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Slowing down Social Europe? The role of coalitions and decision-making arenas

Report 4 – the posting of workers issue

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1. Introduction

The social dimension of the EU is as old as the union itself. However, it was not until the mid-1980s that the EU gradually developed a real social dimension to counterbalance economic integration. The social dimension includes hard-law regulation in the form of directives (the first of which was decided upon in the 1970s) as well as soft-law regulation[1] such as the Open Methods of Coordination and the European social partners' voluntary framework agreements. In recent years, what can be labelled "the regulation-sceptical actors" have been strengthened and "the pro-regulation actors" have been weakened. Indeed, the number of socialist and social-democratic governments in the European Council has been reduced and the same political forces have weakened in the European Parliament. In addition, the Barroso-led Commissions have followed a more liberal agenda than its predecessors and the European Trade Union Confederation (ETUC) has lost bargaining power due both to its affiliate's loss of members and to the challenges from internationalization of production and labour migration. The enlargement in 2004 with new member states where the level of labour standards often do not match those in the old member state also served to strengthen the regulation-sceptical actors. At the same time the enlargement itself made it more difficult to agree on new regulation, as both the number of member states and the socio-economic differences between them increased.

These recent changes are expected to have influenced the development of the social dimension of Europe, also known as "Social Europe". The present project, which theoretical and methodological framework is described in details in report 1 (Mailand, 2010) - aims to explore whether the strengthening of the regulation-sceptical actors has affected the scope and content of regulation as well as the relative weight between different forms of regulation. To address this question, we will analyse recent decision-making processes within the four most important types of EU regulations - the directives, the Method of Coordination (OMC), the social partners' autonomous agreements and case law. In this regards, we will analyse what stand the main actors (the European Council/the member states, the European Commission, the European Parliament, the European social partners and the European Court of Justice (ECJ) have taken with regard to the extent and content of regulation and the choice between the above mentioned different types of regulation. In doing so, we will examine and compare four work and employment related areas. The areas will be labelled "employment policy", "employee involvement", "work-life balance" and "posting". The present report will (from section 2 onwards) focus on the posting of workers policy conceived rather broadly. In the rest of this first section the overall

[1] Regulation will in this report be used as an "umbrella-term" for written rules of all kinds, no matter their juridical statue. "Regulation" is also the name of a special kind of juridical binding rules formulated at the EU-level. It should be clear from the context which of the two meanings of the term is used in which situations.

aim and analytical framework for the project will be introduced briefly (but for a more elaborate presentation, please see Mailand (2010)).

There are two main reasons that a project with such a focus should be able to provide new and relevant knowledge. Firstly, the connection between changes in the various actors' power position on the European scene, and the outcome in terms of regulation agreed, have seldom been analysed. Secondly, in the rare cases were this connection has been analysed, the researchers have exclusively focused on only one policy area or one type of regulation. Knowledge about changes in power positions and regulation outcomes across work and employment related areas and regulation types are therefore limited.

The four types of regulation represent a continuum from what is often named "hard" (legally binding) to "soft" (legally non-binding) regulation. Case law, Directives and Regulations are the binding form of regulation, in that they are supra-national legislation that the member-states are bound to follow. The OMCs represents soft regulation, in that the actors (in this case primarily the member-states) are not legally bound to follow them. However, most OMCs contain some measures to commit the member states, such as quantitative targets, indicators and feed-back reports. This increases the chances that member-states will perceive the regulation as politically binding. These elements are missing in the social partners' autonomous agreements as these just formulate general guidelines for national and sectoral member organisations and therefore, can be seen as the softest form of regulation of the three. Furthermore, the relative importance of the main actors varies between the types of regulation. Although variation is found from case to case, the Commission and the member states are the most important actors in the OMCs, whereas the social partners generally have a greater role to play in relation to the directives and the framework agreements falling within the scope of the social chapters. In general the European Parliament's role is at its peak in relation to the directives, and is less important in relation to the autonomous agreements and the OMCs. Finally, the ECJ is the all dominant actor in relation to case law.

The different actor-constellation in the various types of regulation can be seen as "decision-making arenas" in line with studies of national level decision-making (Winter, 2003; Torfing, 2004; Mailand, 2008). With the reservation that informal contacts always blur the picture, the decision-making processes behind some directives are mainly found on what could be named "the politico-administrative arena" (including the European Council and the European Commission) and "the parliamentarian arena" (the European Parliament alone). Those directives where the social partners are the initiator are at least partly found on "the bipartite arena" (the social dialogue) or „the tripartite arena" (for instance the Commission's consultations of the social partner or the tripartite summit before the annual spring summits), the latter where the Commission coordinates the process). Similar to some directives, the OMC decision making processes take place mainly in the politico-administrative arena, although the

tripartite arena also plays a role (when the social partners are consulted). Contrary to these directives, however, the European Parliament plays only a minor role in the OMCs. The "juridical arena" is mainly reserved for the ECJ, but as we shall see other actors play an important role in giving importance to the case law.

Previous studies (Hooghe and Marks, 1999; Mailand, 2005; Nedergaard, 2005: to name a few) have shown that, to maximize their influence, actors tend to seek alliances and create coalitions with other actors. This is not only the case for the member states in the Council, but also for the various party groups in the Parliament, the social partners and in some cases even the so-called "directorates generals" (departments within the Commission). The multi-level and multi-actor nature of the European decision-making processes on employment and work certainly does not make it easier to study than national level decision-making, but tracking down the coalitions on the European scene can help to find out who wants what, how they get it and why.

1.1 Research questions

Following this, the research project will address the following question: Has the strengthening of the "regulation sceptical actors" affected the content or the range of work and employment regulation at the EU-level?

This question will be addressed through analysis of the following:

- What role have coalitions played in decision-making processes in work and employment related areas?
- What glues the coalitions together and are they divided primarily into pro-regulation and regulation-sceptical groups?
- Has the strengthening of the regulation-sceptical actors affected different work and employment related areas to a different degree?
- How has it been possible for the actors to agree on a number of new regulation initiatives when the regulation-sceptical actors have been strengthened?

The possible effects stemming from the strengthening of the regulation sceptical actors could be the adoption of less new regulation than previously - or of less binding forms of regulation - either due to the juridical status of the types of regulation used or to lower or fewer quantitative targets and minimum levels.

Answering these questions is the ambition of the whole project, and not of this report in itself. This report can only contribute by assessing these questions in light of the case of posting. Furthermore, the analytical framework outlined was not designed to the particular case of posting, and may therefore in some instances not be perfectly suited for this case. First, in evaluating the progress of Social Europe we adopt the perspective that regulation of labour conditions is

an expression of such progress, whereas deregulation or lack of new regulation in the face of new challenges can be seen as a slowing down of the social dimension. But actors identified within our analytical frameworks as 'regulation sceptical' actors have argued that social progress can be regarded as the abandonment of labour regulation so as to allow workers from low wage countries to use their 'comparative advantages' and there by improve their living conditions. Secondly, the term 'regulation sceptical' may be problematic, as it is actually regulatory efforts that are in some instances seen as less socially progressive. Where other policy issues may lend themselves to more straight forward evaluations of weather social progress has been made, in the instance of posting questions such as 'progress for whom' and 'what kind of regulation' seems very relevant. As the analytical framework does not include such issues, however, the analytical delimitations have to a high extent relied on the actors own perceptions in evaluation of the issue.

1.2 Methods and structure of the working paper

This report will focus on the regulation of posted workers. The paper draws on a large amount of written sources ranging from official documents, newspaper reports to secondary literature. Such sources has been supplemented by semi-structured interviews with EU-level and national-level civil servants, EU-level and national-level social partners, members of the European Parliament, and finally academic experts. These interviews have to a large extent been used to fill in the details regarding crucial events. Both interviews and documents are drawn upon throughout the report, but without systematic reference to either. The report is structured as follows: In section 2 the historical background for the posting issue is outlined, with a large emphasis on the adoption of the Posting of Workers Directive. In section 3 the first case study, on the Services Directive, is presented and analysed. As posting of workers is intrinsically linked to the free movement of services within the EU, major change in the regulation of services could potentially affect the posting of workers. In section 4 we briefly look at the adoption of the Temporary Agency Work Directive. As agency workers are one of the three kinds of posted workers mentioned in the Posting of Workers Directive, regulation of agency workers will potentially influence this category of posted workers. In section 5 the second case study, regarding the Laval case and the following political issues, is presented. The Laval case was one amongst four decisions with relation to posting delivered by the European Court of Justice in 2007 and 2008. They all had a major impact on the posting of workers and the regulation there off. Laval, however, was the most politicised of the four decisions, and this section follows the interplay between law and politics from the cases beginning to its present day aftermaths.

2. The historical development

The free movement of workers has been a fundamental element of the European Union since its inception. It has also always been controversial. During negotiations for the Treaty of Rome, Italian pressure for the free movement of workers was denied by the other founding countries of the European Community, and the radical plans to limit member-states authority in regulation terms and condition of workers was fiercely opposed. Though the Treaty of Rome secured the "abolition of any discrimination based on nationality between workers of the Member States" (article 48, para 2), it clearly entailed a demand driven circulation of workers. As such it only allowed foreign workers to "accept offers of employment actually made" by an employer in another member-state. In the 1960s, with large economic growth and increasing labour demand, only then did three new regulations liberalize this attitude so that workers could go aboard to search for work on their own (Romero, 1993).

2.1 Pre-history of the Posting of Workers Directive

A first attempt to regulate the issue of posting of workers was initiated in 1968. When adopting Regulation 1612/68 on freedom of movement for workers within the Community, the Council recognised the problems related to the choice of labour law in situations of 'intra-Community employment relationships,' as they were called. The central question was and, to some extent, still is which labour law should apply to workers from one member-state performing work in another member-state (therein the 'intra-Community' aspect). A number of possible situations can be considered in which this is the case and for some the issue seems to be settled. In the case of a worker from one member-state being employed and working in another member-state, it seemed that the labour regulation of the latter member state would apply. However, other situations are more complicated, as when a worker is employed in one member-state, but is sent temporarily to perform their job in another member-state (that is, posting).

Back in 1968, the Council asked the Commission to find an answer to this question in general. In March 1972, the Commission presented its first proposal for a Regulation on conflict of laws pertaining to employment relations within the Community to tackle this issue. The legal base was Articles 48 and 49 EEC (now Articles 45 and 46 TFEU) which relate to the free movement of workers. An amended proposal was presented in April 1976, but was met with scepticism in the Council. The Rome Convention, which deals more generally with the 'choice of law' issue, was signed in 1980, and the Commission withdrew its proposal for a regulation specific to labour law in 1981 (Evju, 2009).

In the late 1980s the issue of posting was taken up again in relation to the process of liberalizing the rules for public procurement. Unions, especially within the construction sector, lobbied the European Commission to include a

social clause into the new directive on Public Procurement. This would be a clause, identical to the ILO Convention No. 94, which would oblige public authorities to ensure that contractors comply with the national rules and regulations regarding terms and conditions of workers. The Commission proposed such a clause, but due to opposition in the Council, the clause was made optional in the final version of the Directive (Council Directive 89/440/EEC, Article 18).[2] Unsatisfied with this optional clause, unions pressed on for new legal instruments that would secure obligatory minimum standards in situations of cross-border mobility. In November 1989, the Commission issued a Communication concerning its action programme relating to the implementation of the Community Charter of Basic Social Rights for Workers mentioning both a social clause and an instrument regarding the "working conditions applicable to workers from another State performing work in the host country in the framework of the freedom to provide services, especially on behalf of a subcontracting undertaking" (Commission, 1989a: 22).[3] From that point it took almost two years before the Commission presented its first draft Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services (Commission, 1991).

In the meantime in March 1990 the European Court of Justice had pronounced its *Rush Portuguesa* decision (Case C-113/89) and this decision was essential in two ways. First, it allowed employers to post workers to another member-state when providing services in that member-state. This effectively changed the legal status of posted workers from being regulated by the rules regarding the free movement of workers to the rules regarding the free movement of services. Secondly, the decision allowed member-states to extend their labour law to posted workers within their territory. At a time when the Commission was trying to promote the construction of a Single Market the decision gave member-states an opportunity to re-regulate an essential part of service provision (Menz, 2005). Though a number of member-states welcomed this decision, and used it as a tool in regulation of the terms and conditions of posted workers in their territory, two problems could be perceived: From the point of view of those wanting to promote liberalization of service provision, it was problematic that member-states were allowed such a broad playing field in determining what parts of their labour law should apply. While to those wanting to secure the social protection of workers, it was equally problematic that member-

[2] Dorette Corbey (1995) indicate that unions wanted the directive to be usable as an instrument of employment policy. This gives a false impression of the problem. The directive was usable, if the authorities wanted it to be. Unions wanted the clause to be obligatory, so that authorities *had* to apply it.

[3] Looking back, this is the origin of the Posting of Workers Directive, but one should note that the word 'posting' is not mentioned, and that the Commission had, just a few months earlier, published a communication on subcontracting (Commission, 1989b), indicating that this was the commission's original focus. Interviews indicate that the Commission made unions choose between a directive on subcontracting and a directive on posting. That the unions choose the latter shows that they took the issue very seriously even at that point.

states were also not allowed to extend their usual labour regulations to posted workers (Herwig, 2008). Thus, the legal instrument mentioned by the Commission gained a dual purpose; to secure the wages and working conditions of posted workers by outlining obligatory minimum labour law standards that member-states had to extend to posted workers within their territory *and* to improve the conditions for the free movement for services within the Single Market by coordinating which rules should apply to posted workers.

2.2 The Posting of Workers Directive

Rather than tracing the whole political process around the Posting of Workers Directive (Kolehmainn, 2002; Evju, 2009; Eichhorst, 1998) we will just emphasise some of the crucial issues at stake in the process. First, some actors were generally opposed to the directive as such. In particular Great Britain and Portugal, who were both likely to have competitive advantages due to wage levels when posting workers to other member states. They were supported by the employer associations (except for the employers in construction, who favoured increased regulation of posting). UNICE preferred a general adoption of the Rome Convention rather than a new directive. Thus the legal base of the directive was the second controversial issue. A number of observers pointed out that for tactical reasons the Commission had chosen Article 57 (2) regarding the free movement of services as the legal base. Due to previous legislative proposals and the aim of the directive some saw a legal base related to the free movement of workers as more appropriate, but Article 57 (2) allowed for a qualified majority decision in the Council. This choice of legal base was opposed by both Great Britain and Portugal, who saw it as a tactical manoeuvre to avoid them blocking the proposal. On the other hand, the European Parliament, and especially the Economic and Social Committee, found that the directive had an incoherent aim which was aggravated by an inappropriate legal base (Kolehmainn, 2002: 150-152). They wanted another legal base (such as the Article 100a), not to prevent the directive, but to ensure that its aim would clearly be the social protection of workers. They felt that the legal base suggested by the Commission would increase the emphasis on the directives ability to facilitate the free movement of services and de-emphasise the aim of protecting workers. As such the legal base was discussed intensively in both the 'social policy committee' of the Council and in the European Parliament (Kolehmainn, 2002: 150-152). That said, a number of interviewees and scholars have pointed out that it has not been uncommon to use such a legal base for regulating the terms and conditions of workers. Thus, the legal base was freed from the most controversial issue during the adoption process.

Apart from these issues and amongst the large number of other issues at stake in the adoption process, only the three most controversial will be mentioned here: *First*, should the extension of national labour regulation have immediate effect on foreign service-providers or should there be a threshold period

to avoid unnecessary bureaucracy? *Secondly*, what kind of regulations would it be possible to extend? *Thirdly*, which terms and conditions should be extendable, and should the list be seen as exhaustive or should it be possible to add other items to the list when implemented nationally?

The threshold period turned out to be one of the major conflict issues in the political process. If the legal base was a principal issue, the threshold was a practical issue that concerned risk of circumvention and fear of inflexibility. In its original proposal for the directive, the Commission had proposed a three month threshold period in which the extension of the host countries labour regulation should not apply. This was done to provide some flexibility for service providers delivering services for only a short period of time. During its first reading, Parliament suggested that this threshold period should be removed completely to prevent too much administration on the part of the host states. However, this was unacceptable to the Commission and a number of informal negotiations were held between the Parliament and the Commission concerning this. A compromise of a one month threshold period was in the Commission's second proposal. The same conflict was found in the Council, and proved to be the major obstacle for getting the directive adopted. Important home countries (such as Great Britain and Portugal as mentioned earlier) opposed to the directive and supported any threshold that would minimise its effect. They feared that as soon as the directive applied their service providing companies would face both a greater administrative burden and increasing wage-cost. Potential host countries (such as France, the Netherlands, Belgium and Denmark) wanted a zero threshold directive to avoid circumventions. They feared that foreign service providers would use the threshold to avoid being subjected to host country labour regulation, and thus be able to out-compete host country firms on a low-wage-cost basis. In between the two positions countries with ambivalent positions (such as Italy, Spain, Greece and Ireland) were in favour of the directive but wanted to secure a certain level of flexibility for service providers by having a threshold period. Germany was internally divided on the issue. From March 1995 to March 1996, this was basically the only unresolved issue. A suggestion of an optional one month threshold was raised by the French presidency in 1995, but could find no backing by the whole Council. Instead, the Commission suggested a zero threshold model, with an assembly clause giving an eight day threshold for assembly work. At that point both Ireland and Portugal had relaxed their stance on the issue, and the assembly clause compromise was adopted in the final directive (Evju, 2009: 18-19). While the issue of the threshold period seemed to be settled, the Commission has since disputed the rights of member states to control the effect of the directive from day one. Thus, some of the practical issues persist.

As for the second issue, regarding the forms of regulation that should be extendable within the scope of the directive, was actually not very controversial during the process. But as we shall see it has gained importance since, and we

will therefore touch upon it briefly. In its first proposal the Commission had included just two kinds of regulations as extendable: statutory labour law and universally applicable collective agreements (*ergo omnes*). This entailed that collective agreements that were not universally applicable and 'usually applied' wages were excluded. In its first reading, the European Parliament suggested that 'usually applied' wages and working conditions was included in order to make formally non-binding, but effective labour regulations applicable to posted workers. The Commission accepted this, but only to the extent that an overwhelming majority of employers were covered by these 'usual' terms and conditions (Eichhorst, 1998: 18). The end result was, however, more specifically accommodated to the needs of the Italian and Danish system. Thus, apart for the "law, regulation or administrative provision" and "collective agreements or arbitration awards which have been declared universally applicable," it was allowed, in Article 3(8) that systems that did not have *ergo omnes* mechanisms could base themselves on collective agreements that are "generally applicable to all similar undertakings in the geographical area and in the profession or industry concerned" (Danes) and collective agreements "concluded by the most representative employers' and labour organizations at national level and which are applied throughout national territory" (Italians)[4].

With regard to the list of elements to be extended, this became far more controversial and involved a long back and forth dialogue during the whole process. Parliament wanted to extend the list, while some member states just wanted it to be 'open.' The latter seemed to become the end result, as Article 3(10) stated that the directive did not prevent member states from applying regulation of "terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy provisions.". As we shall see, later rulings by the European Court of Justices have restricted the member states claim to use public policy provisions, but from documents and interviews it seems that at the time most people saw Article 3(10) as making the list of items to be regulated *de facto* 'open' (Evju 2009, p. 19). Furthermore, Article 3(7) stated that the directive "shall not prevent application of terms and conditions of employment which are more favourable to workers" then those mentioned in the list of items. Again, interviews and documents give the impression that, at the time, most people regarded this as a clear indication that the directive set minimum standards, but this too has been challenged by the Courts rulings. Thus the final list only included:

(a) maximum work periods and minimum rest periods;

(b) minimum paid annual holidays;

[4] During the implementation of the Directive the Danes realised that they were actually unable to use the clause inserted in their honour, but that's another story.

(c) minimum rates of pay, including overtime rates; this point does not apply to supplementary occupational retirement pension schemes;

(d) conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;

(e) health, safety and hygiene at work;

(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;

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

2.3 Discussion

If one wants to evaluate whether the progress of Social Europe has been slowing down since the middle of the 2000´s and onwards, one needs to compare it with the progress Social Europe had experienced in the period prior to 2000. In the long historical perspective, the Posting of Workers Directive can be regarded as a clear marker of progress for Social Europe. After decades of non-action and years of political conflict, the adoption of the directive made possible a (partial) reintroduction of the principle of equal treatment with regard to posted workers.

However, for several reasons the progress made by the directive is marked by ambiguity. First, as several interviewees remarked, the directive is unclear and contains ample room for interpretation which may result from its adoption process. Concluding her study of the legislative process, Eva Kolehmainn underlined its messiness:

"A considerable number of issues, large and small, were involved and positions varied not merely across Member States but also over time as regards individual Member States. Largely, the lines of conflict were not one-dimensional (...). The final formulation of the Directive was constructed bit by bit in the course of different presidencies, in co-operation with the Commission" (Kolehmainn, 2002: 163).

This process might be one of the reasons for the many controversies raised by the directive after the EU enlargement in 2004. The directive was simply a series of compromises made possible by unclear or ambiguous wordings. Therefore, assessing the progress made by the directive will to some extent depend on the interpretation made later on.

This raises a second issue, regarding the socio-economic context of the directive. A number of interviewees have pointed out that the issues raised during the adoption process were more matters of principle than of real problems. The coalitions at the time were in a sense based on differences between potential

host and home countries, but the socio-economic differences between member states were not as large as they are today. Furthermore national re-regulation had already reduced the benefits of free movement for low-wage countries (Eichhorst, 1998). In that way, the real test of the directives worth would come only after the 2004 enlargement.

That being said, the directive did aim to tackle a problem of social dumping. Recall that trade unions within construction had asked for this directive rather than one on sub-contracting (which was a major issue at the time). It did so by providing a base for member states' regulation of the terms and conditions of posted workers. Member states already did this, but the directive could be seen as providing a shield against the ECJ attempts to interfere with national regulation (Eichhorst, 1998: 28). Seen from this perspective, a continuation of the progress of Social Europe could involve continued legislative efforts to tackle the problems of social dumping raised by new socio-economic situations (such as the EU enlargement) or at least to defend the possibilities of different national models of doing so themselves. Recall the efforts made to make Danish and Italian systems compatible with the directive. These efforts to ensure 'diversity within unity' may, however, also be one of the reasons why the directive's aim changed somewhat during the adoption process. If one of the starting points of the directive was a wish (by trade unions) to make it mandatory for Member states to extend their labour legislation to posted workers, this aim gradually disappeared during the adoption process. This gradual relaxation of the aim started when Germany presented a compromise text that made the application of the directive mandatory in the construction sector only. Later on, the Italian presidency presented a compromise where the threshold period was made optional, and step by step the understanding of the directive's aim changed. In the end, as one observer remarked, the directive contained "so many options that national actors can actually decide which sectors other than the construction industry are to be covered by collective agreements, which additional labour law provisions are to be included in the "common hard core", and which threshold period is to be established" (Eichhorst, 1998: 28). While one of the initial aims had been a directive that would force member states to extend their regulation to posted workers, it had increasingly become a directive that allowed them to do so. However, the statement by Eichhorst is not only interesting for its emphasis on the optionality, but also because it represents the common perception of the time – namely that the list of elements that could be regulated was essentially 'open'.

A final remark on the content could be given to the legal base which was originally intended to be the provisions on free movement of workers, but were – for tactical reasons – changed to the provisions of the free movement for services. In retrospect this choice of legal base played an important part in confirming the *Rush Portuguesa* doctrine of treating posted workers under the provisions of free movement of services. And this would, in turn, become impor-

tant for the future interpretation of the directive and the actors that could become involved in its interpretation. Clearly, the directive did have a coordinative function that should facilitate the free movement of services. But we may speculate, as some interviewees did, that had the legal base related to the free movement of workers, the subsequent case law on the issue might have been focused more the protection of workers aim of the directive rather than its coordinative functions.

Regarding the analytical themes of coalitions and arenas, a few comments might also be in order. While the social dialogue and the use of OMC were not used at the time, a few shifts of arenas did occur. Although the Commission had suggested the directive before the *Rush* decision the decision did nonetheless increase the Commission´s interest in getting a directive that would limit the national re-regulation allowed by *Rush.* Thus, case law helped facilitate the actions of the legislators (as the integration-through-law literature has suggested several times). At the same time, while the ambiguous wording of the directive may have given room for further Court interventions, the legal base has formally excluded the social partners from negotiating the issue. As for coalitions, only a rough outline can be given (as this is a background section), with potential host countries (and trade unions) promoting the directive and potential home countries (and most employers) opposing it. However, the size and composition of these coalitions changed over time. A trade unionist engaged in the process recalled: “To begin with only the Belgian government and the Commission backed the idea of a directive, but then we beat the rest of them into place one by one”.

3. The Services Directive

After the Posting of Workers Directive was adopted and implemented by the member states, it would seem that a silent compromise had been reached. At the European level this was marked by the consensus amongst the social partners within the Construction sector. They had played an important role in the efforts to get the directive adopted and between themselves had established a consensus that the directive should not be revised, but merely better implemented. Ever since that time different groups of national representatives meet from time to time in order to come up with ideas on how to improve and coordinate the implementation of the directive. But interviews indicate that these implementation groups had no decisive influence on the following political processes regarding posting of workers. Rather, the new controversies regarding posting would be caused by the increasing use of posting after the EU-enlargement, especially in the light of the increasing socio-economic differences between member states and thus the potential for engaging in low-wage cost competition. It is these differences that have made the contradictions and uncertainties in the Posting of Workers Directive more and more apparent. Added to this, however, there has been an increasing focus on stimulating and facilitating the cross-border provision of services within the EU. It was in this context the Services Directive became a controversial issue which has (although sometimes indirect) links to the issue of posting.

3.1 The Rise of Services

The issue of posting is intimately linked with the free movement of services within the EU. One of the four fundamental freedoms since the Treaty of Rome, services had been regarded for a long time as a residual category encompassing the movement of economic factors that could not be regarded as capital, labour or goods. As such it had obtained less attention by European institutions than the free movement of goods and labour. On the international scene, however, the issue was starting to gain more attention. From the start of the 1970s an international 'epistemic community' (Haas, 1992) consisting of academics, interest groups representatives and strategically placed bureaucrats, had started to identify the issue of services as one of growing importance for sustained economic development (Drake and Nicolaïdis, 1992). In the 1980s this was consolidated, as it was taken up by a number of international organisations dealing with trade liberalization and international trade. As such, the liberalization of trade in services was a central issue of the Uruguay Round negotiations running 1986 to 1991 (Drake and Nicolaïdis, 1992). Still, in the EU, the issue of services had gained little attention. The Cecchini report of 1988 had highlighted the growing importance of services in the European economy and deplored the barriers to service trade still in existence. But it was not until after the official completion of the internal market, in 1992, that both the European Commission

and the European Court of Justice started to pay more attention to the issue of services (Craig, 2002: 30-35). In the legal field, the ECJ revitalised long dormant statements and reinterpreted the Treaties in an effort to stretch the concept of services. In so doing, it opposed the residual character of services, questioned the temporary nature of service provision and many other steps that would increase the legal importance of service (Hatzopoulos, 2007). Amongst the most important was the confirmation of the mutual recognition principle in the area of services and the increasing reliance on home state control with service providers.[5] On the political front, the commission followed a strategy of simultaneous harmonization and liberalization through sector specific Directives, while continually promoting the importance of the mutual recognition principle with regard to services. This seemed the only possible way as member states were reluctant to engage in some of the more aggressive strategies proposed by the Commission. However, from the mid-90s the Commission began arguing more forcefully for increasing the efforts to remove barriers to the provision of services in the internal market, stressing both the increasing citizens' complaints in the area and the challenges posed by the globalized economy. The turning point for Commission efforts was the March 2000 Lisbon European Council (Loder, 2011: 570), where the member states finally acknowledged the arguments of the Commission and asked it to "set out by the end of 2000 a strategy for the removal of barriers to services" (Council, 2000). However, nothing in this statement, nor in any earlier publications of the Commission, suggested that the way forward should look like the Proposal for Directive on Services in the internal market (Commission, 2004) that the Commission delivered on the 5th March 2004.

Prior efforts would make it likely that the Commission's initiative would be one or more directives, but the horizontal approach – with a *general* directive on services rather than *sector specific* Directives – was quite new. It can be seen as an attempt by the Commission to sidestep the very time-consuming processes involved in sector-specific regulation. According to Bruno de Witte (2007: 9) this regulatory shift was "a distinct example of Commission entrepreneurship, since it had been advocated neither by the other EU institutions nor by major interest groups." The idea of such a general directive was presented in the Commission's *An Internal Market Strategy for Services* of December 2000, which received the full support of the member states, the European Parliament, the Economic and Social Committee and the Committee of the Regions (Commission, 2004: 6). With this backing, the Commission conducted a large investigation into the barriers to cross-border service provisions in the EU, which was presented in July 2002 under the title *The State of the Internal Market for Services.* Both the Council and the European Parliament responded posi-

[5] Mutual recognition is an integration principle that implies that Member States by default accept the standards of other Member States, and only in special cases make restrictions or demands regarding these standards. It is often seen in opposition to the integration principle of harmonization, where common standards are adopted at a European level.

tively, and as can be read from the 'background' section of the Proposal a number of statements between these three EU-institutions gradually underlined the need for a *general* (cross-sectorial) services directive. Parliament even went as far as to "insist(s) that the Competitiveness Council reaffirm Member States' commitment to the country of origin and mutual recognition principles, as the essential basis for completing the Internal Market in goods and services" (Parliament, 2003: point 35). While the consensus between all the formal actors was displayed by the official statements, the Commission was engaged in the elaboration of the actual Proposal for a Service Directive. During this process, member states were consulted (Nicolaïdis and Schmidt, 2007: 722), whilst non-state actors were not heard (Loder, 2011: 572).

The Proposal was presented on the 5th March 2004 by the Commissioner of the Internal Market Fritz Bolkestien, and from that time on it would take almost two years before the first official step of the adoption process – the first reading of the European Parliament – was completed. From then on the process was less contentious, but the Services Directive was only finally adopted on the 12th December 2006. While we shall mainly focus on the formation of coalitions during this long political process, we will briefly start by outlining the main issues at stake with regard to posting.

3.2 Controversies with regard to posting

The controversies that arose in relation to the Services Directive were many and reflect the broad horizontal scope of the Directive. Actors from a number of service industries engaged in the process to influence the modification of the proposal with their sector-specific concerns in mind. Here, however, we shall only look at the issues of importance to the issue of posting. That means 1) the broad horizontal scope of the directive combined with the general country of origin principle, 2) the exclusion of labour law and the Posting of Workers Directive from the scope of the Directive, and 3) the provisions on administrative cooperation and limits of host state control found in paragraph 24 and 25 of the Proposal. In this section I will shortly describe these issues and their relation to posting without reference to the process or the actors involved in it. In that way, I hope to improve understanding of the issues at stake in the political process described afterwards.

As has been noted by Bruno de Witte, the cross-sectorial approach of the directive makes it "difficult to address non-market concerns (…) given that those concerns tend to be service-specific" (de Witte, 2007: 9). This may have implications for service production in general and thereby indirectly on workers' conditions. However, the horizontal approach of the Directive more directly implies that "there is little room to escape from the scope or application of the directive, but for explicit exclusions and derogations provided by the instrument itself" (Hendrickx, 2009: 99). If something is not explicitly excluded from the scope of the Directive, it is regulated by it. In that sense, some have seen simi-

larities between the principle of mutual recognition and the general application of the country of origin principle. However, there are clear differences. Under mutual recognition the host state may always try to justify restrictions that it imposes on foreign service providers, and if it cannot it must remove these restrictions. The case-law of the Court has provided a long list of restrictions deemed justified, and the list may potentially expand as more cases are brought before the ECJ. By contrast, the country of origin principle sets aside the law of the host state, including rules that might have been deemed compatible with the Treaty by the ECJ. The Proposal contained a list of restrictions that the host state can apply, but it is both much shorter than the one provided by case law and is an exhaustive list. In that sense it is no longer possible for member states to defend other restrictions (Barnard, 2008a).

Proponents of the original draft directive often claim that the worries about workers' conditions with relation to the 'country of origin principle' were completely unfounded. They point to the preamble of the Proposal which clearly stated that the Directive did "not aim to address issues of labour law as such" and that the issues regulated by the Posting of Workers Directive were explicitly excluded from the scope of the 'country of origin principle.' However, critics of the Proposal have argued that a statement in the preamble is worth little in a Court case. Further, they have argued that while the Directive might not 'aim' at addressing issues of labour law, this does not mean that it will not have an effect on these issues (Hendrickx, 2009). With regard to the exclusion of the Posting of Workers Directive from the scope of the 'country of origin principle,' it has been argued that this exclusion did not provide for legal clarity (Van Lancker, 2006: 161) and that a number of situations could arise where the Posting of Workers Directive does not apply to posted workers, in which case they would be covered by the country of origin principle (Passchier, 2006). Even with workers covered by the Posting of Workers Directive, it is worth recalling that one of the unresolved issues regarding the Posting of Workers Directive was whether the list of issues was exhaustive or not. But critics of the Proposal argued that with only the issues regulated by (the list of) the Posting of Workers Directive excluded from the scope of the Services Directive, it would seem to underline an interpretation of the list as indeed being exhaustive. All other issues would be regulated by the country of origin principle.

Last but not least, Article 24 and 25 of the proposal were seen as making clear restrictions to what measures the host state can take to control compliance in their implementation of the Posting of Workers Directive. No form of registration, representation or documentation could be required by the service provider, but should be provided by the home state authorities. Not only did critics doubt that cooperation between authorities in home and host state would function so that effective control could be conducted. They also noted that the registration, representation or documentation is sometimes necessary for the labour

market regulation of a host state to function (as in case with collective bargaining where an employer representative is a necessary prerequisite).

3.3 The first reading of the European Parliament

Having outlined these issues of controversy, we will now go into the policy process itself. The Service Directive became a major issue of contest and we might expect that the fronts were clearly drawn between opposing coalitions from the first day of presentation. But, as Dølvik and Ødegård (2009, p.7) have noted, the presentation did not spark any immediate reactions as attention was focused on the upcoming enlargement of the Union. At this point in time neither controversies nor coalitions seemed to exist with regard to the Proposal. Rather, there seemed to be a general consensus between all the formally engaged actors (Commission, Parliament and Council) that the Directive was needed and that the Proposal was a good one. Thus, the story about the initial phases of the policy process surrounding the Services Directive is not one of two preformed coalitions opposing one another in a multi-level game of contest (as in theories of Hooghe and Marks, 1999). It is rather a story about the mobilization and shifts in coalitions as well as the resources and strategies used to bring them about. The question to answer in the following is how a Proposal which the EU-Commission, the Council and European Parliament liked and endorsed came to be altered fundamentally during the political process.

3.3.1 Mobilising the opposition

To understand this several factors matter. First, while there was no drama in February 2004 when Evelyne Gebhardt (Party of European Socialists, PES) was made rapporteur for the Internal Market Committee and Anne van Lancker (PES) for the Employment Committee, it is an important part of the story that they retained their roles as rapporteurs after the EP-election in June, where a centre-right majority was formed. Both came to play very central roles in the process, giving the left an important formal position while it was in minority in Parliament.

Another element contributing to understanding is that the Proposal was leaked in autumn 2003 by people inside DG Employment concerned about its potential consequences for labour law. Feeling too weak to fight DG Internal Market inside the Commission, they leaked the Proposal to gain allies on the outside. This clearly indicates that the Commission was fragmented on the issue. Furthermore, it meant that a number of national trade unions and some NGO´s seemed to be on high alert when the Proposal came out, and from that point on conflicts came to the fore. Especially Belgian and Swedish unions where engaged in the critique. In Belgium, trade unions mobilised, but being in a coalition government with the Liberals made it hard for the Belgian Socialists to make their opposition to the Proposal the official Belgian policy stance (Crespy, 2010). In Sweden, unions alerted government and the ETUC to the potential problems of the Proposal (Dølvik and Ødegård, 2009: 9).

Thirdly, the ETUC seemed ready to engage with the issue, having just experienced a large victory with regard to the first draft of the 'Port packet.' The Port packet was a number of Directives proposed by the Commission, but rejected by the European Parliament in November 2003 after years of controversy. During these controversies, a number of European level trade unions had used a strategy combining expertise, militancy, political marketing and informal contacts to MEP's to 'politicise' the otherwise 'consensual' game of the European Parliament (Beauvallet, 2010: 172-173). This experience – marked by a lot of 'on the job learning' – was shared within the ETUC and made clear that influence could be gained by making MEPs' aware of their potential power vis-à-vis both the Council and the Commission (Beauvallet, 2010). By employing a similar strategy with regard to the Services Directive, the ETUC came to play a central role even though it had no official place to speak from. Thus, while the social partners did not have any formal position in the arena played upon, they came to have major influence. First, the ETUC was quick to form internal agreement and issue a resolution on problems they found with the Proposal (ETUC, 2004). The internal agreement was reached by a deal that East European unions would support the ETUC stance, if the ETUC would advocate for the removal of transitional measures imposed on the free movement of workers from the new member states. The resolution outlined a prioritised issue list that the ETUC would pursue through the whole process. Second, the ETUC set up an internal Task-Force engaged in organizing all of these strategies and delivering expertise and arguments for the political process (Dølvik and Ødegård, 2009). This group promoted the ETUC´s perspectives and suggestions to MEPs, through informal contacts and through the EP Trade Union Intergroup. This was done in an effort to get them revised in the Parliamentarian process. That is, rather than opposing the Directive all together, they opted for a constructive dialogue to change it. While some parts of the trade unions (especially within construction) were generally opposed to the Directive, it was recognized by the ETUC that the support for the Directive was so strong that the best way to go forward was to aim for major revisions. Third, the ETUC and its national constituencies, nonetheless, had a backup plan consisting of mobilising a blocking minority within the Council. This was not easy, as all member states had been consulted during the elaboration of the Proposal and as the Council had generally endorsed the Proposal to begin with. Thus, the strategy consisted in not only lobbying governments, but also setting the public agenda by organizing demonstrations and criticising the Proposal in the media. "After the first demonstration in Brussels 5 June 2004, a number of manifestations were subsequently organized in association with important meetings in the Council and the EP as well as in Berlin, Paris and other capitals" (Dølvik and Ødegård, 2009: 10). Especially Swedish, German, Belgian and French unions seem to have been very active, but it still took a long time to change the positive perception of national governments. Although French trade unions and left

wing groups were successful in setting a critical public agenda against the Proposal, it was not until this issue was tied to the Referendum on the European Constitution that the French President, Jacques Chirac, started to change his mind (Crespy, 2010).

The important role of the ETUC stands in clear contrast to that of employers. First, just like a number of other players, UNICE was surprised by the strong opposition that suddenly faced the Proposal. Second, both some internal divisions and disagreements with the other employer organizations made it hard for them to manoeuvre. While EuroCommerce supported the Proposal, CEEP, UEAPME, Euro-CIETT and FIEC were sceptical to parts of it. On the internal front, French Medef did not fully support the Proposal (Crespy, 2010: 1257). In that sense it was hard for UNICE to claim that it represented 'business' as such. The main (effective) defender of the Proposal was the Commission, and especially the DG Internal Market. In the face of the strong criticisms, the Commissioner of DG Internal Market, Fritz Bolkenstein, started accusing opponents of protectionism and populism, while the Commission started issuing a number of 'explanatory notes' and 'check lists' to oppose the 'myths' regarding the proposal.[6] These clarifications may be seen as the result of a growing recognition inside the Commission that some parts of the draft might have been more carefully drafted (Vallières, 2004). But they can also be seen as part of a broad mobilisation on behalf of the Proposal, drawing on different forms of expertise.[7] However, the opponents of the Proposal were well-armed for this game of expertise, drawing on the trade union experiences from the Port Packets. On 24th September 2004 a Research report Commissioned by Employment Committee rapporteur Anne Van Lancker concluded that the Proposal was "likely to create legal uncertainty," was "likely to render the inspection conducted by the host Member State on the basis of Directive 96/71/EC inoperative" and did "not establish a sufficient level of mutual confidence between Member States, which is necessary for the application of the country of origin principle." And on the 11th November 2004, the Parliament's committees on the Internal Market and Employment organised a joint hearing with experts and representatives of the social partners voicing strong concerns about the proposal. Furthermore, at the end of November the Prodi Commission resigned and Bolkestein was replaced

[6] Such as 'Proposal for a Directive on services in the Internal Market - Explanatory note on the activities covered by the proposal' (25.06.2004), 'Proposal for a Directive on services in the Internal Market - Explanatory note from the Commission Services on the provisions relating to the posting of workers' (05.07.2004), 'A checklist aiming to correct some myths about the Commission's proposal' (11.08.2004) and 'Working document of the Luxembourg Presidency, containing clarifications to the Commission's proposal' (07.01.2005).

[7] Like the famous Copenhagen Economics report on the 'Economic impact of the proposal for a directive on services in the Internal Market' (Economics, 2005) estimating a net employment increase of 600.000 jobs across the Union while at the same time reducing average prices for services by 7,2%, the report by CPB Netherlands Bureau for Economic Policy Analysis estimating a 30-60% increase in commercial services trade in the EU (Kox et al., 2004) and the OECD's Economics Department Working Paper 449, warning that "a watering down of the directive will however reduce the beneficial effects and should be avoided" (Vogt, 2005).

by McCreevy who had much less invested in the success of the Proposal. Signs of internal disagreements within the Commission now started to show more clearly as the new vice president of the Commission, Gunter Verheugen, started publicly criticizing the Proposal at the beginning of March 2005 (Meller and Bowley, 2005).

3.3.2 Effect of the opposition

These massive mobilisations by the opponents of the Proposal led to two intermediate victories. First, there was a gradual change in the perception of the Proposal within the Council. While the Council officially had to wait upon the first reading of Parliament, technical and political discussions regarding the Proposal were already on-going. During the Competition Council 25-26 November 2004, the member states expressed support for the country of origin principle as an essential element of the Proposed Directive. Some members had reservations and felt a need for clarification on several issues, but they could accept this principle "as a starting point for the discussions" (Review, 2004). Over the winter, however, this attitude started to change. The strategy of public mobilization was starting to gain effect in France, where the controversies regarding the Services Directive were linked to the upcoming referendum on the European Constitution. With the 'no'-side growing stronger in the referendum debate, Chirac and the French government began to openly criticize the Proposal. In early February 2005, Chirac started to express strong concerns about the Proposal both in Paris and in Brussels. Shortly after the French change of heart internal pressure from SPD and trade unions and active lobbying of rapporteur Gebhardt made German Chancellor Gerhart Schröder stress the importance of avoiding social dumping and call for changes to the Proposal (Crespy, 2010: 1261-1263). With the Laval-case gaining increased attention, the Swedish government also became more and more skeptical about the Proposal, and these large skeptical countries were joined by Austria, Belgium, Denmark and Luxemburg in their warnings against the social dumping potential of the Proposal. While 75.000 demonstrators (organized by the ETUC in an anti-Bolkenstein protest) were gathered in the streets outside, Chirac used the Employment Summit in Brussels on the 19th March to declare the Proposal 'unacceptable.' At the European Council meeting three days later, the member states agreed to stop further negotiations of the Services Directive until after the French referendum. As Crespy (2010: 1263) has noted the French 'no' to the referendum on 29 May 2005 provoked a "shock wave in the European arena." Heads of states started to recognize that the social issues related to the Bolkestein Directive were one of the main reasons for a French majority rejecting the Constitution. This, in turn shifted the balance of power at the European level, which could be seen as the second major victory of opponents of the Proposal.

On 12 July 2005 the Employment Committee of the European Parliament voted, by a large majority including support from the Popular Party, the Liber-

als, the Greens and the Nordic Left, in favour of nearly all the amendments from its draftswoman Anne Van Lancker. In relation to posting the amendments included:

- The removal of the country of origin principle
- The removal of article 24 and 25 on restrictions to destination states control efforts
- The insertion of several paragraphs stressing that the Directive would not affect social security law, labour law, labour relations between workers and employers, including collective agreements and industrial action, including the so-called 'Monti clause' insuring the "fundamental rights as recognised in Member States, including the right or freedom to strike"
- An elaboration (in Article 17, paragraph 5) of the limits of the Directives scope in relation the Posting of Workers Directive, "including matters for which that Directive explicitly leaves the possibility to Member States of adopting more protective measures at national level" (Van Lancker, 2005).

While the removal of the country of origin principle and Article 24 and 25 may be seen as focused on avoiding deregulation, the inclusion of paragraphs on Labour Law and fundamental rights as well as underlining the possibilities within the Posting of Workers Directive of adopting more protective measures may be seen as attempts to use the massive mobilisation against the Proposal to improve (or at least affirm) the right to regulate working conditions of posted workers. Thus, the vote was considered a major victory for the opponents of the Proposal, even though it is commonly recognised that the Employment Committee is often fairly positive towards regulatory measures in the labour market.

3.3.3 Counter offensive and compromise

While the opponents had managed – in the face of a general consensus on the virtues of the draft - to mobilise a large coalition against the Proposal, they had at the same time clarified the fronts of contention. This, in turn, allowed for the mobilisation of the proponents of the Proposal. At this point in time, the majority in Parliament had shifted from left to right, and both Van Lancker and Gebhardt needed to mobilise votes from the Conservative and Liberal groups to get their amendments passed. In these efforts they played on national interest, especially mobilising conservative and liberal politicians from France, Germany and Belgium. However, the Conservative shadow rapporteur in the Internal Market Committee, Malcolm Harbour, had his mind set on avoiding amendments that would 'water down' the Proposal. He organised an alliance with the Liberals to postpone the Committee vote from the 4th October to the 22nd November. The time was used to formulate counter-amendments to Gebhardt's

'compromise amendments.' The vote turned out in favour of Harbour, as a majority of the Internal Market Committee voted for the Commission's Proposal in its original form. The fronts between the two coalitions were quite clear by now, and a possible deadlock was up ahead.

At this point the ETUC re-entered the scene, trying to take the role of a mediator. While it publicly condemned the Internal Market vote, it went backstage to ask "the EP's President for a delay of the plenary vote in order to organize a counter-attack and warned the EPP that a too liberal draft could be vetoed by some Member States in the Council" (Crespy and Gajewska, 2010: 1196). The vote was postponed from December 2005 to the 16th February 2006. In that period a high-level group, involving key members of the three major groups, worked intensively on getting around the alliance formed by Malcolm Habour and finding a compromise that could be voted through the European Parliament. They feared that no compromise would mean no directive. Not only did the Socialists, Conservatives and Liberals want this directive, but key people in these groups also realised that they had a unique opportunity to strengthen the position of the EP as key European player vis-à-vis the other European institutions by coming up with a compromise (Kowalsky, 2007). In this process, the ETUC was heavily involved in formulating compromise texts (Dølvik and Ødegård, 2009), and the trade union intergroup was used to test whether a compromise would be voted through. In the final phase leading up to the vote, six member states (CZ, ES, HU, NL, PL, UK) came out with a statement against any 'watering down' of the Directive (Nedergaard, 2009). But the plenary vote on 16 February 2006 adopted a highly revised version of the Proposal, with the following changes with relation to posting:

- The removal of the 'country of origin principle' and replacing it with a 'right to provide services' without many implications.
- The removal of article 24 and 25 on restrictions to destination states control efforts
- The insertion of Article 1, paragraph 7, excluding labour law, and paragraph 8, containing the so-called 'Monti clause' insuring the "exercise of fundamental rights as recognised in the Member States and by the Charter of fundamental rights of the European Union, including the right to take industrial action."

The scope of the Directive had also been narrowed as a number of services, including temp agencies, had been excluded. The attempt, by Van Lancker, to underline the possibility of going beyond the list in the Posting of Workers Directive was moved to the preamble and it was specified that going beyond was an issue for public policy. But almost all goals outlined by the ETUC´s original check list were archived, and the opponents of the Proposal seemed in many respect to be victorious.

3.4 From first reading to adoption

After the changes made to the Proposal during the first reading of Parliament, the tables had turned, and a number of former opponents of the Directive had now become its proponents and visa-versa. The content of the Services Directive was now completely different in the eyes of many actors. Most important amongst them was the Commission, whose initial response to the vote was that it would unravel the EP compromise. After this announcement, high placed MEPs reminded the Commission that the text adopted was backed by three large groups in Parliament (Conservatives, Socialists and Liberals) and that unravelling it might spell the end of the Directive. Furthermore, a surprisingly united European Council stated, after its March 23, 2006, meeting, that the Commission's new proposal should be based largely on the outcome of the European Parliament's first reading (Kowalsky, 2007). The signal sent by both legislators was clear, and the new Proposal, presented by the Commission 4. April 2006, accepted almost all amendments made by Parliament. On presenting the proposal, Commissioner for Internal Market and Services, Charlie McCreevy, made a statement to the European Parliament Plenary Session emphasizing that all relations to labour law had been completely removed from the directive: 'This has allowed us to move on from the allegations of lowering of social standards and threats to the European social model. While this perception was wrong it did not go away and poisoned the debate on this important proposal,' he argued.

3.4.1 The Commissions response and the final Directive

Some amendments, however, could not be accepted by the Commission. Amongst them was Amendment 310 that was rejected "because reference to the supervision of compliance with Directive 96/71/EC, which is not affected in any way by the present proposal, is inappropriate" (EU-Commission, 2006).While this a good argument, it also made possible a manoeuvre by the Commission which was part of a compromise with the Conservatives and UNICE. As article 24 and 25 of the original Proposal had been removed, the Commission issued a Communication (Commission, 2006) on the interpretation of the Posting of Workers Directive. This was done the very same day that the new Proposal was issued, and the Communication had the same content as Article 24 and 25 of the original Proposal. While the Communication does not have the same legal status as a Directive, it nonetheless acted as a guideline for the interpretation of the Posting of Workers Directive. Member states that do not want to face potential infringement procedures from the Commission are thus wise to comply with a Communication that essentially entails the same content as the two articles discarded by Parliament's first reading. Thus, it could be argued that the Internal Market part of the Commission (and its allies in UNICE and the Conservative camp) shifted the arena of regulation to side-step the deci-

sion of Parliament. Clearly, what they got was a far 'softer' kind of regulation than a Directive would have been, but one that may still have great effect as a regulatory tool.

Furthermore, in 'streamlining' the Directive the "right to negotiate, conclude, extend and enforce collective agreements, and the right to strike and to take industrial action according to the rules governing industrial relations in Member States" found in Parliament's first reading (Article 1, Paragraph 7) was reduced to "right to negotiate, conclude and enforce collective agreements and take industrial action" in the Commission's new proposal. Thus, the right to strike, the emphasis on country specific industrial relations and the possibility to extend collective agreements disappeared in the streamlining process. While these may be minor details, they may also show themselves to have hard consequences.

The new Proposal was sent to the Council, who debated it on an informal Council of Ministers in Graz on 22 April. The gravity of the issue can be seen from the fact that - for the first time - a parliamentary delegation was invited to attend this Council debate. A final political agreement was reached on 30 May and the Proposal was sent back to Parliament for a second reading (Kowalsky, 2007). During the process of the second reading, Gebhardt forwarded a number of amendments to the new Proposal. Most important for the posting issue was efforts to increase the respect of "national law and practices, especially the rules connected to relations between the social partners in the Member States" (Gebhardt, 2006: Article 1, Para 6-7). This was to ensure that labour market regulation other than law could be taken into account, but most amendments were voted down. Only the recognition of 'practices' in paragraph 7 (but not 6) was retained. On 15 November 2006 the European Parliament approves the amended Services Directive at a second reading. The final version of the Directive was adopted by the Council on December 12, 2006 with abstentions from Lithuania and Belgium, thus avoiding a persistent conflict pitting new and (a majority of) old member states. Such a conflict had seemed likely after the Parliament's first reading, since many East European MEPs had voted against the initial compromise. "Moreover, there had been rumours that their governments were trying to organize a blocking minority in the Council, encouraged by the fact that the UK, Spain, Poland, the Czech Republic, the Netherlands and Hungary had spoken out for a more liberal solution" (Nicolaïdis and Schmidt, 2007: 731). The end result was in many ways similar to the Commission's second proposal, but with a few changes. Article 1, paragraph 7 was changed slightly so that the Charter was no longer mentioned, but industrial action could now be taken "in accordance with national law and practices which respect Community law." This may revitalise some of the respect for national industrial relations lost in the Commission's streamlining, but on the other hand this condition requires them to respect Community law.

3.5 Discussion

In retrospect, there were many cleavages raised by the Proposal for a Services Directive. Party political lines have been criss-crossed by national agendas as well institutional interests. Miklin (2009) has argued that this cleavage even goes to the personal level, identifying differences between the ideology of ministers and the governments they represent. In summarizing the process Crespy and Gajewska (2010) argued that the voting behaviour and other actions of actors involved can best be explained by the contrast between liberals and regulators. This conclusion goes well with our analytical framework, although the word 'regulators' is contradictory as they start to be in opposition to the proposed regulation. The paradox, of course, is caused by the fact that the aim of the Services Directive was to remove barriers and liberalise the service market. That is, it is de-regulatory regulation, which was why 'pro-regulators' where opposed to it. But the issue becomes even more complicated, as coalitions change position after the first reading of Parliament (with pro-regulators now being in favour of regulation). Pro-regulators were not opposed to de-regulatory regulation as such, but only the parts that they assessed would have a negative impact on labour regulation. But while this means that it is difficult to make precise definitions of who pro-regulators and regulation sceptics are, the actors themselves seem to have no problem in identifying their position along the way, and for this reason we have relied to a great extent on their own evaluation of their position.

That said, the process outlined suggests that the opposition between regulators and liberals was not pre-established when the process began. Rather, there was an initial consensus between the major institutions regarding the Proposal and opposition had to be actively mobilised. If it is true that coalitions between regulators and liberals go beyond the scope of any discrete issue (Hooghe and Marks, 1999), so do other repertoires for organizing actors in the multi-level game of the EU. A powerful repertoire seems to be the 'integration doxa' (Adler-Nissen, 2011), that makes EU proponents seek to play a game of consensus (Beauvallet, 2010) to avoid the politicing by EU sceptics. In the case of the Services Directive, the mobilisation of the 'regulator' coalition was very much based on the success of trade unions in tying the Services Directive to the Referendum. Only then did a number of strong players start to back the pro-regulators.

With regard to the substance matter it is not completely clear how to conclude. In general the struggle surrounding the Services Directive is often regarded as a clear victory for the proponents of Social Europe – the pro-regulators in our terminology. They clearly won the fight about mobilising public support and the support of the majority of member states, but did they win the war about the content? To answer this, let us return to the three issues outlined in section 3.2. That is 1) the broad horizontal scope of the directive combined with the general country of origin principle, 2) the exclusion of labour

law and the Posting of Workers Directive from the scope of the Directive, and 3) the provisions on administrative cooperation and limits of host state control found in paragraph 24 and 25 of the Proposal

Clearly the horizontal scope of the directive has not changed, but has been modified, as a number of services were excluded during the political process. Most importantly here, for the issue of posting, is the exemption of temp agencies from the scope of the Directive. Furthermore, with the country of origin principle deleted from the Directive, the broad scope does not have the same implications for posting as it might have had. In that sense, the removal of the country of origin principle can be seen as a clear victory for the pro-regulation actors. That said, paragraph 3 of Article 16 in the Directive still presents a much shorter list of those mandatory requirements that can be used to justify laws and regulations by member states than that found in the Court's case law. Some observers argue that this means that the directive does represent "a deregulatory shift compared to existing EC service law" (Craig, 2002: 11).

With regard to the exclusion of labour law and the introduction of the 'Monti clause' this can be seen as another victory for the pro-regulators. Especially the 'Monti clause' can be seen as not just defending against deregulatory efforts, but actually improving the respect for labour relations. That being said, the Commission's 'streamlining' of the clause made the right to strike and the emphasis on specific national traditions disappear, while industrial action has to abide not only with national law but also Community law (Barnard, 2008a: 346-347). In that way, the 'Monti Clause' of the Services Directive is clearly not as comprehensive as the original Monti Clause (see Council, 1998: Article 2). Furthermore, some scholars have speculated that the vague exclusions of labour law offered by phrases such as 'shall not affect' or 'does not affect' "does not seem to provide a full guarantee that all items of labour law would be excluded from the scope of the Services Directive," but depends on "what exactly would be the meaning of the words 'not affect'" (Hendrickx, 2009: 106). Whereas the phrase 'does not apply' seems to clearly exclude the influence of the Services Directive, 'does not affect' may merely be "declaratory and aspirational" (Barnard, 2008a: 344). Clearly, these are scholarly considerations for now, but might prove to be important in the future if the Commission (or other actors) opt for shifting the arena by going to the Court.

With regard to the deletion of Articles 24 and 25 of the Proposal, this was also regarded as a victory for the pro-regulation actors, as these articles could have limited the ability of member states to enforce the implementation of the Posting of workers Directive. However, the strategy of the Commission has watered down this victory somewhat. While a Communication is of course more disputable and less legally binding than a Directive, they are nonetheless the guidelines for member states that do not wish to be dragged into Court by the 'Guardian of the Treaty.' In a response to the Communication, parliamentarians organized a hearing in which the Commission's interpretation of the

Courts case law was disputed (Parliament, 2006). The Commission in turn issued a new Communication (Commission, 2007), maintaining its interpretation which was once again disputed by the European Parliament (Parliament, 2007). The contention has faded somewhat since then and the Commission's Communications still stands. Shifting arena has thus given the Commission a possibility of bypassing the compromise of a long political struggle.

All in all, then, it seems that pro-regulators won a lot of fights, even though some reservations can be made. But that said, the question remains whether all the fights won have contributed to the progress of Social Europe. Measured against the scale of the original proposal, pro-regulators clearly won a number of victories. But what if we measure against the scale of the time before the Directive? Has Social Europe progressed because the Services Directive was adopted in a revised form? This question points to one of the complicated issues with assessing the progress of social Europe; opposing deregulatory measures (aimed at improving market integration) does not necessarily amount to improving social regulation.

4. The Temporary Agency Work Directive

The next case study concerns the adoption of Directive 2008/104/EC on temporary agency work on the 19 November 2008. In some ways this Directive might seem somewhat outside the scope of the posting issue, but it has nevertheless been an issue touched upon in the debates on posting. First, while agency work seemed to be excluded from the category of posting in the *Rush Portuguesa* decision, posted temporary agency workers are one of the three categories of posted workers mentioned in the Posting of Workers Directive. Still, the issue regarding temporary agency workers is important for determining to what extent posting can be used for the pure supply of labour, without the posting company having any know-how regarding the specific services delivered. As temporary agencies have played a large role in the East-West migration process in several countries, the question of whether these temps should be regarded as posted workers (with its partial equal treatment), as ordinary workers (entitled to full equal treatment in the host country) or something else is quite important. Furthermore, it should be mentioned that agency work was excluded from the scope of the Services Directive (section 3) during its adoption process. Thus, analysing both Directives provides us with a better understanding of the issues at stake in their adoption processes.

4.1 Background

Like in the case of posting, the efforts to regulate agency work started in the 1970s. It was first addressed in the *Council Resolution of 21 January 1974 concerning a social action programme* ([1974] OJ C13/1) wherein the Council expressed the political will "to protect workers hired through temporary employment agencies and to regulate the activities of such firms with a view to eliminating abuses therein." However, the background for the adopted directive of 2008 can be traced back to three proposal directives regarding atypical employment relations presented by the Commission in 1990.[8] The aim of these proposals was to regulate all kinds of atypical employment relations, but this soon proved to be quite difficult. The diversity between the problems raised by different kinds of atypical employment as well as the diversity between the regulatory practices of different member states proved very difficult to bridge. By 1994 it was clear that two of the three proposals would not pass, and the Commission withdrew them. Instead, it launched the first stage of a consultation with the social partners, with the aim of using Article 139 negotiations to handle the issue. As the social partners came back with positive responses, the Com-

[8] COM(90) 228/1 final of 22 June 1990, OJ C 224, 8 September 1990; COM(90) 228/11 final of 22 June 1990, OJ C 224, 8 September 1990 (The latter was amended by COM (90) 5331 1 final, OJ C 305, 5 December 1990); Directive 911383/EEC of 25 June 1991 supplementing the measures to encourage improvements in the safety and health at work of workers with a fixed duration employment relationship or a temporary employment relation, OJ L 288, 18 October 1991.

mission launched a more formal consultation of the social partners in 1995 on the broad issue of "atypical work." This consultation process first led to the 1997 agreement on part-time work and, secondly, to the 1999 agreement on fixed-term contracts, both of which were subsequently implemented by EU directives. In the latter agreement, it was stated that the social partners would consider the need for a similar agreement relating to temporary agency work. Immediately after the conclusion of the fixed-term agreement in March 1999, the ETUC presented a working program to the employers including the issue of temporary agency work. UNICE, however, took a long time responding, as the UK employers in the CBI wanted more time to assess the implications of such a directive (Clauwaert, 2000). Trade unions saw this as an attempt to stall the process. In April 2000 the ETUC demanded to know whether UNICE intended to enter into negotiations or not, if not it would ask the Commission to present a proposal for a Directive. At the beginning of May 2000, however, UNICE announced a decision to enter into European-level talks on the issue of temporary agency work (Eiro, 2000).

The negotiations turned out to be very difficult, as the regulation of temporary agency workers was very different across the EU. In some countries agency work was completely or partially forbidden. In these countries, trade unions saw the directive as an attempt to deregulate the labour market. In other countries, agency work was allowed, and seen from these countries, a directive might help strengthen the regulation of this kind of work. So, on the trade unions side alone there were sharp disagreements. On the employer's side there were controversies as well, but with the procedure of UNICE dictating unanimity, the CBI could effectively block most proposals. Still, the negotiations were conducted and according to interviewees progress was made during the process. Problems and solutions were identified, but in the end there were three issues where no compromise could be made:

First was the issue of non-discrimination. The question was whether it should be non-discrimination with regard to other agency workers (as regulated through laws or collective agreements for this specific type of work) or user-firm workers. Employers wanted both options, so that member states could decide during implementation of the directive. Unions wanted user-firm, and used the argument that most countries either had or were moving towards this principle.

Secondly, there was the issue of the threshold time. When should the non-discrimination apply? Unions wanted the directive to apply from day one, whereas employers suggested as much as after 18 months. In parallel with the discussion surrounding the Posting of Workers Directive, employers stressed the need for flexibility and the disproportionate administrative burden that no threshold would cause, while trade unions argued that any threshold would be an opening for circumvention, make enforcement of the directive very compli-

cated and reduce its effect (as most temps are only used for a very short period of time).

Thirdly, unions wanted the directive to reflect ILO provisions prohibiting the use of temporary agency workers to replace workers on strike. The employer representatives argued against this on the grounds that this would exceed the competence of the EU, as it involved regulating the right to strike and collective action. The question was informally raised with the EU-commission's legal service, which agreed with the employers arguments.

In March 2001, after more than nine months of discussion, the ETUC announced that there was a stalemate in negotiations. UNICE was in favour of continuing the negotiations, but the trade unions felt that it was going nowhere. They wanted the Commission to step in (Broughton, 2001b). In contrast to the negotiations on the fixed term and part time directive, however, the Commission had not promised to take up the issue of temp work if the partners could not agree, and the Employment and Social Policy Commissioner, Anna Diamantopoulou, put pressure on the social partners to continue their talks (Broughton, 2001c). They did so, but by May 2001 it was clear that no compromise would be reached, and the Commission announced that it would indeed issue a legislative proposal shortly. This proposal would draw on the work of the social partners, but the sectorial partners in Euro-CIETT and UNI-Europa also wanted to influence the process and issued joint statements. From this joint statement it was clear that Euro-CIETT could accept a Directive that would prevent the use of agency workers to replace workers on strike, but with regard to the other two issues agreement was not apparent (Broughton, 2001a).

4.2 The Commission's Proposal

Ten months after the social partners negotiations had broken down, the Commission issued, on 20 March 2002, its proposal for a Directive regulating working conditions for temporary workers (EU-Commission, 2002). It was welcomed by the ETUC, while UNICE argued that it was 'ill-conceived' and made things 'unnecessarily complicated' (Broughton, 2002a).

The proposal had the explicit aim of improving the quality of temporary agency work by ensuring that the principle of non-discrimination was applied to temporary workers. Thus, temporary agency workers should have at least as favourable treatment as a comparable worker in the user enterprise in respect of basic working and employment conditions, including seniority. Any differences in treatment had to be justified by objective reasons. These 'basic working and employment conditions' regarded both pay and issues of working time (such as the duration of working time, rest periods, night work, paid holidays and public holiday). The proposal stated that if no comparable worker existed, the collective agreement applicable in the user undertaking should be referred to. If there is no collective agreement, the comparison will be made by reference to the collective agreement which applies to the temporary work agency. If there is no

collective agreement here, the basic working and employment conditions of temporary workers will be determined by 'national legislation and practices.' In that sense, it made a clear hierarchy with the working conditions of the actual workers in the user company as the primary target of comparison. The proposal also contained, however, a number of exceptions from this general principle of non-discrimination: Member states could exempt temporary agency workers who continue to be paid in the time between assignments in user firms, just as they may let the social partners concluding collective agreements which derogate from this principle 'as long as an adequate level of protection is provided for temporary workers.' Furthermore, member states where allowed to exempt assignments of less than six weeks from the principle of non-discrimination. In addition to these issues, the proposal stated that obstacles to temporary workers being hired by the user undertaking after the assignment should be removed, and no fees should be chargeable for this by the temporary agency. It also contained the removing of obstacles to the use of temporary agency workers in the member states, and a number of other issues. But there was no clause limiting the use of temporary workers during strikes. The Commission's legal service had found that the employers were right that this would involve the regulation of strikes and thus fall outside the competence of the EU.

This issue was taken up in the European Economic and Social Committee in its Opinion on the proposal from 19 September 2002 (Committee, 2002). While the vote - 83 in favour, 75 against and 12 abstentions – showed contention, the opinion argued that although the Treaty did not allow the Directive to place a formal ban on using temporary agency workers to replace those involved in a collective dispute, it could still contain a provision allowing member states and/or the social partners to introduce regulations ruling out the use of temporary agency workers in undertakings where workers are on strike. Otherwise, the general emphasis of the proposal to remove barriers to the use of temporary workers might well undermine the possibility of member states to disallow the use of temps during collective action. The EESC also criticised the possible exemptions from the non-discrimination principle. Especially the exemption allowed for assignments under six weeks was criticised, as it would exempt a very large part of all temp work. But the Committee was also reluctant towards the exemption of workers getting paid between assignments, and wanted this payment to be according to collective agreements.

At its plenary session on 20-21 November 2002, the European Parliament gave a first reading to the European Commission's proposal for a Directive on working conditions for temporary agency workers. It proposed a range of amendments to the proposal, of which only the most central should be mentioned. First, the EP opinion deletes the Commission's definition of a comparable worker, stating instead that 'the basic working and employment conditions applicable to a temporary worker shall be at least those which apply or would apply to a worker directly employed by the user undertaking a contract for the

same duration, performing the same or similar tasks, taking into account qualifications and skills.' Secondly, it removed the option for exemption for assignments of less than six weeks. Third, it states that exception with regard to those employed and paid by the agency in-between assignments should only regard wages and wage-related elements. Fourth, the Parliamentarians inserted a paragraph obliging member states to maintain or introduce restrictions or prohibitions on temporary agency workers being assigned to user undertakings or sectors where workers are engaged in collective industrial action. Finally, the Parliament inserted provisions that would help member states for whom the principle of equal treatment between temporary agency workers and user company workers, or the existence of permanent or collective agreements for temporary agency workers, is not customary (essentially the UK and Ireland) (Broughton, 2002c).

It should be noted that this first reading of the parliament did not go without contention. The Employment Committee, which had the lead on the Directive, had views very similar to those of the trade unions, while the Legal Committee made comments much in line with the employers. But we shall not dwell too much on these differences, as the controversies in the European Parliament came to play a far less important role for the adoption of the Directive than was the case with the Services Directive. From Parliament's first reading in 2002 to the adoption of the Directive in 2008, the main arena of contention was the Council of Ministers and it was here that the final deals were made.

4.3 From deadlock to directive

The debate in Council started in October 2002, with positive remarks from most member states and a focus on the principle of non-discrimination and the concept of the 'comparable worker'. (Broughton, 2002b). But by March 2003 it was clear that, despite a general recognition of the importance of this issue and broad agreement on the need for a Directive, the Council was marked by 'divergent views' among the delegations. Three issues seemed to be especially controversial. First, several member states argued that there was a need for a specific derogation to help unemployed people gain access to the labour market. Second, a large number of member states wanted to have an assessment of the impact that the required review of restrictions and prohibitions on temporary agency work would have on their national legislation. It was especially the implications for existing national legislation or collective agreements regarding restrictions on the use of temporary agency workers that they were concerned about. Third, the Council was divided regarding the possibility of exemptions for assignments under six weeks. Some member states wanted it completely removed, while others wanted a far longer period. These issues would continue to be at the fore of the Councils discussions (Broughton, 2003b).

During the debate at the June 2003 meeting, a majority of delegations stated that they would be willing to accept a transitional period of five years during

which an exemption to the principle of equal treatment could be granted 'in view of the specific conditions of Member States' labour markets.' However, four delegations were of the view of this exemption should be permanent. As a compromise, the Presidency suggested that the exemption should apply pending a future decision by the Council of Ministers and the European Parliament (EP). However, the majority of delegations did not accept this and the other four delegations stated that they would accept this only if the 'qualifying period', during which time an exemption may be made, was six months (Broughton, 2003a). From that point on, little seemed to happen. The issue was discussed at a couple of council meetings, but with little progress. Especially the six weeks seemed to be an unresolvable problem, and by 2005 the Commission stated that it would 'reconsider the proposal in the light of future discussions on other proposals' (Broughton, 2006). In that sense, the directive seemed to be almost dead. There were, however, a large number of actors that still wanted the Directive to come into existence.

First, during the Services Directive negotiations in the European Parliament, the political left fought hard to get agency work excluded from its scope. They recognised that if agency work was included in the scope of the Service Directive, there would be little incentive for 'regulation sceptics' to continue negotiating the agency directive. The proposal for the Temporary Agency Directive was in a sense a classical example of a traditional service sector Directive, entailing both liberalising and harmonizing elements: article 4 focused on the removal of barriers, while article 5 sets common principles for the labour regulation of temporary agency workers. But had temp agencies been included in the Services Directive it would have amounted to approximately the same as article 4, giving no bargaining chip for trade unions and the left. The deadlock in Council started as the Services Directive was presented, and only when the latter was finally adopted did the Temporary Agency Work Directive come back on the Council´s agenda. Thus, the Temporary Agency Work Directive was kept alive because agency work was excluded from the Services Directive.[9]

Second, the Temporary Agency Work Directive was linked to another directive. Initially it had been linked to the part-time and fixed-term directives (as part of a package on atypical forms of employment), but as both of these Directive had long since been adopted, the Temporary Agency Work Directive now stood alone. As the Portuguese presidency commenced in the second half of 2007, the Portuguese were very eager to get the file moving. Thus, a Portuguese Head of Unite in DG Employment suggested to the Portuguese Presidency that they link the Temporary Agency Work Directive with the Working Time Directive. While both concerned labour market regulation, this suggestion was mainly tactical.

[9] This example may well illustrate what it means that the Services Directive is a general, horizontal directive.

To understand the importance of this link, we need to understand the structure of the blocking minority against the Directive in council. This was essentially a minority centred around the UK, consisting of Ireland, Malta, Germany, the Netherlands, the Czech Republic and possibly Slovenia and Hungary. While Ireland followed the UK due to similarities of labour markets, Germany did so for other reasons. On the one hand, the Temporary Agency Work Directive might pose some problems for the German system, but this was resolved by introducing the exemption in Article 5.2. On the other hand, the UK and Germany had, allegedly, made a shady deal in which the UK would support Germany on directives that might interfere with its co-determination system, while Germany would support the UK on issues of labour market regulation. Thus, convincing the UK to change its stance was a key issue in getting the directive passed. Being of a much more general scope, the Working Time Directive might function as a bargaining chip for those in favour of the Temporary Agency Work Directive: if the UK would agree on the latter they could keep their opt-out from the former. Thus, the two were linked in Council debates to make the agency directive progress. The UK, however, was not easily persuaded and some interviewees tell that UK Prime Minister, Tony Blair, called Portuguese Prime Minister, José Sócrates, to have him remove the Directive from the Council agenda, and thus win time. Still, the blocking minority was starting to erode. The incoming Slovenian presidency convinced the Dutch to switch side and gave the Germans their exemption. Furthermore, the deal between Germany and the UK was gradually becoming obsolete as most of the Directives that Germany had feared had already been passed. In Council, some were starting to talk about putting the agency directive to a vote (Carley, 2008).

Nonetheless, a final decisive event seemed to be the conclusion of a tripartite agreement on temporary agency workers in the UK. The negotiation between the CBI, the TUC and the British government had begun in 2006, and resulted in agreement in which a 12 week exemption period from equal treatment was given. Neither the CBI nor the TUC were happy with the agreement, but both felt obliged to accept it. From the CBI´s perspective both the deal and the Directive in general were far too regulatory and would increase the costs of companies using temporary workers, but the UK government had made it clear to them that if they did not conclude the agreement government would accept the proposal for the Directive on the table. So they got their 'hands dirty' and made the deal. The TUC for its part noted that research done by the CBI had showed that a vast majority of assignments lasted less than 11 weeks. Thus, the agreement effectively hampered the effect of the Directive on the UK labour market. But from the perspective of the TUC, concluding the agreement allowed all other member states to have decent regulation of their temp agencies, while it would have little effect on the UK labour market.

With this agreement in hand, the UK government could agree to the Temporary Agency Work Directive in order to keep their opt-out on the Working Time

Directive. This did not go quite as planned, as the European Parliament decided to approve the Temporary Agency Directive, but disapprove the Working Time Directive in its second reading of the two. This also meant, however, that Parliament did not oppose the Temporary Agency Work Directive despite the fact that it entailed no provisions directly allowing for member states to disallow the use of temps during labour conflicts. This can be explained by a good deal of pragmatism (closing the deal while possible), but the shift from a left-wing to a right-wing majority during the directives adoption process might also be one of the reasons.

4.4 Discussion

How should we assess the Temporary Agency Work Directive? Which coalition won regarding which elements? And, how does it relate to the issue of posting? Countouris and Horton (2009: 337) have argued that "the Directive represents a departure, in everything but rhetoric, from the regulatory concepts commonly associated with job, and labour market, security, in favour of deregulation, precariousness of work and further labour market segmentation. This is certainly true when the Directive is contrasted with the two other main EC instruments adopted in the 1990s to regulate part-time and fixed-term work." The argument might be a good indication of the shift that has occurred to the content of labour market regulation after the 'regulation sceptics' gained in power. Still, the description of the Temporary Agency Work Directive seems a bit too harsh when we look at the political process and its outcome.

Overall, the mere adoption of the directive as a sector specific directive (as oppose to agency work being included in the Services Directive) can be seen as a victory for the pro-regulators, because it allowed for elements concerning the improvement of labour conditions to be taken into the Directive. Most importantly, here, was the emphasis on equal treatment of agency workers with workers in the company they are assigned to (rather than to other agency workers). This was a victory for trade unions rather than employers. The same can be said as regards the fact that there is, as a default, no threshold period before the equal treatment begins. These were two of the three major unsolvable problems in the negotiations between employers and trade unions, and in both cases trade unions got their way.

Regarding the use of temporary agency workers to replace workers on strike, employers won out however. While Parliament had suggested a clause insuring that the Directive would not prevent national regulation from prohibiting such practices, this was not part of the final compromise in Council. In addition, the Directive contains a number of possible exemptions from equal treatment. Some were made to accommodate different national systems, but what can be made of them will vary greatly from member state and will to some degree depend on the respective strength of the trade unions and employers in these countries. Thus, Schlachter (2012) has argued that just as the function and understanding

of the temporary workers agencies is different in the different countries, so will be the understanding and implications of the directive.

What about the Directives implication for posting? This too is a bit hard to tell. On the one hand, the emphasis on equal treatment with workers at the company of assignment (or, secondarily, the conditions stipulated by collective agreements) may prove to be better than the conditions secured by the Posting of Workers Directive – especially after the ECJ decisions discussed in the third case of this report (see section 5). Thus, posted agency workers may have their conditions improved by the Directive. On the other hand, there are two reservations. First, this will depend on the actual implementation of the Temporary Agency Work Directive (as discussed above). Secondly, it will depend on whether the Temp or the Posting of Workers Directive is seen as having primacy for regulation of posted agency workers. As the Posting of Workers Directive is (increasingly) seen as a Directive that should insure the legal certainty of service providers, putting additional demands about equal treatment on temporary work agencies might be seen as restricting their right to provide services across borders. The question, however, is hardly resolved, and it will to a large extent be the implementation made by the member states and (possibly) the rulings of the ECJ that will decide this.

As for the issues of coalitions and arenas, a few comments are in order. First, experiencing difficulties with the adoption of its first proposal, the EU-Commission tried to shift arena to get the social partners to tackle the difficult Directives on atypical employment. This succeeded in two cases, but not with regard to temporary agency work. Secondly, the process might indicate that employers declared themselves willing to negotiate to stall the process and avoid it going back to the Commission. On the other hand, trade unions seem to have been opting for a better result with an ordinary legislative process than what they could achieve by keeping the issue on their own negotiation table. Third, in contrast to the Services Directive, which was very much elaborated in Parliament, the main struggle with the Temporary Agency Work Directive was found in Council. Fourth, it is worth mentioning that after the long struggle in Council, the final compromise has to some extent shifted the issue back to social partners, but at the national level, and the social partners at the European level are now advising their national affiliates on the implementation process.

As for coalitions, the negotiation process between the social partners seems to have outlined the lines of contention. It was to a large extent the same issues that were at stake both in Parliament and in Council, and the coalitions seem to have formed around them. However, the regulation sceptic coalitions seem to have been divided in two; one part that was actually (but to varying degree) sceptical of regulating the temporary agency issue or at least the way this regulation was suggested, and another that was concerned about the effect it might have on their particular system. During the process, the latter group was gradu-

ally accommodated by different exemptions or persuaded that their concerns were unfounded.

Finally, has the shift in the balance of power between left and right in Europe had any effect on the process? As the arguments by Countouris and Horton above might suggest, the Directive is not as strong as the other Directives on atypical work. Nonetheless, it was adopted with equal treatment from day one. Furthermore, it is hard to make a one-to-one conclusion from the political colour of a government to its position in the EU arena. As an interviewee noted, the conservative French government were more favourable against this Directive (and on labour market regulating Directives more generally) than the labour government in the UK. Still the shift from left to right may have been one of the reasons why the non-strict-substitution clause was not adopted.

5. Political responses to the 'Laval-quartet'

While the Posting of Workers Directive, the Services Directive and the Temporary Agency Work Directive are all the result of traditional political processes, the finer details of posting regulation have often been resolved by the European Court of Justice (ECJ). As already noted, the *Rush Portuguesa* decision had been central to the adoption of the Posting of Workers Directive itself. Even if this decision had gone against the regulatory efforts of the French authorities, it nonetheless allowed member states to extend their labour legislation to posted workers. This was confirmed by the Court over a long time, but with a gradual shift. For instance, by equating qualitatively and quantitatively different regulation regimes, the Guiot decision would seem to shift the Court´s approach to posting from one "quite similar to that applied in the cases concerning the free movement of workers" to one more in line with the "highly deregulatory" mutual recognition approach (Kolehmainn, 2002: 124)[10]. And this shift would be confirmed by the Arblade decisions introduction of a new demand that the labour regulation imposed should be 'sufficiently precise and accessible' and its indication that contributions to social funds should be excluded from the concept of minimum wages.[11] But while both of these cases, and others, provided deregulatory interpretations of the Treaties, they left it for the national courts to decide whether the specific circumstances were in breach of EU regulation. And – while not a case on posting – the Albany decision argued that issues relating to specific provisions of the Treaty (such as the free movement of goods, services and workers) should be interpreted on the background of the "provisions of the Treaty as a whole" including those concerning social progress – and that while collective agreements might restrict competition they could nonetheless be allowed because of their social policy objectives. Thus, while having clear tendencies towards deregulation, the case law on posting had never delivered a decisive blow to the labour regulation regime of a member state, their efforts to regulate the conditions of posted workers or the rights of trade unions to engage with these issues. This, however, can be said to have happened by the so-called Laval-quartet (Malmberg, 2010) consisting of four decisions delivered by the ECJ between December 2007 and June 2008. In the following, we will look at the political responses to these cases, but we will, in short, outline some of the issues at stake in these decisions.

5.1 The 'Laval-quartet'

As mentioned there were four decisions issued by the ECJ between December 2007 and June 2008. The literature analysing these decisions from a legal point

[10] The Guiot case (Case C-272/94) was decided on 28 March 1996, very close to the final compromise regarding the Posting of Workers Directive, and was seen by some as questioning that compromise (Houwerzijl and Pennings, 1999).
[11] C-369/96 decided 23 November 1999. The demand for 'sufficiently precise and accessible' regulation is one of the issues to be found later in the Laval judgement.

of view is enormous, and it will be impossible to even try to summarise it here (Bücker and Warneck, 2010; Barnard, 2008b; Blanpain and Swiatkowski, 2009; Bruun and Malmberg, 2008; Davies, 2008; see for instance Sciarra, 2008; Deakin, 2008; Malmberg, 2010; van Peijpe, 2009). The following will only outline the very basic issues and is very partial. It aims only at outlining the stakes in the political controversies that followed.

The *Viking* ruling came first, on December 12, 2007. The case did not involve posting, but the right to establishment and the right to strike. It originated in a dispute between a Finish shipping company, Viking Line, that wanted to establish themselves in Estonia in order for them to use (low wage) Estonian workers to man their ships, and the Finnish Seaman´s Union (backed by the International Transport Worker´s Federation), who wanted to prevent this relocation. In the ruling, the ECJ recognised, for the first time, the right to collective action, including the right to strike, as a "fundamental right." But it immediately went on to argue that "the exercise of that right may none the less be subject to certain restrictions" and has to "be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality." A balance had to be found between the different rights and freedoms. Collective action that "has the effect of making less attractive, or even pointless" the use of the Treaty freedoms was in principle to be regarded as restrictions to these freedoms, but "those restrictions may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for ensuring the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective" (ECJ, 2007b). These can be seen as general remarks on the use of collective actions, and they can potentially hamper trade unions use of such action, as it can be difficult to live up to the Courts requirements in practice. While this ruling might be seen as uncontroversial in some countries, in other countries it is highly controversial to put any such tests or requirements on the use of collective action. For two reasons, however, the Viking case did not cause any immediate uproar. First, the ECJ left it for the national court to determine if 'overriding reason of public interest' were being protected and if this was done in a proportionate manner. Secondly, the parties to the case had already made a confidential settlement, which meant that the national court would not have to make this assessment.

The uproar came after the *Laval* ruling, which came a week later, on December 18, 2007. This case had concerned a dispute between a Latvian company, Laval, who had posted workers to a Swedish construction site to perform a job there, and the Swedish construction union, Byggnads, who wanted these posted workers to be covered by their collective agreement. The dispute had started in June 2004, just few months after the EU-enlargement, and had been heavily politicised by statements from Swedish and Latvian ministers, as well as EU Commissioners and EU parliamentarians. Even before the judgment, it

had be cast as a sign of the struggle between left and right, east and west, and employers and employees in Europe. In the opinions given before the ECJ, member states had been divided between east and west when answering the questions posed to the Court.

From a more legal point of view, the main issue of the case was whether Byggnads could take collective action to force a collective agreement upon Laval, when the Swedish implementation of the Posting of Workers Directive did not explicitly allow for this and when the content of the collective agreement went beyond the minimum requirements outlined in the Posting of Workers Directive. The ruling stated that they could not, and unlike the Viking case it left no room for assessment by the national court. Rather, the ECJ underlined that the obstacles to the free movement of services created by collective actions "cannot be justified with regard to the objective of protecting workers" because that is the job of the Posting of Workers Directive. And it added that "the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited" to the things listed in that Directive. Even more specifically it argued that attempts to force firms into negotiations of pay cannot be justified "where such negotiation forms part of a national context characterized by a lack of provisions which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay"(ECJ, 2007a). This was a formulation from the Ablade decision, but with no opportunity for the national court to evaluate if this was the case. Finally, it should be noted that the ECJ came to this conclusion by drawing not only on the Posting of Workers Directive, but on the Treaty itself.

The Laval judgment was followed, on 3 April 2008, by the Rüffert decision, in which the ECJ disallowed the partial legal extension of collective agreements. The case concerned a law from the German federal state of Lower Saxony which obliged public authorities to contract only with firms 1) prepared to pay the wages laid down in the relevant sectoral collective agreement, and 2) prepared to insure that all sub-contractors comply with the collective agreements as well. Although the law was aimed at public authorities and was based on ILO Convention No. 94, the ECJ decided that it was not compatible with the free movement of services. Because it "impose(d) on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State" it "constituting a restriction within the meaning of Article 49 EC." And as the method by which this restriction was imposed was different from the methods described in the Posting of Workers Directive, it could not be justified. The Rüffert decision, thus, cast doubt about the possibility of referring to social standards set by collective agreements in relation to public procurement, just as it problematized measures that would prevent low wage competition.

Finally, the Luxembourg decision, of 19 June 2008, put major restrictions on the use of the 'public policy' category mentioned in the Posting of Workers Directives article 3 (10). Unlike the other three cases, which were preliminary rulings, this case was based on an infringement procedure brought on Luxembourg by the EU Commission. In Luxembourg´s implementation of the Posting of Workers Directive a number of terms and conditions of employment were considered as public policy provisions, including requirement of a written employment contract, automatic indexation of remuneration to the cost of living and respect of collective agreements. The Commission found that this went beyond the scope of the 'public policy' category of the Posting of Workers Directive, and the ECJ agreed. In its ruling it stated that the list in article 3(1) of the Posting of Workers Directive is exhaustive, and that the public policy exception in article 3 (10) "is a derogation from the fundamental principle of freedom to provide services, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States." A number of member states have used article 3 (10) to extend the list I article 3 (1), and all of them were now potential targets of the ECJ´s scrutiny.

In some ways the four cases are very different, concerning very different issues. One of the cases does not even concern posting. But while some have stressed the differences between these cases, others have seen in them a common tendency in the ECJ´s interpretation of EU law. This common tendency involves sharp restrictions on the possibility of both trade unions and member states in regulating the terms and conditions of posted workers, a hampering of the use of non-legally binding collective agreements to regulate the terms and conditions of posted workers and a transformation of the minimum standards of the directive into maximum standards. Here is not the place to discuss whether the four judgements should actually be seen as a quartet from a purely legal point of view. It should just be noted that in the political process following the Laval decision, the four were linked together. Furthermore, while the Laval ruling may have the most specific circumstances and, thus, have the least implication in the EU at large, it was this ruling that got most political attention. For these reasons alone, it may be justified to talk of the 'Laval quartet,' and the following will therefore to a high extent focus on the political aftermath of the Laval ruling.

5.2 Mobilising for political action

If the Laval case had already been a major European issue before the decision this was clearly enhanced by the verdict itself. A huge number of European newspapers reported the content of the decision and comments made by different actors. In France the conservative newspaper Le Figaro declared that 'L'Europe légitime le dumping social'(Figaro, 2007) and thus found itself in line with the Greens of the European Parliament who argued that the decision "opens the door for wage dumping in the EU" (Presse, 2007). Their concerns were echoed

by the Socialists in the European Parliament, who argued that the ECJ created "uncertainty" about the possibility of collective action and that this uncertainty could be used for social dumping. While few listened to the Swedish EU sceptics demanding a Swedish resignation from the EU, some might have noted that the Irish trade unions stated that "if the ruling ultimately meant that companies registered abroad could pay inferior wages here based on local rates in their own country, and that unions could do nothing to encourage them to meet Irish standards and norms, then it could have serious consequences" for the trade union´s support for the forthcoming EU treaty (Times, 2007).

It might not have been this specific warning, but a more general concern of avoiding political controversy that can explain the lack of voices celebrating the decision. In its initial response, the Commission argued that the decision was "very nuanced" and needed to be analysed "very carefully" (Euobserver, 2007). In some countries, commentators argued that the ruling would have little implications for countries such as UK and Germany (Tribune, 2007). Even in Denmark, some actors immediately started arguing that the case, which had formerly be regarded as concerning fundamental principles of collective action and free movement, would probably not have any real effect on the Danish system (Politiken, 2007). The Danish minister of Employment asked his staff to analyse the decision before taking any action.

From the clear opposition before the ruling, between actors arguing on behalf of the right to strike and the right of free movement respectively, new lines of contention were formed after the ruling. As became apparent at a public hearing held by the European Parliament´s Employment Committee on the 26 February 2008, the new lines of divergence were between those wanting political action and those wanting technical solutions. The shift can best be illustrated by showing what did not happen. During the hearing, only a sole voice argued that the decision should lead to legislative measures that would safeguard companies that post workers from "arbitrary and unjustified demands of trade unions." All other arguments regarded the severity and potential implications of the decision, and what actions needed to be taken to counter them.

At the European level, Socialists, Greens and trade unionists argued that the decisions would have major implications, not only for the conditions of workers and the Nordic labour market regimes, but for the EU as such. Their argument was summarized by the Secretary-General of the ETUC, John Monks, who argued that the **"**license for social dumping" given by the decision could lead to **"**protectionist reaction." Where Bolkestein derailed the EU Constitutional Treaty, he warned, the Laval case could damage the ratification of the EU Reform Treaty. He called for action by the politicians by arguing that what the EU-Parliament had rejected during the Service Directive debates had now been implemented by the ECJ.

On the opposite side stood liberals, conservatives and employer representatives warning against overreaction. The decisions concerned very particular

labour regimes, they argued, and these issues should not, therefore, be related to questions of the European Unions future. For instance BusinessEurope´s representative, Jørgen Rønnest, argued that the decisions had provided legal clarity and that one should recognize the particularity of the cases. "It is extremely important to recognise the differences between the Finnish, Swedish and Danish systems and we have to wait for Member states to draw their own conclusions on what these decisions mean for their national systems" (EurActiv, 2008). So, rather than pushing for an elaboration of the full implications of the decisions, the regulation sceptics opted for avoiding the same political mobilisation they had experienced during the process surrounding the Services Directive.

Thus, after the EP hearing 26 February 2008, both coalitions were faced with challenges. The pro-regulation actors, from trade unions and the political left, were challenged by their opponents to show that a problem existed and to elaborate how it could be resolved by political action. While these technical legal efforts would take time, they had to sustain and increase momentum gained by the immediate responses to the decision. The Irish referendum presented itself as an opportunity equivalent to the French one during the Service Directive process, but only if they acted fast and used the situation to their advantage. The regulation sceptics (the political right and employers), on the other hand, were faced with the challenge of postponing the debate until the immediate protests against the decision had faded somewhat. At the same time, however, they had to appear as taking the problems faced by Social Europe seriously or risk that the posting issue would once again interfere with big EU issues (such as the upcoming referendum and later on the renewal of the Commission´s mandate).

The first to act were the pro-regulators. In the EU Parliament the Employment Committee mandated the draft of an 'own-initiative report,' and a Swedish Social Democrat, Jan Andersson, was made rapporteur. Andersson clearly envisioned a strong Parliament resolution, demanding legislative initiatives by the Commission. This became clear from his draft report presented in the beginning of May the same year (Andersson, 2008). At the same time, the ETUC made hasty internal compromises, in an effort to respond quickly to the issues raised by the Laval decision. On the 4 March 2008, the ETUC Executive Committee adopted a resolution outlining a first response to the cases. It outlined some of the problems faced by trade unions after the decision and called for a revision of the Directive and the adoption of a Social Progress Clause making it "absolutely clear that the free movement provisions must be interpreted in a way which respects fundamental rights" (ETUC, 2008). Interviewees have emphasised the speed with which the ETUC succeeded in creating an internal consensus, as a clear east-west divide might have made it hard. But apparently compromises were made by strengthening the ETUC's opposition to national transition regimes (so as to increase the free movement of workers from the new member states).

5.3 The actions of the Commission

The next acts were by the Commission which presented a *Recommendation on enhanced cooperation in the context of the posting of workers in the framework of the provision of services* (EU-Commission, 2008), which was endorsed by the EU´s Ministers of Employment at the Luxembourg Council on 9 June 2008. The recommendation proposed the setting up of a 'high level' group to engage with the problems related to posting. The concept of 'high level' should clearly indicate that the Commission took the concerns of trade unions very serious. As it turned out, however, it could find no legal basis for establishing such a group and it was in turn changed into an Expert Committee consisting mainly of the same Member State representatives that had met informally since 2003 to discuss the implementation of the Directive. The only real change was that the social partners got observer-status in this Committee (and that the Commission would later on increase the production of reports to be assessed by the group) (EuroPolitics, 2008). While the timing could indicate that this Recommendation was a response to the issues raised by the Laval decision, interviewees inside the Commission argued that it was actually just a follow-up on the previous Communications on the issue (Commission, 2003; Commission, 2006; Commission, 2007). However, the Commission used the opportunity to show its involvement with the cases. Rather than presenting the Recommendation on its day of adoption (31 March), the Commission waited four days until 3 April when the ECJ issued its decision on the Rüffert case. The ruling was immediately linked to the Laval and Viking decisions and seen by pro-regulators as containing an even clearer 'licence for social dumping' than Laval because of its emphasis on allowing Eastern European service providers to use their 'comparative advantages' (low wages). The ruling caused centrally placed conservative MEPs to issue a press release stating that a revision of the Posting of Workers Directive might be needed. Thus, upon presenting its new Recommendation EU Commissioner for Employment, Vladimír Špidla, said that "the Commission will continue to stand up against any form of social dumping." He argued that the Recommendation would "provide effective tools to fight undeclared work across borders, increase administrative co-operation between Member States and enable labour inspectorates to do their jobs more effectively." Where pro-regulators had called on the Commission to act, Špidla argued that it was "now up to Member States to take the necessary steps to improve the implementation of the posting of workers directive" (Commission, 2008a). In that way, the Recommendations could be seen as both confirming the Commissions engagement with the issue, but at the same time relegate the problems of solving the situation for other actors.

The Irish Lisbon Treaty referendum on the 12 June 2008 ended in a 'no.' A number of issues had been central to the debate in Ireland and it would be a gross exaggeration to assume that the ECJ rulings had a decisive impact. But concerns amongst trade unions about the pressure from East European workers

and the ECJ decisions was one of the central themes in the 'no' campaign (Hyman, 2009: 24), and ascribing higher importance to "social progress and the protection of workers' rights" in the EU were among the list of demands stated when renegotiation of the Treaty began in December (Council, 2008). Some even claim that the 'social progress clause' suggested by the ETUC was an explicit demand from the Irish negotiators, but that it was erased during an informal meeting with British Prime Minister, Gordon Brown. One week after the referendum, the ECJ announced its decision in the Luxembourg case, restricting the use of the 'public policy' category of the Posting of Workers Directive. This limited the open-endedness of the Directives list of issues. The case had been brought before the Court by the Commission itself, but the timing of the verdict was bad for the Commission.[12] The four decisions were linked under the title 'the Laval-quartet' and the pro regulation actors stressed the importance of political action in the face of a Court that seemed to have a highly deregulatory agenda. This continued pressure from the European trade unions and the left side of the European Parliament in the context of the "no" vote in the Irish referendum on the Lisbon Treaty, led the European Commission to finally acknowledge that the cases raised legitimate questions and concerns, which need to be tackled. In its *Communication on the Renewed Social Agenda* (Commission, 2008b), the Commission stated that it would host a special Forum in the autumn to discuss these issues with the social partners and Members. The Forum was held on the 9 October 2008.

Leading up to it, in September the social partners in the Construction sector had held a seminar in an attempt to find a common position, but failed. In particular Swedish trade unionists insisted on a revision of the Directive, which was a departure from the former position of the Construction partners. Thus, after years of strategic influence on the Commission, due to common positions, the social partners in construction found themselves in uncompromising disagreement (which was deplored not just by employers but also by a number of national trade unions). Furthermore, two weeks before the Forum the ETUC wrote to the current head of the EU, French President Nicolas Sarkozy, urging him to consider a review of the Directive and the adoption of a Social Progress Clause, to help correct the balance between the freedoms of the single market and fundamental rights. The ETUC provided a draft text for the Clause and suggested that it should be attached to the European Treaties in the form of a Protocol, to ensure that it is legally binding at the highest level. Two days prior to the Forum, Business Europe responded by publishing a position paper arguing that there was no need for revision of the posting of workers directive after the ECJ rulings. The paper pointed out that there were still many restrictions to the free movement of services, but that the four rulings "will contribute to a

[12] Or rather, it was brought before the Court by the Internal Market DG of the Commission, but this was bad for the Employment DG, which had to deal with the political trouble caused by the decisions.

better functioning of the internal market whilst at the same time protecting workers´ rights." Any problems caused by the rulings should be solved in the countries concerned (BusinessEurope, 2008). Thus, there was little chance of compromise between the social partners leading up to the Forum.

The Forum itself involved representatives from the Commission, the Social Partners and from member states. A number of Ministers of Employment present deplored the rulings, their interpretation of the Directive and their potential consequences, but they did not want to engage in a revision process. The results, they argued, could easily turn out to be worse than the present state of affairs, but most likely a blocking minority on both sides would prevent any change whatsoever. In an effort to 'act' the French Minister of Employment and the Commissioner for Employment asked the social partners to sit down and look at the problems. This could be seen as a shift of arena, but most interviewees mainly see it as a way to stall for time. The Social Partners have no way of revising a Directive and it was known in advance that they were in fundamental disagreement. On the other hand, when the Presidency and the Commission asks the Social Partners to sit down and talk, they have no option but to oblige. However, the ETUC insisted that what was going on could and should not be regarded as 'negotiations' as this might give the Commission an opportunity to withdraw from the issue while talks where going on. Thus, the ETUC insisted that the Commission still had to take an initiative itself.

The partners met several times during 2009 and had a final meeting in January 2010. Here they concluded a common paper in which they 'agreed to disagree.' At this point they had made their positions completely clear to each other, and were still in disagreement. In the meantime, the ETUC had established an Expert group on posting, consisting of trade union lawyers and legal scholars. Their assignment was to outline in meticulous detail the problems caused by the ECJ decisions and come up with a detailed proposal for legislative initiatives that could resolve the issues. Their report was presented to the ETUC´s social policy group 13 October 2009 and to the Executive Committee 10 March 2010. If we draw a parallel to the ETUC´s efforts during the adoption of the Services Directive, this final report might have served as a useful document for pro regulation actors during a political revision process. It could have become the parallel to the ETUC´s list of demands in the Services Directive process. But when the report was finished, the pro regulators had little leverage. At that time the Lisbon Treaty had been adopted in Ireland, the new Barroso Commission had been approved and the momentum and opportunities of the pro regulation actors had all but passed.

5.4 The Anderson report

With no political will to revise the Directive in the Council and no possibility of an agreement between social partners, the only possible way to start a revision process was by an initiative from the Commission. However, the problems en-

countered with regards to the revision of the Working Time Directive had made the Commission very reluctant to take initiatives for which there seemed to be no political support in Council. It did, as an interviewee explained, not "want another Working Time Directive." Furthermore, from the beginning the Commission was very divided by the rulings, as they spelled trouble for DG Employment but promoted the interest for DG Internal Market. The only EU-institution where pro-regulation actors seemed to have an arena for action was the European Parliament.

After the Service Directive process the European Parliament seemed more powerful than ever. The Commission had had to revise its proposal extensively due to the first reading by Parliament and the Council had recognized the importance of Parliament by inviting central MEPs to one of its meeting. With these inter-institutional victories in mind, some members of Parliament envisioned that a strong demand from Parliament for a Commission initiative would make the Commission act. This was the clear intention of the '*draft report on Challenges to collective agreements in the EU*' presented by Swedish Socialist Jan Andersson to the Employment Committee on 8 May 2008. It argued "that the ECJ has interpreted EU legislation in a way that was not the intention of the legislators" and therefore called upon the Council, the EP and especially the Commission "to take immediate action to ensure the necessary changes in EU legislation to change the new practise of the ECJ" (Andersson, 2008). After criticising the ECJ´s interpretation of the Directive, the report outlined a number of changes that had to be made to the Posting of Workers Directive. Amongst them was a broadening of its legal base and the possibility of using 'habitual wages' under the Directive. Furthermore it called for a Social Clause and a number of initiatives to improve the implementation of the Directive.

The report led to heated debates in the Employment Committee and especially the Legal Committee, where criticism of the ECJ was seen as completely inappropriate. It soon became clear to centrally placed Socialists that the report would not pass as a resolution in its current form, and negotiations began between different groupings in the European Parliament. During this process, the report was almost completely altered. The final text gave a little bit for everyone to hang on to. That was the price for the compromise. Rather than criticising the ECJ it argued that "current Community legislation has both loopholes and inconsistencies and therefore may have lent itself to interpretations of the Posting of Workers Directive that were not the intention of the Community legislator." Rather than a strong request for action by the Commission, it welcomed "the Commission's indication that it is now ready to re-examine the impact of the internal market on labour rights and collective bargaining" and suggested "that this should not exclude a partial review of the PWD" (Parliament, 2008). But even this watered down text had problems passing. After a long plenary debate on 22 October 2008, the vote was postponed. Key Socialists had discovered that some of the Eastern European group members had their voting

agenda because they saw the resolution as an attack on the new member states. Thus, the Socialists asked to get the vote postponed, so they could try and persuade these Eastern European Socialists to support the resolution.

So, even though the resolution was finally passed with a great majority, it was clear that it gave no strong mandate to argue for the necessity of Commission initiative. When the Commission responded three months later, on 21 January 2009, by rejecting the need for legislative action in response to the rulings, EP Socialists and trade unionists tried to appear surprised and outraged. The Socialist Group co-ordinator on employment and social policy, Stephen Hughes, warned that "the people of Europe will not back a European Union that fails to take their concerns seriously. We want assurances that the Commission will act." The ETUC General Secretary, John Monks, also called on the Commission to rethink its position, saying that the willingness of the social partners to discuss the issues of labour mobility, including the legal aspects, was not an excuse for inaction by the Commission. But despite these statements, it was clear that the pro regulation actors were outmatched due to their diminished strength in the different EU arenas.

5.5 Barroso's promise

Nonetheless, the pro regulation actors made a final effort to avoid the Laval-quartet being passed uncontested into the tomes of case law. To do so they had, once again, to link the very particular issue of posting with big political issues of the European Union. This time it was the renewal of the Commissions mandate that proved to be an opportunity to keep the issue alive. As the Commission's mandate would run out in the autumn of 2009, Barroso started to declare his interest in another term. He was backed by a large number of member states and there were no immediate alternative. Thus an attempt was made to fast-track him through to another term, which was heavily criticised by the left side of Parliament. The Socialist group leader, Martin Schulz, argued that "the Council's wish to run this past a meeting of the European Parliament leaders at the end of June, followed by a vote in July, rather than to have a full and official consultation of the Parliament, is wholly unacceptable" (Newsroom, 2009). Thus, Barroso was forced to take the approval of Parliament seriously. Although he was backed by a majority of the European Parliament, he was eager to get legitimacy produced by the backing of a large majority of Parliament or at least by a pro-EU majority (EurActiv, 2009). He had, therefore, to persuade some of the Socialists to back him and in order to do so, had to accommodate some of their demands. Thus on 9 September 2009, Barroso appeared before the Socialist Group for a closed door meeting. He was exposed to heavy criticism on a number of issues, but avoided making promises on almost all issues. With regard to employment issues, however, the Socialists forced him to promise to do something regarding the Working Time Directive and the posting issue. 16 September 2009, Barroso was re-elected by Parliament by a 382 to 219 vote,

and 2 October the same year Ireland adopts the Lisbon treaty. There were no more immediate 'big issues' to draw upon in the struggle for a revision, but Barroso had made a promise of doing something about the posting issue, and his new Commissioner of Employment, Social Affairs and Inclusion, László Andor, would have to honour it.

Along with the Minister of Labour and Immigration of the Spanish Presidency, Celestino Corbacho, Andor arranged a conference on posting of workers and labour rights on 17 and 18 March 2010 (EuroPolitics, 2010c). In his opening statement, Andor argued that the Commission would first assess "whether these difficulties can be handled within the framework of the existing Directive or whether they require a comprehensive review of the Directive." He then added that he would honour Barroso´s promise to the European Parliament by making a "proposal, which I will submit to the co-legislators within one year — after taking into account the findings of a consultation of all the stakeholders, including the European social partners" (Andor, 2010). This statement, with its one year deadline, was appreciated by the pro-regulators but was highly problematic in terms of the internal procedures of the Commission. It would simply be impossible to make all the consultations and impact assessments necessary under the new 'good governance' regime. Thus, when Andor presented his work programme to the European Parliament's Committee on Employment and Social Affairs one month later, 27 April 2010, he said that the Commission would present a legislative proposal on implementation of the directive on posted workers "in 2011." He also said that the proposal will clarify legal obligations for national authorities, companies and workers concerning implementation, as well as aim to improve cooperation between national authorities and ensure effective enforcement through sanctions and remedial action (EuroPolitics, 2010b). Later on in 2010 Andor postponed the initiative even more, arguing that "stakeholders have to be consulted before the proposal is drafted, so it is not likely to be ready before the last quarter of 2011" (EuroPolitics, 2010a). But the mere fact that something was under way gave pro-regulators a hope. Suddenly it did not seem completely misplaced when the ETUC presented its proposal for a revision of the Posting of Workers Directive at the end of May 2010. Especially, as the so-called Monti-report had been published at the beginning of that same month.

5.6 Monti´s report

This report on *A New Strategy for the Single Market* had been commissioned by Barroso himself, and in it former Commissioner Mario Monti argued that it was an urgent task to solve the problems regarding posting if the Single Market project should progress. The report therefore suggested that initiatives should be taken to "clarify the implementation of the Posting of Workers Directive" and "introduce a provision to guarantee the right to strike modelled on Article 2 of Council Regulation (EC) No 2679/98" – the so-called 'Monti clause' that had

been the model for the Social Clause proposed by pro regulation actors.[13] Furthermore, Monti suggested "a mechanism for the informal solutions of labour disputes concerning the application of the directive" (Monti, 2010: 72). The report was followed by an 'own initiative' report by European Economic and Social Committees Section for Employment, Social Affairs and Citizenship (to be adopted later by the Committee itself) on *The Social Dimension of the Internal Market.*. The report, which was initiated by Swedish Trade Unionist Thomas Janson, backed the Monti report's proposal for a social clause, but argued that a partial revision of the Directive, to make possible the equal treatment of workers, should not be ruled out (Committee, 2010). And at the same time, the ILO Committee of Experts on the Application of Conventions and Recommendations (which is held in high esteem by the European Court of Human Rights) issued a Comment that criticised the ECJ judgements for creating a doctrine that "is likely to have a significant restrictive effect on the exercise of the right to strike in practice in a manner contrary to the Convention" (Ceacr, 2010).

All in all, while the immediate uproar regarding the decisions seems to have been thwarted in the formal EU institutional arenas, the coalition of pro regulation actors seemed to use institutions outside the EU to mobilise again. Especially the Monti report was hard to ignore, as it was commissioned by Barroso himself and linked to the re-launch of the Single Market. During the 2 June hearing in the Employment Committee of the European Parliament on the balance between economic freedoms and social rights in relation to the posting issue, it was clear that the Commission was still reluctant to initiate a revision of the Directive, but its representative, Armindo Silva, indicated that it would draw inspiration from the Monti report (Euobserver, 2010). The effect of this has to be seen in the kind of initiatives the Commission said it would take. Where the Commission's main emphasis had been on the technical solutions to problems of implementation, the inspiration drawn from the Monti report would take another direction. The reports focus on the Internal Market would be used as an invitation to engage with the issue by Internal Market Commissioner Michel Barnier. Whereas Andor was relatively inexperienced in politics and regarded as a weak Commissioner, Barnier had a huge portfolio of political capital (experience, networks, understanding of the game, etc.) and a far greater leverage. As he started to prepare (yet another) re-launch of the Internal Market, he followed Monti in arguing that something had to be done about the threat to the fundamental rights posed by the ECJ decision. This could be seen as tactical manoeuvres to secure support for the re-launch of the Single Market. But it could also be assessed as a real concern from the Frenchman (with the French huge respect for fundamental rights). Interviewees speculated that Barnier´s involvement could spell a change that Andor would never get through, while

[13] It is called the 'Monti clause', not because Monti suggested it as a solution in his report, but because he, as Commissioner on the Internal Market, wrote it into Council Regulation (EC) No 2679/98.

other interviewees feared the involvement of DG Internal Market in the elaboration of the new Monti clause. As it turned out, however, both initiatives soon landed on Andor´s table.

5.7 The long wait

The Commissions 2011 Working Programme officially announced a "legislative initiative on Posting of Workers" to be proposed in the 4th quarter of 2011, with the general objective of improving the implementation and enforcement of the Posting of Workers Directive. "More specifically, the aim is to ensure effective respect of the posted workers' rights and clarify the obligations of national authorities and businesses. The aim is also to improve cooperation between national authorities, the provision of information for companies and workers, ensure effective enforcement through sanctions and remedial action and prevent circumvention and abuse of the rules applicable" (Commission, 2010a: Annexes, para 18). This was the technical solution which would uphold the promises of a legislative initiative by Barroso and Andor. But on the very same day, 27 October 2010, the Commission also published a Communication called 'Towards a Single Market Act' with 50 proposals for improving the Single Market. Under the heading 'Increasing solidarity in the single market' the Commission made two proposals regarding fundamental rights. Proposal no. 30 pointed to the announcement of a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, and added that this would be "likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market" (Commission, 2010b: 23). This extended beyond the promises made by Barroso and Andor, and more importantly, beyond the purely technical focus on implementation of the Directive. This dual approach was confirmed in the Commissions 'Single Market Act' of April 2011. Interviewees in the Commission state that the link to the re-launch of the Single Market was crucial for the proposals ever getting adopted by the Commission.

After the presentation of the Working Program all actors waited for the Commissions initiative. The Commission was engaged in a number of impact studies and internal evaluations, but everything has been kept extremely confidential. A number of interviewees have noted that some parts of the proposal would usually have been leaked, but it took a long time for information to come out. One reason may be that the issue has turned into 'big politics' with Barroso´s cabinet closely observing the progress made. Another reason may be that for a long time the Commission simply did not know what to do. This could be the reason for the very open invitation for debate declared at the Commission's conference on posting and fundamental rights at the end of June 2011. Here, Andor declared that the Commission would indeed take two initiatives.

On the one hand they would propose a 'Monti II' Regulation that should "clarify the extent to which trade unions may use the right to strike in the case

of cross-border operations." While the name would indicate the Commission's willingness to meet the demand for a Social Progress Clause inspired by the Monti I regulation, Andor's emphasis on 'recognition' of the social partners and the lack of conflict between freedoms and rights seemed vague. Further, putting emphasis on "applying the proportionality test on a case-by-case basis" would not seem to solve the problem of insecurity of the legality of their actions faced by trade unions. Interviewees say that the mandate given to the people working on these proposals in the Commission was that they could not do anything that would revise the case law.

On the other hand, Andor would propose an Enforcement Directive aimed at improving the implementation of the Posting of Workers Directive and providing a legal basis for an enhanced administrative co-operation between member states (including a long planned electronic exchange system). This initiative would possibly also target 'letterbox' posting and set a time limit to temporary posting. On the latter issue, Andor noted that "maintaining the essentially temporary nature of posting is very important from the point of view of equal treatment" (Andor, 2011). Thus, the 'technical' Enforcement Directive might seem to have more pro-regulation bite that the 'principal' Monti II regulation.

The proposals were to be presented on the 21 December 2011, but they failed to pass the Commission´s impact assessment board twice. Having finally passed, they were set on the agenda of the College of Commissioners meeting 7 times before being finally adopted 21 March 2012. One reason for the long suspension was the fact that draft copies of both initiatives were leaked in December 2011, and a huge number of actors started to inform the Commission about their opinion on these drafts. Some interviewees argue that it was the Commission itself that leaked the proposals to get an unofficial reaction to the proposals. This caused the Commission to revise the proposals substantially, and the revision process entailed a huge internal battle within the Commission. Influenced by the arguments of employers, Barroso was eager to delete all elements about joint and several liability from the enforcement Directive, and Andor had to go to Barroso twice to insist that some parts would be kept in. The proposals were revised several times, right up to the very last discussion in the College of Commissioners, and even there it was heavily debated before it was finally adopted.

5.8 The Proposals

As promised, the Commission came with two proposals. One was the Monti II Regulation, which had been heavily criticised by trade unions even before its adoption by the Commission. The proposal consisted of 13 pages of explanatory notes outlining the background for the proposal and comprised 5 articles in less than two pages. Article 1 states the purpose of the Regulation as laying down "the general principles and rules applicable at Union level with respect to the exercise of the fundamental right to take collective action" while the Regulation would "not affect in any way the exercise of fundamental rights as recognised in the Member States" which seems a contradiction in terms. In article 2 these general principles are presented in short by stating:

> *"The exercise of the freedom of establishment and the freedom to provide services enshrined in the Treaty shall respect the fundamental right to take collective action, including the right or freedom to strike, and conversely, the exercise of the fundamental right to take collective action, including the right or freedom to strike, shall respect these economic freedoms".*

In a sense, this was a codification of the doctrine of balancing what the ECJ had established in Viking, and did nothing to change the case law. Article 3 was aimed at securing the inclusion of foriegn service providers in alternative dispute resolution mechanisms. The article aimed at establishing an alert mechanism, which would oblige member states to inform the Commission and other relevant member states whenever circumstances affecting the "proper functioning of the internal market and/or which may cause serious damage to its industrial relations system" arise. Compared to the leaked versions from December 2011 one article had been completely deleted. It would have had delegated the ultimate responsibility for assesing whether "collective action is suitable for ensuring the achievement of the objective(s) pursued and does not go beyond what is necessary to attain that objective" to the "national court in the Member State where the industrial action is planned or has started." This article might have been seen as an attempt to avoid 'regime shopping' between different national courts (as had happened in the Viking case), just as it might be seen as an attempt to insure that the ECJ would leave it to the national Courts to make the final assessment. But the article was dropped during the heavy lob-bying process from December to March.

Trade unions denounced the Monti II Regulation immediately, pointing to the legal base (Article 352 of the Treaty), the Regulation form (which means that no national implementation or adaption is possible), the codification of the Viking doctrine of balancing and the fact that the EU has no legal competence to regulate the right to strike. Indeed, it seems strange that the Legal service of the Commission could approve a text laying down general principles regarding the right to strike when one recalls that it found it impossible to have a clause

forbidding the replacement of striking workers in the Temporary Agency Work Directive because this would imply regulating the right to strike. Anyway, as a number of trade unionists argued: The Monti II Regulation does not change anything with regard to the problems raised by the judgements; it only makes the problems worse. The same seemed to be the conclusion of the French minister of Employment, Xavier Bertrand, who shortly after the presentation of the proposal made a press statement saying that the French could not support the Regulation as it was presented. He was dissatisfied with the fact that it seemed to make the right to strike conditional, which was unacceptable. From the other side of the table UK officials declared that the Regulation was a distraction from Europe's priority to ensure growth and competitiveness. As the adoption of the Regulation requires unanimity this seemed to be the end of the Monti II Regulation.

The second proposal of the Commission was an Enforcement Directive, aimed at improving the implementation of the Posting of Workers Directive. This proposal contained a number of elements regarding administrative co-operation and registration which we will not go into here. They may have practical relevance to the everyday regulation of posting, but in the context of the Laval- quartet they have little impact. Actually, the Enforcement Directive was never meant to address the issues raised by the judgements, and can to a large extent be seen as a part of the continuing efforts of improving the implementation of the Posting of Workers Directive. However, it might still address the issue in an indirect way by limiting the use of posting. If the judgements had made it possible for employers to use posting to circumvent national regulation, making tighter or clearer definitions of posting might limit the problems seen by trade unions. In the leaked version, the Enforcement Directive contained a definition of a posted worker that (amongst other things) placed emphasis on the "existence of a genuine link between the employer and his country of origin." This would help prevent the use of letterbox companies. But this was deleted in the adopted proposal, as the Commission feared that such a (re)definition of a posted worker would be used by EU Parliamentarians to reopen the Posting of Workers Directive itself.[14] Nonetheless, article 3 of the adopted proposal still contained a list of elements that the competent authorities could take into account in assessing whether a company "genuinely performs substantial activities" in its home state, and whether a posted worker "temporarily carries out his or her work in a Member State other than the one in which he or she normally works." Although the "absence or lack of document(s)" was deleted from the final proposal, this list might be used to uncover bogus-posting in the sense of the Posting of Workers Directive. However, the Enforcement Directive is unclear as to what happens if this is the case. Would the company be

[14] In the adopted proposal the text 'Without re-opening Directive 96/71/EC' had even been added to the introduction, to make clear that this was not a possibility.

considered established, with requirements for equal treatment and full compliance with the all labour regulation? Or would the Rome I Regulation, with its default 'home country' principle, apply (which in the light of the ECJ rulings could mean that any host country labour regulation could be seen as an unjustified restriction to the free movement of services)?

These issues were not at the immediate forefront of the debates on the proposal for the Enforcement Directive. Instead, employers very sharp reactions against the joint and several liability element in the proposal was the centre of attention. Employers find chain liability extremely problematic, because it makes the main contractors responsible for the bad behaviour of sub-contractors, which (they argued) would inhibit the free movement of services. They had lobbied hard in Barroso´s cabinet to have it completely removed, but it had only been substantially watered down.[15] This issue will probally be a critical point of contest in the adoption process.

Another central issue related to the word 'only' inserted in article 9 of the final version of the proposal. Where the introduction to the proposal describes the control measures that have been disallowed by the ECJ, article 9 described the control measures that the member states can take. But by stating that the member state can *only* do what the ECJ has thus far allowed, the Directive will transform an potentially open ended list of measures into a exhaustive list (just as was debated during the adoption of the Services Directive). For this reason, trade unions were opposed to this 'only.'

While both of these issues will be highly important to the practical regulation of posting in the future, neither of them have much relation to more principle issues that were raised by the Laval-quartet. And while the adoption process is far from finished - and this may take years – it seems that these issues will not really be adressed.

5.9 Discussion

Due to the unfinished nature of the process, it is difficult to assess the final outcome of the political processes. Nonetheless, some intermediate conclusions can be drawn: More than four years after the Laval decision, pro-regulators have not been successful a mobilising a response to the ECJ decisions and their deregulatory trend. The Monti II Regulation, which could have addressed the more principle issues, was designed under a mandate that it could not reverse the case law, and so it will only codify the rulings of the ECJ (rather than to change them). Instead, adoption of the Regulation (with its legal basis) would poten-

[15] This element had been substantially watered down during the highly informal consultation. From a horizontal element (in the leaked version) it had now been limited to the construction sector, with the possibility for member states to extent it to other sectors. From an inclusion of all links in the chain (in the leaked version), it now only regarded the direct (first) link (making it, in the eyes of trade unions, extremely easy to circumvent). Further, where member states had been allowed to made rules on due diligence to let main contractors free from the chain liability (leaked version), it was now mandatory for them to do so. And all elements that would have included the social partners in establishing the mechanisms of chain liability were deleted in the final version.

tially open a 'floodgate' (as an interviewee called it) to the EU regarding labour market issues. Additionally, as the ECJ based its decisions not only on the Posting of Workers Directive (secondary law), but on the Treaty itself (primary law), it has been obvious from the start that only Treaty change can actually address the issues raised by the ECJ decisions. Finally, an number of the initiatives that could have helped contain the problems (seen from a pro regulation perspective), such as a stricter definition of posting or an indication that national courts have the ultimate say when assessing the legitimacy of the right to collective action, has been watered down or deleted completely from the two proposals. Some parts of them may be inserted once again during the political process, but interviewees in the EU Parliament indicate that the definition issues will not be re-inserted as this would demand a real revision of the Posting of Workers Directive.

As for the issue of arenas, this case study provides an interesting amendment to the two other ones as it shows the ECJ as an important arena. Once the decisions are taken, it has proven very hard for the pro regulators to mobilise sufficient political force to change them. Where the experience of the Services Directive showed that attempts to deregulate via political routes can prove difficult, the Laval quartet shows that much more severe deregulation can be passed quickly via the legal route.

With regard to the coalitions, trade unions and employers have been opposed during the whole process. But the shifting balance of power in Europe has clearly affected the process of coalition formation in this case. In the European Parliament, the increased strength of the right has made it impossible to mobilise a strong voice for social Europe at this time. In the Council, even those countries that are very critical towards the rulings have warned against a revision of the Posting of Workers Directive, as they fear that it would lead to an even worse result under the present constellations of political power. And in the Commission, Barroso´s repeated intervention in the formulation of the proposal to accommodate employer concerns shows that DG employment (with its more Social Europe friendly agenda) is under strong pressure internally.

6. Conclusion

Caught between the freedom to provide services and labour law, posting is an issue that highlights problems of measuring whether Social Europe is slowing down or not. This is so because the efforts to enchant socially orientated regulation needs to be view in relation to the rapidly expanding regulation of the possibility to provide services and the changed economic composition of the EU, which have both fundamentally changed the problems that the social regulation needs to respond to. With the EU enlargement of 2004 and 2007, the wage differences within the EU have grown enormously, which have made the potential for using cheap labour much larger. In this situation, posting is increasingly being used to circumvent national labour legislation and the principles of equal treatment that were invented to safeguard different national standards of labour regulation. It is against this background that we must assess the tempo of Social Europe.

Seen from this perspective and with the case of posting in mind, we might not want to talk about the 'slowing down', but rather the 'full stop' or even reversal of the social dimension of Europe. Two of the three cases in this report regard initiatives that are aimed at liberalising the provision of services (potentially at the expense of workers protection). In this situation, pro regulators have found themselves in the defensive. They are not fighting for improvements of social standards, but for maintaining social standards that are under attack. In the first case, the Services Directive, pro regulators were able - through huge efforts - to avoid an initiative that they felt would have been highly problematic. But in the third case, the Laval quartet, they did not have the sufficient power. As for the second case, the Temporary Agency Work Directive, it must be seen as a victory for pro regulators to have it adopted after almost 18 years of struggle. However, even in this positive case the victory is moderate; first because the content for the Directive is assessed as being weak compared to other legislation on atypical employment, and second because the practical implications of the Directive are unclear. In that sense it seems that the answer to the question of whether *the strengthening of the "regulation sceptical actors" has affected the content or the range of work and employment regulation at the EU-level* is 'yes' with regard to the posting of workers issue. This is mainly seem in relation to the Laval quartet: Where the *Rush Portuguesa* decision led to a legislative process where the Posting of Workers Directive was adopted as a 'shield against the ECJ', the Laval quartet have not gained any legislative response yet and probably will not in the near future. As for the Services Directive it was not an attempt to increase regulation of the terms and condition of posted workers (as a response, for instance, to the growing use and abuse of posting after the EU enlargements), but to liberalise the provision of services at the expense of states possibilities to control posting. The (partial) victory of pro regulation

actors consisted in (partially) preventing deregulation, not increasing regulation. As many pro regulation interviewees have noted, it is not just specific issues regarding posting but a context with focus on 'competitiveness', 'cutting red tape', 'smart regulation' and increasing emphasis on the free movement of services that makes concerns about labour law and social standards marginal issues. It is symptomatic that in studying the field one constantly encounter the efforts of trade unions and other pro regulation actors to mobilise for increased regulation or avoid deregulation, whereas employers and other regulation sceptics have had a more leaned back approach, confident – one could suspect – that the foundational principles and the current functioning of the European Union is working to their advantage almost by itself.

As for the issue of coalitions, we have asked what role coalitions have played in decision-making processes, what glues them together and whether they are divided primarily into pro-regulation and regulation-sceptical groups? It is not easy to answer these questions on the basis of a single issue such as the posting issue, but some considerations can be made. In a multi-level and multi-institutional polity like the EU, coalitions are crucial to the adoption of legislation and they have been so in the cases under study as well. The question is whether these coalitions are stable and exist independent of the particular legislative issue. With regard to posting, there is a tendency that trade unions, socialist and the left, DG employment and high wage member states are pro regulation, while employers, conservatives and liberals, DG internal market and low wage member states are sceptical of regulation. However, the picture is not always that clear cut. With regard to the Services Directive, most member states and EU parliamentarians were positive until trade unions started to mobilise against it. With the Temporary Agency Work Directive, some member states (such as Germany and the Netherlands) had particular institutional interests that made them oppose it, while a number of new member states were willing to accept it. And with the Laval quartet, a number of high wage member states and national trade unions were reluctant to engage with a revision of the Posting of Workers Directive, because they feared the outcome, while conservatives of the EU parliament have voiced concerns with the ECJ rulings.

These complexities are caused by the fact that coalitions are not only glued together by principles of pro or anti regulation, but by a mixture of both political and institutional interests, as well the framing of the particular issue. As for the latter, defining the principles of coalition formation is maybe one of the most important issues in any of the political struggles. To a large degree, coalitions seem to form during the process, and the active efforts to mobilise actors for one or the other coalition has shown itself as being important in all three cases.

This also speaks to the question of how it has been possible for the actors to agree on a number of new regulation initiatives when the regulation-sceptical actors have been strengthened. The answer is that the regulation sceptics may

not perceive themselves as such. In the case of the Temporary Agency Work Directive it was clear that the ‘sceptics’ were divided between real sceptics, like the UK and the CBI, and actors that were merely looking out for institutional interests, such as Germany and EURO-Ciett. Making compromises that accommodate the interests of the latter group seems to have been crucial for the adoption of that Directive.

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