The 96/71 directive opted for the protection of posted workers by creating a coordination mechanism in order to “lay down a nucleus of mandatory rules for minimum protection” to be observed in the host country by employers who post workers to perform temporary work in the territory of a Member State where the services are provided”\textsuperscript{1}. The aim is therefore not to harmonise the material content of national rules applicable to posted workers, even if the majority of the matters listed in article 3 § 1 of directive 96/71 – the hard core provisions – are covered by harmonisation directives.

In the \textit{Rush Portuguesa}\textsuperscript{2} case, the preamble of directive 96/71 in a very general manner, states that “Community law does not preclude Member States from applying their legislation, or \textbf{collective agreements} entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his

\begin{itemize}
\item[1] Recital 13 of directive 96/71.
\end{itemize}
employer is established in another Member State"\textsuperscript{3}. It adds that “Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means”\textsuperscript{4}.

However article 3 § 1 of the directive is more restrictive because it obliges Member States to ensure that posted workers benefit from the same protection as that set out on their territory “by law, regulation or administrative provision, and/or by collective agreements (...) which have been declared universally applicable within the meaning of paragraph 8, insofar as they concern the activities referred to in the Annex.”

The States must therefore ensure that posted workers on their territory benefit from the application of certain provisions resulting from certain collective agreements concluded in certain sectors.

Although the directive authorizes Member States, according to various methods, to offer better protection to posted workers, as a matter of principle, it limits the scope of collective autonomy of national social partners in one of its most essential manifestations, collective negotiation (1). The Court of Justice’s case law gives full effect to these limits.

However, the directive makes no reference to collective action despite the fact that in many Member States, the right to strike is inseparably linked to collective negotiation\textsuperscript{5}. This omission certainly results from the fact that the treaty, at the time the directive was adopted, as is the case today, excludes the right to strike from the scope of social harmonisation. This did not stop the Court of Justice from recognizing the right to strike as a fundamental right\textsuperscript{6}, providing a framework to its exercise to when the aim of the trade union’s collective action is to improve the protection of

\textsuperscript{3} Ibid.
\textsuperscript{4} Ibid.
\textsuperscript{5} The European Social Charter revised in 1996 is clear on this link; stating that "With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake: (...) the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into" (article 6 – The right to bargain collectively).
\textsuperscript{6} Based on article 28 of the Charter of Fundamental Rights of the European Union: “Workers and employers, or their respective organisations, have, in accordance with Community law and national laws and practices, the right to negotiate and conclude collective agreements at the appropriate levels and, in cases of conflicts of interest, to take collective action to defend their interests, including strike action.”
posted workers\(^7\). Case law therefore also limits the exercise of the right to strike, curbing the other essential form of collective autonomy of national social partners (2).

1. The limited scope of collective agreements

Only certain collective agreement provisions must be compulsorily applied to posted workers on the host country’s territory. Directive 96/71 poses three limits, but also contains provisions which allow these limits to be bypassed. The Court of Justice’s case law adds additional requirements to the application of the host country’s collective agreements, arising from article 56 FEU (former article 49 EC) forbidding restrictions to the freedom of provision of services.

1.1. Matters covered by hard core provisions

Posted workers are only guaranteed the protection of collective agreements in the host country for the matters covered by the hard core provisions\(^8\).

However, article 3, paragraph 7, of directive 96/71 authorises more favourable conditions of work and employment to be applied to workers in the matters listed in article 3, paragraph 1.

Nonetheless, the interpretation by the Court of Justice in the Laval and Rüffert cases denies this favourable clause any scope in the name of fair competition between companies from the host country and companies from other Member States. The directive cannot be interpreted as allowing “the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection. Indeed, as regards the matters referred to in Article 3(1), first subparagraph, (a) to (g), Directive 96/71 expressly lays down the degree of protection for workers of undertakings established in other Member States who are posted to the territory of the host Member State which the latter State is entitled to require those undertakings to observe(...) the level of protection which must be

\(^7\) ECJ 18 December 2007, Laval,
\(^8\) See previous Roundtable.
guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1)\(^9\).

According to the Court, the only way posted workers can benefit from more favourable collective agreement provisions involving matters covered by the hard core provisions\(^{10}\) is where their employer so decides. Undertakings established in other Member States have the “the right (…)to sign of their own accord a collective labour agreement in the host Member State, in particular in the context of a commitment made to their own posted staff, the terms of which might be more favourable”\(^{11}\).

*The Court’s interpretation of the first indent of article 3(10) of directive 96/71 is just as restrictive, enabling Member States to apply terms and conditions of employment on matters other than those specifically referred to in paragraph 1. But this right can only be exercised “in compliance with the Treaty and, in the case of public policy provisions, on a basis of equality of treatment, to national undertakings and to the undertakings of other Member States”\(^{12}\).*

The Court of Justice clearly precludes management and labour from using this article. In the Laval case the Court states that “the terms of the collective agreement for the building sector\(^{13}\) in question were in fact established through negotiation between management and labour; not being bodies governed by public law, they cannot avail themselves of that provision by citing grounds of public policy in order to maintain that collective action such as that at issue in the main proceedings complies with Community law”\(^{14}\). Only national public bodies can use article 3(10) of directive 96/71.

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\(^{10}\) In Laval, certain clauses of the building sector collective agreement derogate, for some of the matters referred to in article 3, paragraph 1, first subparagraph, under a) to g), of directive 96/71, namely working time and annual holidays, from Swedish legal provisions which fix the terms and conditions of work applicable to posted workers, by granting more favourable conditions.

\(^{11}\) ECJ 18 December 2007, Laval, point 81.

\(^{12}\) Article 3 § 10; ECJ 18 December 2007, Laval, point 82.

\(^{13}\) Article 3 § 10; ECJ 18 December 2007, Laval, point 82.

\(^{14}\) ECJ 18 December 2007, Laval, point 84.
In addition, the ECJ strictly interprets the possibility of citing grounds of public policy as it constitutes an “exception to the system put in place by that directive and a derogation from the fundamental principle of freedom to provide services”\textsuperscript{15}. As a result, each Member State cannot unilaterally define its scope without any control by the European Community institutions. (...) public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society”. \textsuperscript{16} A specific point of the Commission v Luxembourg case is worth pointing out as it dismisses from the outset one of the solutions which could have extended the application of local collective agreements. The Court sees no reason why provisions which encompass the drawing up and implementation of collective agreements, should per se fall under the definition of public policy; the same shall apply to the actual provisions of such collective agreements themselves, which in their entirety and for the simple reason that they derive from that type of measure, cannot fall under that definition either\textsuperscript{17}.

These specifications therefore also limit the freedom of public bodies to give maximum scope to collective agreements. A Member State cannot cite public policy in order to apply all collective agreements applicable on its territory to posted workers.

1.2. Activities covered

The host Member State is bound by an obligation to apply the collective agreements to posted workers “insofar as they concern the activities referred to in the Annex”\textsuperscript{18}, i.e. building sector activities. This limit explains why the cases judged by the ECJ involve building sites on which undertakings established in other Member States have posted workers. However, Member States can disregard this restriction and require both national undertakings and those from other Member States on an equal footing, to abide by the terms and conditions of work and employment set out in the collective

\textsuperscript{15} ECJ 19 June 2008, \textit{Commission v Luxembourg}, C-319/06, point 49.
\textsuperscript{16} ECJ 19 June 2008, \textit{Commission v Luxembourg}, C-319/06, point 50. This solution has been criticized namely because it would appear that the Court confuses the notion of “public policy provisions” with that of “grounds of public policy” thereby justifying the obstacles to the freedom to provide services. See P. Rodière, “Les arrêts "Viking" et "Laval", le droit de grève et le droit de négociation collective”, \textit{RTD eur.} 2008, p. 47.
\textsuperscript{17} ECJ 19 June 2008, \textit{Commission v Luxembourg}, C-319/06, points 65-66.
\textsuperscript{18} Article 3 § 1.
agreements and involving activities other than those referred to in the Annex\textsuperscript{19}. France used this possibility by extending the application of collective agreements without limiting them to any particular sector\textsuperscript{20}. The German law of 20 April 2009 on compulsory work conditions for posted cross-border workers extends the application of collective agreements, which have been declared universally applicable or those which have been extended by ministerial decision in compliance with the new procedure introduced by this law, to other sectors\textsuperscript{21}.

1.3. The scope of collective agreements

The third limit has caused the most difficulties and has given rise to the greatest criticism following the recent cases of the ECJ. Pursuant to article 3, paragraph 8, of the directive, only collective agreements which have been declared universally applicable must be applied to posted workers.

This covers “collective agreements which must be observed by all undertakings in the geographical area and in the profession or industry concerned”. This general scope is guaranteed by an extension (and/or widening) mechanism such as that applicable in French law.

In theory, only such a system enables a collective agreement to be considered as having an \textit{erga omnes} effect (unless there is a 100\% level of union membership in the Member States which require the employee to be a trade union member in order for the collective agreement to be applied, or there is a 100\% level of employer union membership in the Member States which require the employer to be a trade union member in order for the collective agreement to be applied).

In 1996, the community legislator had anticipated the case where there is no system for declaring collective agreements universally applicable, as in Sweden. Member States can use as a base, collective agreements which have a \textbf{general effect} on all similar undertakings in a given sector and coming within the territorial scope of the

\textsuperscript{19} Article 3 § 10, second indent.


\textsuperscript{21} This covers building, cleaning of buildings, e-mail services (Briefdienstleistungen), security, mines, commercial cleaning services, waste management and street cleaning, education and training services.
latter and/or collective agreements concluded by the most nationally representative social partners and which are applied throughout the national territory, whilst maintaining equal treatment between undertakings established in another Member State and undertakings from the host Member State in a similar situation.

The aims of these provisions is to avoid requiring undertakings posting workers in another Member State to comply with the provisions of collective agreements which would not apply to certain competitors in the host Member State. The free provision of services thereby justifies these requirements and enables the Court of Justice to deny the application of any local collective agreement which does not fulfil such requirements.

As a result, in a Member State which does not have a system for declaring collective agreements universally applicable, and in which the collective agreements which determine a nucleus of mandatory rules are not negotiated at sector level, or interprofessionally, undertakings established in another Member State are only bound to comply with the provisions of the collective agreements on the actual work site. This is the case in Sweden, where working conditions are negotiated for a given building site. It is also the case in Germany, when the agreement which sets the minimum wage has a limited scope.

The Court of Justice interprets article 3(8) literally. It refutes the case in Sweden where sector-wide collective agreements in reality apply to all undertakings in the building sector.

It particularly emphasises “a lack of provisions, of any kind, 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”\(^{22}\).

1.4. Limits set by case law arising from the free provision of services

Fulfilling the requirements of article 3(8) of the directive does not ensure that the relevant provisions of the collective agreements are implemented. The collective agreements must also comply with the requirements resulting from article 56 FEU (former article 49 EC), which constitute the sole legal basis of the directive. Where

\(^{22}\) ECJ 18 December 2007, Laval, point 110.
the application of collective agreements may restrict the free provision of services, it must not create unequal treatment discriminating against employers established outside the Member State where the service is provided; it must be justified by imperative requirements in the general interest and be proportionate to the aim pursued\textsuperscript{23}.

The \textit{Portugaia construções Ld}\textsuperscript{24} case provides an interesting illustration of this situation. In the name of freedom to provide services, the Court cites German law which allows collective agreements to be concluded which derogate from the general rules – determining a wage which is lower than that fixed by sector collective agreements. This legislation thereby requires employers, who are not established in Germany, to apply the minimum wage fixed by the sector agreement, whilst German employers may be exempted from this requirement as a result of collective negotiation. The Court ignores the case of German workers and that of Portuguese posted workers, who would all suffer a loss in wages. Workers are considered purely as expense items for companies, not as individuals whose dignity should be specifically protected.

This decision gives a purely economic view of collective agreements, aimed solely at ensuring fair competition between companies. Yet, the ECJ case law allows competition between companies based on differences in wages in countries where labour negotiations are decentralised and where collective agreements are not necessarily applied to all undertakings in a given sector\textsuperscript{25}.

The same aim is invoked by the German legislator in the law of 20 April 2009, which applies workings conditions resulting from laws and regulations on hard core matters to posted workers and creates a mechanism which extends the scope of collective agreements and which is contended by German social partners who decry a severe infringement of collective autonomy.

\textbf{2. The limited exercise of the right to strike}

\textsuperscript{23} ECJ 25 October 2001, \textit{Finalarte e a.} prec., point 51.
Before being limited, the right to take collective action, including the right to strike, is determined as a fundamental right by the Viking and Laval cases. However, due to lack of community jurisdiction for regulating this fundamental right, it can only be invoked in situations within the scope of community law. In other words, the company must be in a situation falling within the scope of one of the economic freedoms recognized by the treaty\textsuperscript{26}, as is the case in the above mentioned judgements.

The right to take collective action is analysed as a restriction of the economic freedoms. The Court uses a well known reasoning, by checking that the obstacle is not discriminatory and determining whether the unions’ action is justified by a legitimate aim viewed as an imperative requirement in the general interest and is proportionate to the aim pursued.

Protecting workers from the host Member State from social dumping is viewed as an imperative requirement in the general interest\textsuperscript{27}. Therefore, in the Viking case, the Court accepted that Finnish unions were permitted to start a strike to deter a shipping company from registering one of its ships in Estonia, which would have removed the crew from the scope of Finnish labour law. If the national jurisdiction considers that the employees’ conditions of work and employment were genuinely threatened, striking would have been considered as a justified restriction to the freedom of establishment\textsuperscript{28}.

Equally, in theory, a blockade launched by a trade union in the host Member State aiming to grant posted workers working conditions set at a certain level falls within the aim to protect workers\textsuperscript{29}. But such an action would not be justified in restricting the freedom to provide services when it requires the undertaking to comply with social rules which are not set out in a universally applicable collective agreement. Limiting the use of the right to collective action here in fact means limiting the scope of collective agreements. Clearly, it is obvious that the blockade aimed to grant

\textsuperscript{26} S. Robin-Olivier and E. Pataut, « Europe sociale ou Europe économique (à propos des affaires Viking et Laval) », Revue de droit du travail 2008, p. 80.


\textsuperscript{28} ECJ 11 December 2007, International Transport Workers' Federation and Finnish Seamen's Union, C-438/05, point 77.

\textsuperscript{29} ECJ 18 December 2007, Laval, point 107.
posted workers the same working conditions as those granted to Swedish workers. But in my opinion, this aim should be pursued by a union, whose very vocation it is to seek better protection for employees. One could say that this case severely infringes upon the freedom of association as interpreted by the European Court of Human Rights.

These case law solutions are contended by Swedish and European trade unions, by certain Member States and by the European Parliament as they jeopardize the autonomy of trade unions. All the more so as the Court arrived at these solutions by admitting, using a questionable reasoning³⁰, that the provisions of the treaty forbidding unjustified restrictions to the freedom to provide services have a direct horizontal effect. They are directly enforceable against unions. One of the consequences is that the Court thereby enables liability proceedings to be brought against unions, founded on Community law, whenever such an action is considered incompatible with the treaty.

This is exactly the solution provided by the Swedish Supreme Court in a judgement dated 2 December 2009. The Court ruled that trade unions can be held liable for not respecting article 49 (now article 56 FEU) and ordered to pay damages. The same solution is applied as regards the discriminatory nature of Swedish legislation which authorizes collective action despite the existence of a collective agreement. Thus, a union can be held liable to compensate an undertaking, despite the fact that the action in question was in compliance with Swedish law. The union is therefore held liable due to the Swedish State’s failure to fulfil its obligations.

In addition to this issue, the decision is further contended because the Swedish Supreme Court did not deem it necessary to request a preliminary ruling on the claim for damages filed against a union, nor on the retroactive effect of the ECJ judgment.

The Swedish government merely drew the consequences of the Laval case and on 8 October 2009 offered a series of measures that are due to come into force on 1 April 2010. These measures provide a framework defining the ability for a trade union to launch collective action against a foreign undertaking in order to obtain the application of a collective agreement. These measures stipulate that demands made

³⁰ S. Robin-Olivier and E. Pataut, op. cit.
by the unions may only involve situations referred to in a central sector-wide agreement and applicable in Sweden to the same workers\textsuperscript{31}.

\textbf{Conclusion}

The problems and criticism that have arisen from the case law and the very text of the directive, highlight the fact that reflection is needed on the future direction that the European Union must take as regards the collective autonomy of national social partners.

As regards social policy, article 151 FEU maintains national collective agreement systems and collective autonomy is recognized as an essential element of the European social model. Meanwhile, the right to collective negotiation and the right to strike are provided better protection under civil and political rights by the European Court of Human Rights than by the European Union. In that context, it is all the more obvious that national models, based on collective autonomy rather than on the law, risk being destabilised, as well as complex collective relation systems with several levels of negotiation and those allowing a great amount of decentralised negotiation at a company level.

It is telling that the Member States who were directly affected by the Court of Justice’s decisions did not argue for the directive to be reviewed. Rather, they decided to “give in” and to readjust their social relations model.

Conversely, the European Parliament\textsuperscript{32} backs the European Trade Union Confederation’s position on the need to modify directive 96/71 in order to allow collective agreements to be applied more readily to posted workers.

\textsuperscript{31} Rapport de D. Badré au nom de la Commission des affaires européennes du Sénat sur «le respect du droit à l'action collective et des droits syndicaux en Europe dans le cadre du détachement de travailleurs » dated 25 November 2009, no. 117.

\textsuperscript{32} Report of the European Parliament “Challenges to collective agreements in the EU” dated 22 October 2008. The Parliament asks the Commission to review the directive to take into account “a wider range of methods for organising employment markets than that covered by article 3, paragraph 8”.

11