, 7), this test explicitly draws on the ECJ's decision in Arblade [1999] ECR I-8453, para. 31. It is hard to argue that, for example, laws on unfair dismissal, however central to a system of employment protection, are 'crucial' to safeguard a country's social organization. It will therefore be harder to argue in future that Polish workers temporarily posted to the UK will be subject to key aspects of UK employment protection legislation which applies as overriding mandatory provisions of the forum.

This difficulty of applying UK labour law to posted workers is now further compounded by the application of Articles 3(1) of the Posted Workers Directive (PWD) 96/71 and Article 49 EC, as interpreted by the Court of Justice in *Laval, Rüffert* and *Commission v Luxembourg* to which we now turn.

C. Posted Workers and UK Law

1. The UK's implementation of the PWD

Unusually, when it comes to implementing Directives, the UK did not pass specific legislation to give effect to the PWD. Because, as we have seen, the UK applies all of its labour laws to those falling within its territorial scope the UK thought British law (more than) adequately covered the list of situations in Article 3(1) PWD. However, the UK did repeal some provisions in its legislation thought to deny protection to posted workers. In particular, s.196 ERA 1996 which removed rights under the ERA from those 'engaged in work wholly or mainly outside Great Britain', was repealed by s.32 of the Employment Relations Act 1999, with the result that the territorial limitation no longer applied to any of the rights listed in the ERA.

In addition, SI 1999/3163 The Equal Opportunities (Employment Legislation)(Territorial Limits) Regulations 1999 removed the word 'mainly' from, for example, s.10(1) SDA which had required that for discrimination to be unlawful it had to relate to employment 'at an establishment in Great Britain'

and that 'employment is to be regarded as being at an establishment in Great Britain unless the 'employee does his work wholly or mainly outside Great Britain'. From 1 October 2005, the territorial scope of the SDA was further amended by SI 2005/2467 Employment Equality (Sex Discrimination) Regulations 2005 to bring it into line with the more recently introduced discrimination laws.

2. Problems with the UK's implementation

As we have seen, the UK has applied all of its employment legislation to posted workers in the UK including key employment rights such as unfair dismissal, redundancy payments and family rights (eg paternity leave, right to request flexible working), none of which are listed in Article 3(1) PWD. It will be argued that the UK's position may well be in breach of the PWD and Article 49 EC. The argument runs as follows.

Under Article 3(1) PWD, the host state must apply a 'nucleus of mandatory rules' (Recital 13 PWD) to posted workers working in its territory, whatever the law applicable to the employment relationship. Following *Laval* and *Rüffert*, we know that the list of areas covered by Article 3(1) (restrictions on working time, minimum rates of pay, conditions of hiring out of workers, health and safety, protection of pregnant workers and those who have recently given birth and equality legislation) is exhaustive and interpreted restrictively (confirmed in *Commission* v. *Luxembourg*, para. 26). One explanation for this strict approach is that Article 3(1) is a 'derogation' (per AG Mengozzi in *Laval*, at para. 132) from the principle of home state control laid down in Article 6(2)(a) of the Rome Convention/Article 8(2) of the Rome Regulation, and derogations must be narrowly construed. Another explanation is that the Posted Workers Directive is not primarily a worker protection measure, as had been widely assumed by labour lawyers at least, but rather a measure to facilitate freedom to provide services, as its legal basis (Articles 47(2) and 55 EC) demonstrates. It should therefore be interpreted in a way that facilitates service provision which means that any potential barriers to freedom to provide services, particularly employment laws of the host state, should be narrowly construed (see also *Commission* v. *Luxembourg*, paras. 32-3). Therefore, if the detailed terms of the Directive are not complied with, in particular Articles 3(1) and Article 3(8), there will be a breach of Article 49. This point is made explicitly by Advocate General Mengozzi in *Laval* (para. 149):

A measure that is incompatible with Directive 96/71 will, *a fortiori*, be contrary to Article 49 EC, because that Directive is intended, within its specific scope, to implement the terms of that Article.

As Deakin has shown, the Directive and Article 49 are mutually reinforcing: the restrictive interpretation of the Directive is derived from Article 49 and the substance of Article 49 is derived from the Directive ((2007-8) 10 *CYELS* forthcoming).

All of this suggests that the UK can apply its laws to posted workers but only in the areas listed in Article 3(1) of the Directive, and that posted workers can enforce those rules in the areas listed in Article 3(1) before British employment tribunals under Article 6 PWD. However, the UK's extension of other important areas of its legislation, including unfair dismissal protection and family friendly rights, to posted workers looks vulnerable to challenge as being incompatible with Article 3(1) PWD and Article 49 EC (see also COM(2003) 458, 11 and 14). Are there any ways out for the UK?

3. Escape Routes?

3.1. Article 3(7) Minimum Standards Clause

The first possible escape route is Article 3(7) PWD. This says that paragraphs 1 to 6 of Article 3 'shall not prevent application of terms and conditions of employment which are more favourable to workers'. While many commentators, together with Advocate General Bot in *Rüffert,* assumed this meant that the *host* state could impose higher standards, the ECJ disagreed. In *Laval* it said that under Article 3(7) the *host* state could not impose terms and conditions of employment which went 'beyond the mandatory rules [in Article 3(1)] for minimum protection' (para 80, *Rüffert*, para 33). Rather, the ECJ continued, Article 3(7) applied (1) to the situation of out-of-state service providers voluntarily signing a collective agreement in the host state which offered superior terms and conditions to their employees and (2) to the situation where the *home* state laws or collective agreements were more favourable and these could be applied to the posted workers.

So, under this interpretation, British rules on, for example, the minimum wage could legitimately be extended to British workers posted to Poland (as paragraph 20 of the Guide to the Minimum Wage envisages). Likewise a German worker temporarily posted to Portugal will continue to enjoy German terms and conditions. It was this scenario that prompted the German government to support, in early drafting, what is now the ECJ's understanding of Article 3(7) of the Posted Workers Directive (PWD) 96/71, namely that the *home* state can apply higher standards to its posted workers, thereby protecting German workers working in Portugal. However, the ECJ's interpretation of Article 3(7) means that the UK cannot rely on Article 3(7) to extend all of its labour law rules to Polish workers posted to the UK. So this escape route appears to be blocked.

3.2. Article 3(10) PWD Public Policy provisions

Another possibility would be for the UK to rely on Article 3(10) PWD to justify extending all of its labour legislation to posted workers if it can argue that these rights constitute 'public policy provisions'. There are two problems standing in the way of this argument. The first is small and technical. *Laval* suggests that if a state wishes to take advantage of a derogation it must do so expressly (para. 84). It is not at all clear that general assertions made by the UK to the Commission and on the relevant websites constitute a sufficiently positive step to constitute 'national authorities having had recourse to Article 3(10)'.

The second and more substantive problem facing the UK is the decision in *Commission v Luxembourg*. In that case the Commission argued that by declaring that most of its labour law provisions and collective agreements to be mandatory rules under Article 7(2) of the Rome Convention and applying them to posted workers, Luxembourg breached Article 3(1) of the Posted Workers Directive and Article 49 EC. In its defence, Luxembourg argued that it could extend its legislation to posted workers because the rules all related to mandatory provisions falling under national public policy under Article 3(10) of the Posted Workers Directive. In other words, Luxembourg said that Article 7(2) of the Rome Convention (now Article 9(2) of the Rome I Regulation) and Article 3(10) PWD were co-extensive. The Court effectively agreed with Luxembourg's analysis but reached the opposite conclusion when applying these provisions.

The Court began by recalling its observations in Cases C-369/96 and C-374/96 Arblade [1999] ECR I- 8453, para. 31 that 'the classification of national provisions by a Member State as public order legislation applies to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State' (para. 29). As we have already seen, this is the same test used to define overriding mandatory provisions in Article 9(2) of the Rome I Regulation, thus supporting the view that Article 3(10) PWD and Article 9(2) of Rome I are co-extensive.

Having laid down this narrow reading of public policy the Court then said that the public policy exception, as a derogation from the fundamental principle of freedom to provide services, had to be interpreted strictly (paras. 30 and 31). In support, it cited Declaration No 10 on Article 3(10) PWD recorded in the Council minutes which provides that the expression 'public policy provisions' should be construed as covering 'those *mandatory* rules from which there can be no derogation and which, by their nature and objective, meet the imperative requirements of the public interest. These may include, in particular, the prohibition of forced labour or the involvement of public authorities in monitoring compliance with legislation on working conditions' (para. 33, emphasis added).

These observations further emphasise the idea that Article 7(2) of the Rome Convention, now Article 9(2) of the Rome I Regulation, and Article 3(10) PWD are co-extensive. Both suggest that only exceptionally can the host state insist on applying its law to temporary/posted workers. This conclusion sits rather uncomfortably with the observations made by the Commission in its Green Paper on the Conversion of the Rome Convention that Article 3(1) 'determines a "focal point" of mandatory rules to be complied with throughout the period of assignment to the host Member State … The Directive must therefore be regarded as an implementation of Article 7 of the Rome Convention, concerning overriding mandatory rules' (COM(2002) 654, 36), a view which appears to be repeated in the 34th Recital of the Rome I Regulation ('The rule on individual employment contracts should not prejudice the application of the overriding mandatory provisions of the

country to which a worker is posted in accordance with Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services'). It is hard to argue that maximum work periods, minimum rest periods and minimum paid holidays, satisfy the *Arblade* test of being 'crucial for a country for safeguarding its public interests'. Yet they are listed in Articles 3(1)(a) and (b) as part of the PWD's nucleus of 'mandatory rules' which the host state must apply.

How can this circle be squared? Perhaps the only way is through reliance on the doctrine of preemption. The Community legislature has selected those matters listed in Article 3(1)(a)-(g) PWD to be the mandatory rules under Article 7(2) of the Rome Convention/Article 9(2) of the Rome I Regulation. Therefore, Member States cannot unilaterally rely on Article 7(2)/Article 9(2) and Article 3(10)) to impose additional requirements on posted workers over and above those laid down by Article 3(1) PWD, except in truly exceptional circumstances (which may, in fact, never arise).

The exceptional nature of Article 3(10) was emphasized later in the *Commission* v. *Luxembourg* when the Court tightened up the criteria for public policy still further (para. 50):

…while the Member States are still, in principle, free to determine the requirements of public policy in the light of national needs, the notion of public policy in the Community context, … may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.

For good measure, the Court added that the Member State invoking the derogation must produce 'appropriate evidence or by an analysis of the expediency and proportionality of the restrictive measure adopted by that State, and precise evidence enabling its arguments to be substantiated (para. 51).

The test set out in paragraph 50 of *Commission v Luxembourg* replicates the well known test for public policy used by the Court in the context of free movement of persons (Case 30/77 *Bouchereau* [1977] ECR 1999, now enshrined in Article 27 of the Citizens Rights Directive 2004/38) to consider whether a Member State is justified in *deporting* a migrant. It is surprising that the Court has transplanted this test to the very different context of labour law, although it may have been influenced by the Commission's own view of public policy set out in its Communication on the implementation of the Directive (COM(2003) 458. 13). With the exception of laws against slavery (referred to in Declaration No.10), it is difficult to see how states can argue that any labour laws, however fundamental to the system of employment protection, satisfy this extraordinarily high standard, as we saw from the working time example. (The group of experts advising the Commission thought that public policy provisions would cover fundamental rights and freedoms such as freedom of association and collective bargaining, prohibition of forced labour, the principle of non-discrimination and elimination of exploitative forms of child labour, data protection and the right to privacy but there is no evidence that the Commission agreed with this (COM(2003) 458, 14)). The effect of *Commission* v. *Luxembourg* is to interpret Article 3(10) PWD and Article 7(2)/Article 9(2) of the Rome Convention/Regulation almost out of existence.

With the *Bouchereau* test as its yardstick, it is not at all surprising that the Court then found that specific aspects of Luxembourg labour law that were applied to posted workers could not be justified under Article 3(10). For example, Luxembourg law, like UK law, required a written contract or document established pursuant to Directive 91/533 on the written statement, a matter not covered by Article 3(1) PWD. The Court pointed out that since employers were required by the law of the home state to provide a written statement, the Luxembourg law was likely to dissuade undertakings established in another Member State from exercising their freedom to provide services. The Court therefore concluded that the Luxembourg rule did not 'comply with the first indent of Article 3(10) of Directive 96/71, in so far as it is not applied in compliance with the Treaty' (para. 44). Likewise, the Court rejected Luxembourg's attempt to apply a 'living wage' to posted workers (ie all wages indexed to the cost of living) in order to ensure 'good labour relations in Luxembourg' and to protect 'workers from the effects of inflation' (para. 48). Such general assertions, made in the absence of 'appropriate evidence', meant that Luxembourg had failed to make out the public policy derogation (paras. 54-5).

Luxembourg, again like the UK, also applied its own laws implementing the Part-time Work Directive 97/81 and the Fixed-term Work Directive 99/70 to posted workers. Once again, the Court notes that

the requirement 'concerns a matter which is not mentioned in the list in the first subparagraph of Article 3(1)' (para. 57). This is a surprising observation since Article 3(1)(g) talks of 'equality of treatment between men and women *and other provisions on non-discrimination*'. Both Directives 97/81 and 99/70 have the principle of non-discrimination at their core. Nevertheless, the Court continued that such rules were likely to hinder the exercise of freedom to provide services by undertakings wishing to post workers to Luxembourg (para. 58), and that since the host law already ensures the protection of these rights, Luxembourg again could not rely on the public policy exception (para. 60). Finally, the Court said that collective agreements could not could not constitute a public policy exception under the first indent of Article 3(10) (paras. 64-5) nor did the second indent of Article 3(10) apply to them since that related exclusively to the terms and conditions of employment laid down in collective agreement which have been declared universally applicable.' (para. 67).

There is every chance that the UK will find itself in a similar position to Luxembourg – and not just in the areas of the written statement and part-time and fixed term work. The only possibility for the UK is to push the Commission to use the cooperation provisions in Article 4(2) PWD: 'The Commission and the public authorities … shall cooperate closely in order to examine any difficulties which might arise in the application of Article 3(10)'. But whatever interpretation they might come up with must still be compatible with Article 49 EC (*Commission v Luxembourg,* para.33). Article 3(10) therefore also does not look a promising route for the UK.

3.3. A long shot: Public Policy under the Rome Convention/Regulation?

The analysis so far suggests that any attempt by a Polish posted worker, toiling on the Olympics site who is dismissed for, for example, blowing the whistle on dangerous working conditions, should not be able to rely on protection for whistleblowers under ERA 1996 since whistleblowing is not one of the mandatory rules listed in Article 3(1). Therefore he would be left with the ordinary conflicts of law rules which make clear that Polish law governs his situation. There is, however, a possibility that if he were nevertheless to go before a British Employment Tribunal to claim protection under PIDA 1998 and (now the relevant provisions in ERA), the ET might nevertheless decide to apply UK law. It might reason that even though under standard conflicts of law rules Polish law applies, because Polish law does not, for example, specifically provide protection in a whistleblowing situation (although the situation may be covered by general Polish law on dismissal), this 'entails a result not compatible with the values of the forum' (Green Paper, COM(2002) 654, 45). The ET might therefore, under the public policy provisions in Article 16 of the Rome Convention/Article 21 of the Rome I Regulation ('The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*order public*) of the forum') rule out the normally applicable foreign law and apply British law instead. In other words, while under conventional conflicts analysis Polish law applies, the British courts can ensure that UK law applies via public policy.

This is a long shot as an argument. It is precarious because the language of public policy in Article 16 of the Rome Convention/Article 21 of the Rome I Regulation appears to overlap with the language of public policy in Article 3(10) PWD which, as we saw above, gives such a narrow reading of 'public policy' as to preclude arguments of this sort. However, in its Green Paper the Commission appears to draw a distinction between mandatory provisions 'a concept specific to private international law, and *public policy* rules of *national* law' on the one hand (emphasis added), and 'international public policy' on the other. The latter applies 'after having determined the law applicable to a given legal situation with its conflicts rules' while, with the former, 'the court does not look to its conflicts rules to ascertain the applicable law and evaluate whether its content may be incompatible with the system of values of the forum but automatically applies its own rules' (COM(2002) 654, 45).

If this distinction is correct it should enable ETs to apply the conflicts rules to posted workers (and then conclude that Polish law should apply) but then consider whether, on the facts of each particular case, British law should, nevertheless, apply under the public policy provisions in Article 16 of the Rome Convention/Article 21 of the Rome I Regulation. Of course this does not do much for *ex ante* certainty nor for the nerves of ET chairs (or indeed claimants) who will have to consider whether Polish law applies and what it might say on any particular issue. However, this approach might just be compatible with Article 49 EC. As we have seen, the Court is showing itself

willing to read Article 49 in the light of secondary legislation. We also know that Member States can apply their legislation to posted workers provided that the posted workers 'do not already enjoy the same protection, or essentially comparable protection by virtue of obligations to which their employer is already subject in the Member State in which it is established' (*Commission v Luxembourg*, para. 42). The fact that, say, whistleblowing is not covered by a specific Community Directive might strengthen the ET's hand.

However, there remains one further uncertainty. In respect of matters listed under Article 3(1) PWD, courts have jurisdiction over posted workers under Article 6 PWD. By implication, Article 6 will not apply in respect of matters falling outside Article 3(1). This means that the tribunals will have to fall back on the Brussels Regulation 44/2001 (OJ [2001] L12/1), Article 19 of which says that an employer domiciled in a Member State may be sued either in the courts of the Member State where he is domiciled; or in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so. Retuning to our example of the Polish posted worker, the employer can only be sued in the Polish courts (the employer's place of domicile and the place where the employee habitually works) with the result that English tribunals may not have jurisdiction over a case involving a posted worker claiming rights outside those listed in Article 3(1) PWD. Article 21 of the Brussels Regulation continues that the provisions of the Section on jurisdiction over employment contracts can be departed from only by an agreement on jurisdiction '(1) which is entered into after the dispute has arisen; or (2) which allows the employee to bring proceedings in courts other than those indicated in this Section'. It is hard to envisage that the Polish employer would agree to the UK courts having jurisdiction.

4. Conclusions

Even if this 'long shot' reading of the Directive, Rome Convention/Regulation and the Treaty are correct, it remains very unlikely that the UK will be able continue applying all of its labour laws to posted workers as a general rule. It has long been established that, under Article 49 providers of services should not be subject to compliance with all the conditions required for establishment, since this 'deprives of all practical effectiveness' the Treaty provisions on services (Case C-164/99 *Portugaia Construções* [2002] ECR I-787). The UK has already received a pre-infraction letter from the Commission on this issue which it defended by pointing out that since most British employment rights are subject to a qualifying period, most posted workers will not be in the UK long enough to qualify for those rights. It also made the moral case that, in the name of equity and fairness, workers working alongside each other ought to be treated the same. Moreover, the UK's labour market is probably the most open to posted workers in the EU. As the Commission itself has observed, 'the UK is the only Member State which does not impose any of the restrictions' identified by the ECJ as incompatible with Article 49 such as licensing and authorization requirements (cited in House of Commons European Scrutiny committee (30th report of session 2006-7), para. 3.18). And because the UK does not impose registration requirements it cannot know how many posted workers are actually working in the UK. BERR suspects that, with the UK's open market for the EU-10 countries, more individuals come to the UK as migrant workers under Article 39 EC than as posted workers under Article 49. It may be that the Bulgarians and Romanians, who do not as yet enjoy free movement as workers, come to the UK as posted workers. It is their employers who might try to argue that British law is incompatible with the Posted Workers Directive. The Commission, for its part, might decide to reactivate its pre-infraction letter, although the relatively open British labour market (and the risk of bad publicity in the tabloids 'Brussels orders cut in workers' rights') might suggest that the UK should not be at the front of the line when it comes to facing infringement proceedings. Given that Ireland is in a similar position to the UK, it is extremely unlikely that the Commission will take any action against Ireland – and by implication the UK - until after (any) referendum in Ireland on the Lisbon Treaty.

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