

Liberalising trade in services: creating new migration opportunities?

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1. Introduction

It is quite uncommon to associate migration with the rules on services trade. Indeed, all economic definitions of services insist on their immaterial nature and on the increased possibility of trading them ‘virtually’ over networks or else, without any physical movement of the parties involved. Somehow this ‘immaterial’ nature of services reflects on their providers/recipients which seem to be ‘invisible’. Even though most services still require the physical contact of the provider with the recipient¹ and, when provided over national borders, do entail migration, service providers and/or recipients are rarely thought of as ‘immigrants’. This may be due to the fact that they enter the foreign territory with a specific aim and, once this aim accomplished, move back to their state of origin; technically they only qualify as short term non-cyclical migrants and are of little interest to policy-makers. A second reason may be that both service providers and recipients are economically desirable: the former are typically highly skilled and trained professionals and the latter are well-off ‘visitors’, increasing consumption in the host state.

The legal definition of services in Article 57 TFEU (ex Art. 50 EC) further nourishes this idea about service providers/recipients not being migrants: the relevant Treaty rules only apply when the provisions on free movement of workers and freedom of establishment – themselves clearly linked to migration – do not apply. This distinction has been fleshed up by the ECJ which has consistently held that the distinction between the rules on establishment, on the one hand, and the rules on services, on the

¹ Some authors even talk of ‘co-production’ of services; see L. Rubalcaba, ‘Historical and anthropological origin of the service economy’ in L. Rubalcaba, *The new service economy, Challenges and policy implications for Europe*, (Cheltenham/Northampton: Edward Elgar, 2007) 14-42.

other, lies on duration.² Indeed, all EC manuals state four types of service provision falling under the EC Treaty: a) where the service provider moves to the recipient's state, for a short period of time (longer stay would amount to establishment), b) where the service recipients themselves move to the state where the service is offered (eg for medical care, education, tourism etc), c) where both service providers and recipients move together in another member state (eg a tourist guide accompanying a group travelling abroad) and d) where the service itself is provided across the borders (typically through the use of ICTs). None of these situations would typically qualify as migration.

The above 'dissociation' between services and migration has been gradually weakened in the recent years. Indeed, migration is increasingly connected to the transnational provision of services. This is the result of three kinds of factors: developments in the European Court of Justice's (ECJ) case law; legislative initiatives in the EU; and the GATS. Each one of these is considered in some detail below.

The aim of the analysis which follows is to show the extent to which (legislative and judicial) policies aimed at the free provision of services actively affect migration conditions within the EU. The EC rules on the provision of services primarily affect the movement of EU nationals. As it will be shown below, however, third country nationals (TCNs) may also claim the benefits of the rules on services, either as recipients thereof or as employees of some EC undertaking which is providing services in another member state (posted workers).

² See below, 2.1.

2. The ECJ extending the rules on services to cover migration

In these last years the ECJ has applied quite extensively the Treaty rules on services.³ Some aspects of this case law have provoked vivid – occasionally violent – reactions, while others have gone quite unnoticed. In the former category, the recent cases concerning posted workers, have not only aggrieved trade unions and surprised lawyers specialising in labour and social law, but they have even prompted some of the most prominent EU scholars to ask for disobedience to the Court.⁴ In the latter category, the extensive application of the rules on services in cases where a long-term establishment is involved, has only been noticed by few scholars – and has been welcomed by many of them. Both these developments are highly relevant as means of opening up further migration.

2.1 Rules on services to apply on long-term establishment

According to the black letter of Article 56 TFEU (ex 49 EC), it is supposed to apply to situations where no other Treaty freedom applies; it has a subordinate character. In this respect, services (Article 56 TFEU) were traditionally distinguished from establishment (Article 49 TFEU, ex 43 EC) by virtue of their temporary nature. Hence, in the *German insurance* case,⁵ the Court held that as soon as the service provider acquired some stable infrastructure in the host State, the Treaty provisions on

³ See in general for the Court's case law Hatzopoulos, Vassilis and Do, Uyen, 'The Case Law of the ECJ Concerning the Free Provision of Services: 2000-2005' (2006) 40 *CMLRev* 923-991; and before that Hatzopoulos, Vassilis, 'Recent developments of the case law of the ECJ in the field of free movement of services 1994-1999', (2000) 37 *CMLRev* 43-82.

⁴ Scharpf, Fritz, 'The only solution is to refuse to comply with ECJ rulings' 4:1 (2009) *Social Europe Journal* (6 April 2009), available at <http://www.social-europe.eu/2009/04/interview-the-only-solution-is-to-refuse-to-comply-with-ecj-rulings/>

⁵ Case 205/84, *Commission v. Germany, Insurance*, [1986] ECR 3755.

establishment became applicable. This position was later reviewed in *Gebhard*,⁶ where the Court recognized that a provider of services within the meaning of Article 56 TFEU (49 EC) could make use of some permanent infrastructure in the host State. Nevertheless, the Court insisted on the temporal character of the provision of services. It stated that ‘not only the duration of the provision of the service, but also its regularity, periodicity or continuity’⁷ may bring it under the rules on establishment. This made commentators conclude that service provision must be of an ‘episodic’ or ‘irregular’ nature.⁸

In its most recent case law, however, the Court seems to be abandoning the temporal criterion in favour of a more economic one. Indeed, the Court seems ready to treat economic activities which qualify as services under Article 56 TFEU (49 EC), irrespective of their duration. The first clear move in this direction occurred in the *Schnitzer* judgment.⁹ Mr. Schnitzer, a German national, was pursued in Germany for having employed a Portuguese construction company for three years, without it being registered in conformity with the German legislation. The first question asked to the Court was whether the Portuguese company should be deemed to be established, in the sense of Art 43 EC, or on the contrary, if it were merely providing services in Germany. If the former were true, then the company should abide by all the regulations of the host Member State. If the latter qualification applied, then according to well-established case law, the service provider could not be expected to fulfil all the requirements of the host State - especially not registration requirements,

⁶ Case C-55/94, *Gebhard*, [1995] ECR I-4165.

⁷ Para 27 of the judgment.

⁸ See Hatzopoulos, n. 3 above, 45, where this restrictive approach of the Court was also criticized as being inappropriate in view of the current development and sophistication of services.

⁹ Case C-215/01, *Schnitzer*, [2003] ECR I-14847.

unless such a requirement were justified by an overriding reason of general interest.¹⁰ In order to reply to the question asked, the Court referred to the same criteria as in *Gebhard*, i.e. the duration, the regularity, the periodical nature and the continuity of the service, but reached the a diametrically opposed conclusion. The Court found that the above characteristics were not enough to make service provision fall within the scope of Article 49 TFEU (43 EC): ‘services within the meaning of the Treaty may cover services varying widely in nature, including services which are provided over an extended period, even over several years [...]. Services within the meaning of the Treaty may likewise be constituted by services which a business established in a Member State supplies with a greater or lesser degree of frequency or regularity, even over an extended period, to persons established in one or more other Member States’.¹¹

This is an important statement where the Court, explicitly for the first time,¹² seems to be favoring an economic approach over a legalistic one, thus abandoning the artificial distinction between services and establishment. Such a trend could already be identified in some earlier cases concerning ‘naturally’ trans-border services, such as TV broadcasting, telecommunications or transport,¹³ where the Court applied

¹⁰ See eg the *Tourist Guide* cases, see Cases C-154/89, C-180/89 and C-189/89, respectively *Commission v. France, Italy and Greece*, [1991] ECR I-659.

¹¹ *Schnitzer*, n. 9 above, para 30.

¹² The seeds for this finding had been shown in case C-131/01, *Commission v. Italy, Patent Agents*, [2003] ECR I-1659, where the Court held that, although the submission and follow-up of patent applications and the protection of patents awarded did entail a series of actions spread over a long period of time, this did not mean that the activity in question necessarily entail a stable and continuous participation in the economic life of the host State.

¹³ Case C-17/00, *De Coester*, [2001] ECR I-9445; Joined Cases C-544/03 and C-545/03, *Mobistar and Belgacom* [2005] ECR I-7723; and Case C-92/01, *Stylianakis*, [2003] ECR I-1291, respectively.

Article 56 TFEU (49 EC) without taking into account any temporal consideration. However, the case under discussion, not only makes it clear that it is the economic nature – and not the duration – of the activity that constitutes the main criterion for its legal classification, it also creates a presumption in favour of the application of Article 56 TFEU (49 EC) in all service situations. The Court finds that an *a priori* registration requirement of service providers may not be justified because ‘at the moment when a provider of services envisages supplying services in the host Member State and examination of the conditions governing access to the activities concerned is carried out, it is often difficult to say whether those services are going to be supplied just once or very occasionally or whether, on the other hand, they will be supplied in a repeated or more or less regular manner’.¹⁴ In other words, the Court states that the nature of the activity is readily ascertainable and can safely lead to legal qualifications, while its duration, periodicity, etc., are not.¹⁵

In this way, the concept of service under the EC Treaty is brought into line with that under the WTO agreement and the GATS.¹⁶ Moreover, logic and coherence are introduced in the way that EC Treaty provisions apply, since the legal category of services is *prima facie* made to coincide with the economic one. Instituted at a time when service activities represented an insignificant part of the economic activity of Member States, the traditional analysis according to which services constitute a

¹⁴ *Schnitzer*, n. 9, para 39.

¹⁵ It is worth noting that the Services Directive (for which see below 3.1 and especially 3.1.1) follows broadly the same logic, since in rec 5 it considers that liberalisation is important for ‘operators who wish to become established in other Member States as well as those who provide a service in another Member State without being established there’. Thereafter, the directive contains (distinct) rules for the provision of services, both by undertakings established and by undertakings occasionally acting within the territory of another Member State (Chapters III and IV, respectively).

¹⁶ For which see below, para 4.

residual category could no longer hold true. Henceforth, the rules on establishment which exist under the EC Treaty (in contrast to the GATS, where no such rules exist), ought to apply only in those cases where the service provider genuinely and permanently moves to another Member State. This should be ascertained, according to the Court, by reference to two criteria: a) a material criterion, whereby the infrastructure set up by the service provider goes beyond what is strictly necessary for the temporal provision of specific services and b) an intentional criterion, whereby the service provider ‘holds himself out to, amongst others, nationals of the second Member State’¹⁷ and intends to acquire and occupy a market share in this State.

The (r)evolution of the concept of services catalysed by the judgment in *Schnitzer*, largely unnoticed by the doctrine,¹⁸ was confirmed by the Court, some months later, in a case against Portugal concerning private security firms.¹⁹ The Portuguese legislation at stake only concerned undertakings offering private security services within Portugal for longer than a calendar year.²⁰ The question arose whether the said legislation could be judged by reference to Article 56 TFEU (49 EC). The Court repeated its findings in *Schnitzer* and further widened the scope of application of the rules on services. For the Court held that ‘all services that are *not* offered on a stable *and* continuous basis from an established professional base in the Member State of

¹⁷ *Schnitzer*, n. 9 above, para 32.

¹⁸ Some authors have observed the newness of the Court’s approach but have hesitated to identify a fully new direction, see e.g. Prieto Catherine, ‘Liberté d’établissement et de prestation de services’, (2004) *RTDE*, 543 speaks of the temporal criterion as being “*dilaté*” in this case.

¹⁹ Case C-171/02, *Commission v. Portugal, Private Security Firms*, [2004] I-5645.

²⁰ The Court had already accepted that a period of a calendar year did not counter the application of the rules on the free provision of services in Joined Cases C-369/96 and C-376/96, *Arblade and Leloup*, [1999] ECR I-8453.

destination constitute provision of services within the meaning of Article 49 EC²¹. This being said the Court further emphasized that ‘no provision of the Treaty affords a means of determining, in an abstract manner, the duration or frequency beyond which the supply of a service or of a certain type of service in another Member State can no longer be regarded as the provision of services within the meaning of the Treaty’.²² The negative formulation used by the Court together with the casuistic approach put forward considerably widens the scope of application of Article 56 TFEU (49 EC), while it does away, once and for all, with the myth of services being a subsidiary category.

It, therefore, becomes clear, that any EU national wishing to exercise an economic activity which qualifies as a service in another member state may, henceforth, invoke the rules on services, even if such service provision entails a (temporary?) migration. Under any kind of classification of migrations,²³ a delocalisation for a period of one – or several – years in another state does qualify as migration and, indeed, long term migration. Therefore, all the rules on services – including the Services Directive – become relevant for intra-EU migration.

This is not a purely theoretical development, but has serious practical consequences. While the Treaty provisions on the free movement of workers and freedom of establishment are based on the idea that migrants should, in principle, comply with all the requirements of the host state, the service providers are allowed, to a large extent, to rely on their home state regulatory framework while offering their services abroad.

²¹ *Commission v Portugal*, above n 19, para 25 in fine, emphasis added.

²² *Ibid*, para 26.

²³ See e.g. King, Russel ‘Towards a New Map of European Migration’, *International Journal of Population Geography*, 8 (2002) 89-106 and Triandafyllidou, Anna, Gropas, Ruby and Vogel, David (2007) ‘Introduction’ and Triandafyllidou, Anna and Gropas, Ruby ‘Concluding Remarks’, in Triandafyllidou, Anna and Gropas, Ruby (eds) *European Immigration. A Sourcebook* (Aldershot: Ashgate, 2007) 1-19, and 361-376.

Through the imposition of extensive mutual recognition obligations and administrative cooperation, the Court has put into place an imperfect (and unspoken) country of origin principle (CoOP).²⁴ This translates into some kind of regime portability: all qualifications, guarantee deposits, other authorisation requirements examined by the home state, safety and security regulations complied with in the home state etc, should be given full effect in the host state.²⁵ Therefore, in the very *Schnitzer* judgment, which concerned construction works extending over a period of three years, the Court held that if an entry to the trades register were justified at all, such an entry ‘cannot be other than automatic, and that requirement cannot constitute a condition precedent for the provision of services’. In the recent cases concerning posted workers (for which see below para 2.2) the Court went as far as recognising that this regime portability covers, under circumstances, also the employment legislation and collective agreements in force in the home state.

It is clear that this regime portability enhances the mobility of service providers across the borders. Therefore, the extension *ratione temporis* of the scope of application of the rules on services to cover periods extending to several years may have positive impact on intra-community migration; it may, therefore, qualify as a facilitator.²⁶

²⁴ See Hatzopoulos, Vassilis ‘Que reste-t-il de la directive sur les services ? CDE 43 (3-4/2008) 299-358, 313-315.

²⁵ See in this respect Hatzopoulos, Vassilis, *Le principe communautaire d'équivalence et de reconnaissance mutuelle dans la libre prestation de services*, (Athènes/Bruxelles : Sakkoulas/Bruylant, 1999) ; and more recently Hatzopoulos, Vassilis, ‘Le principe de reconnaissance mutuelle dans la libre prestation de services’ paper delivered in a conference on ‘Mutual Recognition’ organised by the Université Robert Schuman de Strasbourg, on 5 December 2008, available at <http://www.coleurope.eu/template.asp?pagename=lawpapers> .

²⁶ For the concept of migration facilitators see, among several writers, Papademetriou, Demetrios, ‘Managing Rapid and Deep Change in the Newest Age of Migration’, in Spencer, Sarah, *The Politics*

While, on the face of it, such a facilitator only concerns EU nationals, in the following paragraphs it will be shown that third country nationals (TCNs) are also to a large extent favoured in their migration plans by such a development.

2.2. Posted workers

The starting point in the Court's case law concerning posted workers are cases *Evi v Seco*, *Rush Portuguesa* and *Vander Elst*.²⁷ The first concerned a French undertaking using third country nationals in railway repairs in Luxembourg, the second a Portuguese undertaking deploying Portuguese nationals (at a time when they did not yet benefit from free movement) in railway construction in France and the third, a Belgian undertaking deploying Moroccan workers in construction (read: demolition) works in France. Red together, these three cases broadly settled the issue of posted workers, along with three key principles: a) a service provider may move from one member state to another with his own personnel, irrespective of their nationality, without having to satisfy supplementary administrative requirements linked either to immigration or to labour market regulations; b) a service provider may, nonetheless, be required to comply with the legislation (collective agreements, arbitral sentences etc.) of the host State concerning minimum remuneration and other working conditions and all national measures reasonably suited to enforcing /monitoring such a requirement are acceptable;²⁸ c) a service provider may not be required to comply

of Immigration, Managing Opportunity, Conflict and Change (Massachusetts etc: Blackwell, 2003), 39-58.

²⁷ Joined Cases 62/81 and 63/ 81, *Evi v. Seco*, [1982] ECR I-223; Case C-113/89, *Rush Portuguesa*, [1990] ECR I-1417; Case C-43/93, *Vander Elst*, [1994] ECR I-3803.

²⁸ For the importance of minimal pay agreements as a means to combat poverty see Funk, Lothar & Lesch, Hagen, 'Minimum Wage Regulations in Selected European Countries', (2006) *Intereconomics*, 89.

with all the social security obligations and linked formalities for workers who are already covered in his (home) State of establishment, unless such burdens actually add up to the protection of workers. These basic principles, especially in relation to minimum pay, were later ‘codified’ by Directive 96/71.²⁹ The Directive also provided for the designation of one or more ‘liaison offices’ and for cooperation between the competent national authorities in order to facilitate the free provision of services.

All three principles above were consequently confirmed in *Arblade and Leloup*.³⁰ This case concerned two French undertakings which had been employing their own personnel (the nationality of which is not specified in the Court’s judgment) in Silo constructions in Belgium and had infringed regulations which, among other things, a) imposed a minimum pay, b) necessitated the drawing-up, keeping and retaining of social documents for each one of the workers employed and c) required the payment of supplementary social security contributions for each worker, in the form of “*timbres intempéries*” and “*timbres-fidélité*”. According to the principles above, the Court accepted a), but rejected b) and c). It is also worth noting that, following the adoption of Directive 96/71 and while the above judgments were still pending, on February 1999, the Commission tabled a draft directive on the posting of workers

²⁹ Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services, OJ [1996] L 18/ 1; the word codified is oversimplifying in this context, as the exact content of the Directive and the extent to which it restricts or expands the scope of application of previous case law has been hotly disputed by legal scholars, see eg Davies, Paul, ‘Posted workers: Single market or protection of national labour law systems?’ 34 *CMLRev* (1997) 571-602; Meyer, Francis, ‘Libre circulation des travailleurs et libre prestation de services, à propos de la directive « détachement du travailleur »’, *RIDE* (1998) 57-73.

³⁰ Joined Cases C-369/96 and 376/96, *Arblade*, [1999] ECR I-8453.

who are third-country nationals for the provision of cross-border services³¹, but this initiative did not receive the support of member states and was subsequently dropped from the Commission's agenda.

It is in the last ten years, however, that developments in the area of posted workers have been spectacular; in at least two respects. For one thing, the Court has cut down on national administrative requirements concerning entry and working conditions of TCNs (2.2.1). More importantly, the Court, has somehow curbed the principle that posted workers should be fully subject to working and pay conditions of the host country (2.2.2). While the former development makes it easier for TCNs to integrate the EU job market, the latter confers on them (or gives them back) a clear competitive advantage over indigenous workers.

2.2.1 Softening up administrative requirements for entry and work

Already in *Vander Elst*³² the Court had held that it was enough for TCNs legally resident and employed in Belgium and temporarily posted to France, to comply only with the migration requirements of the latter state and that no individual working permits could be required by the French authorities. Similarly, in *Commission v. Luxembourg, posted workers I*³³, was at stake a rule whereby all service providers deploying non-EU personnel in Luxembourg should have their personnel obtain an individual working permit or, alternatively, have a collective working permit issued for them. This rule only concerned the right to work and applied on top of any entry requirements to which workers were already subject. The Court found that the objectives of the legislation in question, i.e. the social welfare of non-EU workers and

³¹ [1999] OJ C 67/ 12.

³² Case C-43/93 *Vander Elst* [1994] ECR I-3803.

³³ Case C-445/03 *Commission v Luxembourg, posted workers I* [2004] ECR I-10191.

the stability of the Luxembourg labour market could be equally attained through a system of simple declaration, instead of an authorisation requirement; being unnecessary to the attainment of the above objectives the measure in question unduly restricted the service providers freedom of movement. It clearly stems, therefore, that TCNs may work in a member state without having the required working permit, as long as such work is provided in the framework of an employment contract with an undertaking based in any other member state.

In *Commission v. Germany, posted workers*,³⁴ the regulation at stake required foreign workers to be in possession of an entry and work visa, which was only delivered to posted workers provided i.a. that they were already employed with the posting firm for at least a year. The Court found this requirement – and in general the visa regime – in violation of Article 56 TFEU (49 EC) as disproportionate to the pursued objectives. It found, again, that a declaration obligation imposed on the posting undertaking would suffice for the protection of the reasons invoked by Germany. A similar requirement of the Austrian legislation imposing to posted workers in order to obtain, on top of entry visas, an ‘EU posting confirmation’, was also condemned in *Commission v Austria, posted workers*.³⁵ More recently, in *Commission v Luxembourg, posted workers II*,³⁶ the Court went as far as to hold that a mere notification obligation, which should be accomplished any time until the first day of work was violating Article 49 EC, because it contained ‘ambiguities’ that were able to

³⁴ Case C-341/02, *Commission v. Germany*, [2005] ECR I-2733.

³⁵ Case C-168/04 *Commission v Austria, posted workers* [2006] ECR I-9041; in the same case was also condemned the impossibility to regularise on the spot workers once posted.

³⁶ Case C-319/06 *Commission v Luxembourg, posted workers II* [2008] ECR I-4323.

‘dissuade undertakings wishing to post workers to Luxembourg from exercising their freedom to provide services.’³⁷

2.2.2 Wage and social rights portability

2.2.2.1 Inroads to the full applicability of host state legislation

Concerning minimum pay, the Court has shown clear signs of departure from the full and automatic application of the host State legislation. In *Mazzoleni*³⁸ the question arose whether the personnel of a French security company occasionally deployed in sites in Belgium should be paid at the higher tariffs applicable in Belgium. The Court held that the application of the host country legislation may become, under certain circumstances, neither *necessary* nor *proportional*.³⁹ The necessity test requires the host State authorities to verify whether their national legislation is needed to ensure an ‘equivalent’ level of remuneration for workers, taking into account fiscal and social charges applicable in the States concerned.⁴⁰ Even if the necessity test is satisfied, the application of the host State legislation may still be countered if it entails disproportionate administrative burdens for the service provider or inequalities between its employees (proportionality test).⁴¹ A few months later in *Portugaia Construcoes*⁴² the Court held that the host State’s collective agreement on salaries could be applied only if it contributed in a ‘significant way’ to the employees’ social

³⁷ *Ibid* para 81. In the more recent case C-219/08 *Commission v Belgium, posted workers* nyr, however, the Court was ready to accept the obligation imposed on posting service providers to submit declarations concerning the status of their posted workers.

³⁸Case C-165/98, *Mazzoleni*, [2001] ECR I-2189.

³⁹ *Ibid*, para 30, emphasis added.

⁴⁰ *Ibid*, para 35.

⁴¹ *Ibid*, para 36.

⁴² Case C-164/99 *Portugaia Construções* [2002] ECR I-787.

protection.⁴³ Therefore the sacrosanct principle of the respect of host State minimum pay requirements becomes conditional on a) significantly increasing the employees' revenue and b) not disproportionately burdening the employer (!).⁴⁴ Broadly the same principles above apply in relation to social security contributions in the host State, following the Court's judgment in *Finalarte*.⁴⁵

2.2.2.2 Portability of home state legislation?

It is, however, with its infamous judgments in *Laval*, *Viking* and *Rüffert*,⁴⁶ that the Court has administered a decisive blow to the applicability of host state minimum wages and rules of social protection and has opened the way for some kind of regime portability for posted workers. These judgments are extremely important in many respects and have aroused excitement among trade-unions, practitioners and academic writers.⁴⁷ It is not my intention to provide yet another analysis of these cases; instead

⁴³ *Ibid*, para 29.

⁴⁴ This is a peculiar proportionality test: usually the restrictive measure is appraised as against a less restrictive one, while here the competing interests themselves are being compared.

⁴⁵ Joined Cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98, *Finalarte*, [2001] ECR I-7831.

⁴⁶ Case C-341/05 *Laval and Partneri* [2007] ECR I-11767; Case C-438/05 *Viking* [2007] ECR I-10779 and Case C-346/06 *Rüffert* [2008] ECR I-1989.

⁴⁷ For the latter, see, among many, Cremers, Jan, Dolvik, Jon-Erik & Bosch, Gerhard, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU?' 38:6 *Industrial Relations Journal* (2007) 524-541; Malmberg, Jonas & Sigeman, Tore, 'Industrial actions and EU economic freedoms: the autonomous collective bargaining model curtailed by the ECJ' (2008) 45 *CMLRev* 1115-1146; Ronmar, Mia, 'Free movement of services vs national labour law and industrial relations systems: understanding the *Laval* case from a Swedish and Nordic perspective' (2008) 10 *CYEL* 493-521; Ashiagbor, Diamond, 'Collective Labor Rights and the European Social Model' (2009) 3 *Law and Ethics of Human Rights*, 222-266; Barnard, Catherine, '*Viking* and *Laval*: An Introduction' (2008) 10 *CYEL* 463-492; Dashwood, Alan, '*Viking* and *Laval*: Issues of Horizontal Direct Effect' (2008) 10 *CYEL* 525-540; Deakin, Simon, 'Regulatory Competition after *Laval*' (2008)

I will only focus on the question of minimum wages. In *Laval* and *Viking* the main question raised was that of the legality of industrial action undertaken by trade unions in high-wage countries (Sweden and Finland, respectively) in order impose their own wage requirements on low-wage posted workers (from Latvia and Estonia, respectively, at a time when such workers enjoyed no right to work on their own). In *Viking* the question was only debated under the perspective of Article 56 TFEU (49 EC), while in *Laval* Directive 96/71 was also held to be applicable.⁴⁸ The Court held, for the first time, industrial action to be a fundamental right which should be available to trade unions in order to protect the interests of their members. Such right, however, should be exercised in accordance to the Treaty fundamental freedoms (such as the freedom of establishment and the free provision of services) and only be the source of restrictions which are proportional to the aims pursued. It is this proportionality test which has a sting in the tail, since for its application it is necessary to take into account the level of protection afforded to workers in their home state and compare it with the protection level for which trade unions are fighting. Only 'if it were

10 CYEL 581-609; Hös, Nikolett, 'The principle of proportionality in the *Viking* and *Laval* cases: an appropriate standard of judicial review?' (2009) 6 EUI Working paper; Novitz, Tonia, 'A Human Rights Analysis for the *Viking* and *Laval* Judgments' (2008) 10 CYEL 541-562; Sciarra, Sylvana, '*Viking* and *Laval*: Collective Labour Rights and Market Freedoms in the Enlarged EU' (2008) 10 CYEL 563-580; Woolfson, Charles & Sommers, Jeff, 'Labour Mobility in Construction: European Implications of the *Laval* un Partneri Dispute with Swedish Labour' (2006) 12 *European Journal of Industrial Relations* 49-68; Joerges, Christian & Rödl, Franz, 'Informal Politics, Formalised Law and the "Social Deficit" of European Integration: Reflections after the Judgments of the ECJ in *Viking* and *Laval*' (2009) 15 *ELJ* 1-19; see also Blanpain, Robert, (ed) *The Laval and Viking Cases. Freedom of Services and Establishment v. Industrial Conflict in the European Economic Area and Russia* (2009) 69 *Bulletin of comparative labour relations*, The Netherlands, Kluwer Law International.

⁴⁸ This aspect of the judgment alone is open to considerable criticism since it seems to be recognising that the rules of a directive are relevant in a dispute between private parties (the posting undertakings on one hand and the trade unions on the other), ie the directive has horizontal direct effect; see in particular Dashwood and Deakin, in the previous footnote.

established that the jobs or conditions of employment at issue were [...] jeopardised or under serious threat' would the exercise of the right to strike be justified in view of the internal market requirements. This seems to be a much weaker test than the usual equivalence test followed by the Court: what is required is not that the protection offered by the home state is equivalent or, at least, comparable to that offered by the host state legislation; it is enough that the workers' condition is not 'under serious threat'.⁴⁹

Failure to take into account the level of protection ensured under the home state legislation is not merely a hinderance to the enjoyment of the fundamental freedoms, but a discrimination proper: it is one of the rare situations where discrimination lies in the application of the same rules to different situations, the difference being that foreign service providers are already subject to their home rules on workers' protection. In other words, the failure to apply the principle of mutual recognition (of social and other charges) amounts, in this case, to discrimination!⁵⁰ Such discrimination may only be upheld by virtue of some express Treaty exception and not by overriding reasons of general interest.⁵¹

The need to take into account the level of protection already offered by the legislation of the home state has been further confirmed in very strong words in both cases. In *Viking*, without further ado, the Court found the general Flag of Convenience (FOC) policy pursued by the ITF (the International Transport Worker's Federation) to be foul of the Treaty provisions because it was applied 'irrespective of whether or not

⁴⁹ Which, of course, raises the subsequent question of how 'serious' a threat is serious enough...

⁵⁰ See eg *Viking* para 72 and *Laval* para 116.

⁵¹ *Laval* para 119; it is worth noting that this distinction as to the causes which may justify discriminatory and non-discriminatory measures had been generally eclipsed from the recent case law of the Court, only to make an impressive comeback in the case under consideration.

that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees'.⁵² Similarly, in *Laval* the *Lex Britannia* was condemned since it failed 'to take into account, irrespective of their content, collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established'.⁵³ Further, in *Commission v Austria, posted workers* the Court held the requirement that Austrian wage and employment conditions be routinely observed contrary to Article 49 EC since it 'does not take account of the measures for the protection of workers by which the undertaking intending to carry out the posting is bound in the Member State of origin'.⁵⁴

The posted workers Directive 96/71 for its part, which was supposed to make sure that basic employment regulations of the host state apply to all workers posted there,⁵⁵ has been seriously undermined by the Court in *Laval*, and even more so in the subsequent *Rüffert* and *Commission v Luxembourg* cases,⁵⁶ in four ways. *First*, the scope of measures which the host member state may impose on posted workers

⁵² *Viking* para 89.

⁵³ *Laval* para 116.

⁵⁴ Above n 35, para 49.

⁵⁵ The Posted Workers Directive in fact creates an exception to the general private international law rules, as enshrined in the Rome Convention, now turned into Regulation (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L 177/6, according to which, unless otherwise agreed, workers in temporary postings remain subject to their home state rules; see for a full argument about the Regulation, the Posted Workers Directive and the judgments under consideration, Deakin above n 48, 590-595.

⁵⁶ Case C-346/06 *Rüffert* [2008] ECR I-1989; Case C-319/06 *Commission v Luxembourg, posted workers II* [2008] ECR I-4323; the former case concerned the obligation imposed by a German Lander that all employees or subcontractors of undertakings executing works within its territory receive pay above the national minimum, while the latter concerned several aspects of the Luxembourg legislation, including a system of automatic indexation of wages above the national minimum. Both were found incompatible with the Posted Workers Directive.

has been drastically circumscribed: a) it may not apply measures which have not been agreed upon following some of the procedures described in the Directive,⁵⁷ b) which are of no general territorial application,⁵⁸ c) which do not fix the actual level of pay but limit themselves to setting criteria for its calculation,⁵⁹ or d) which prescribe wages above the bare minimum.⁶⁰ At any rate, the list of issues enumerated in the Directive, and about which the host state may apply its own legislation, is an exhaustive one.⁶¹ *Second*, the possibility of the host state to impose measures justified by public order considerations, is also seriously restricted: the concept of public order is a community one – not left to the individual states to determine – and subject to restrictive interpretation.⁶² *Third*, contrary to a clear statement in recital 17 and Article 3(7), whereby the Directive's terms 'shall not prevent application of terms and conditions which are more favourable to workers', the Court finds that member states cannot be allowed 'to make the provision of services in its territory conditional upon the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection'.⁶³ By transforming the 'floor' into a 'ceiling',⁶⁴ the Court not only flies on the face of the express Directive's provisions, but also against 'the widely accepted understanding of other social policy directives and regulations, which do not seek to set out either uniform laws or even a level

⁵⁷ *Laval* paras 63, 67, 70 and 71

⁵⁸ *Rüffert* para 29.

⁵⁹ *Rüffert* para 24.

⁶⁰ *Rüffert* para 33; *Commission v Luxembourg* paras 45-55.

⁶¹ *Commission v Luxembourg* para 26.

⁶² *Ibid* paras 30-31.

⁶³ *Laval* para 80; *Rüffert* para 33.

⁶⁴ This point is made, among others, by Malmberg & Sigeman, above n 47, 1145.

playing field, but to establish a floor of rights above which regulatory competition is possible'.⁶⁵ *Fourth* – and this is the development having the most far reaching consequences – the Court in the most recent *Commission v Luxembourg, posted workers II* case, discretely opens the way for using the Directive against its very objective, in order to pre-empt the host state from imposing its own measures to posted workers: for issues which are subject to a minimum harmonisation and are, as a matter of law, secured by all member states, the host member state may not impose its own (more demanding) conditions.⁶⁶ It is true that in the judgment under consideration the minimum harmonisation contemplated by the Court was organised by a different directive (91/533);⁶⁷ according to point '*Third*' above, however, the Posted Workers Directive itself is a harmonisation instrument – possibly a self defeating one.

Therefore, the Court transforms what was initially thought of as a guarantee against social dumping and as a safe harbour from the application of the country of origin principle to quite the contrary: to a presumption of regime portability. Such portability stems from Articles 49 and 56 TFEU (43 and 49 EC) and may, in some occasions, be orchestrated by virtue of the very directive which was supposed to avoid it.

Such a result may seem far-fetched and even absurd in the light of the considerations above. From a migration point of view, however, it may not be as undesirable an outcome. Indeed, it may be said that the Court's recent case law is informed from the

⁶⁵ Excerpt taken from Deakin above fn 47, 597 (footnote omitted).

⁶⁶ *Commission v Luxembourg* paras 38-44.

⁶⁷ Council Directive 91/533/EEC on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship [1991] OJ L 288/32.

neoclassical analysis of migration.⁶⁸ The Court tacitly acknowledges wages differential as the main driving force behind economic migration and, through the above case law, creates the conditions for wage competition and self-regulation through the labour market. Increased offer of labour in high-wage countries will cause wages to drop, while at the same time wages in the sending countries will rise as a consequence of labour shortages there. Eventually, wages in the sending/receiving countries will grow closer and the motivation to migrate will decline; by the same token real convergence of member states economies will have been achieved. From such a perspective the Court's case law on posted workers makes perfect sense: in the short term it enhances migration and, hence, free movement, while in the medium-long term it contributes towards 'an ever closer Union' since it brings wages and other market conditions closer.

This pro-migration stance of the Court of Justice is not new. Indeed, the Court has constantly lent its support to migrant workers, since the beginnings of the Community. Not only has the Court supported European workers, but also TCNs associated with some European undertaking. In the latter case, instead of the rules on the free movement of workers and freedom of establishment, the Court had to ground its findings on the rules on services. It is also no secret that the Posted Workers Directive corresponds to the Member States' effort to circumscribe the Court's early case law on TCNs as posted workers.⁶⁹

⁶⁸ The Neoclassical theory of migration is just one – probably the most prominent – among several theories explaining modern migration; see Massey, Douglas, Arango, Joaquin, Hugo, Graeme Kouaouci, Ali, Pellegrino, Adela and Taylor, Edward 'Theories of International Migration: A Review and Appraisal' 19:3 (1993) *Population and Development Review*, 431-466.

⁶⁹ See Davies, Paul, 'Posted workers: Single market or protection of national labour law systems?' 34 *CMLRev* (1997) 571-602; Meyer, Francis, 'Libre circulation des travailleurs et libre prestation de services, à propos de la directive « détachement du travailleur »', *RIDE* (1998) 57-73

On the other hand, it may not be said that the Court has been unaware of the risks of regulatory competition stemming from its pro-migration stance. Already in *Vander Elst* the Court found that ‘the application of the Belgian system in any event excludes any substantial risk of workers being exploited or of competition between undertakings being distorted’.⁷⁰ This consideration, however, has been forgotten in subsequent case law and, in any event, does not hold true after the 2004 and 2007 enlargements and the accession in the Community of low-wage countries. Therefore, it could be said that the Court privileges migration, integration and effective equalisation of working conditions in the medium term at the price of admitting short term regulatory competition. Such an approach, if it does exist, makes sense where European nationals are concerned; it makes much less sense in relation to TCNs. In the Court’s case law however, such a distinction may not be identified. Based on Article 49 EC and the nationality of the employer/service provider – not that of the employee/posted worker – the Court’s case law benefits European and non European workers alike. It is true that the recent enlargements shifted temporarily the focus from the latter to the former, but the way is there open also for migrant workers from third countries.⁷¹

⁷⁰ *Vander Elst*, para 25.

⁷¹ It should be remembered that *Rush Portuguesa* as well as *Viking*, *Laval* and *Rüffert*, all concerned EU citizens, but at a time when their individual right of free movement were suspended by virtue of a transitional period.

3. The EC legislature making it easier for foreign service providers

3.1. The Services Directive 2006/123 – enhancing service provision

The Services Directive does not concern migration. Having as its legal bases Articles 47(2) and 55 EC (now 53 and 62 TFEU)– and not the provisions of Title IV EC – this directive is primarily concerned with the intra-EU provision of services. Its main focus, therefore, are Community nationals, not TCNs (3.1.1). Moreover, the few provisions of the Bolkestein draft which affected posted workers have been dropped from the final text. TCNs, nevertheless, may be the indirect beneficiaries of various provisions of the Services Directive, in at least three ways (3.1.2.). Indeed, to the extent that this directive will actually facilitate the cross-border provision of services, it will also increase migration pressures.

3.1.1. Facilitating the establishment of EC service providers

One of the main inputs of the Services Directive – and the one least discussed by legal writers – is the extent to which it simplifies the establishment of service providers. Chapter III of the Directive (Articles 9 to 15) constitutes the first piece of legislation of a horizontal nature (i.e. not sector-specific, such as e.g. the TV without frontiers Directive) to align the economic with the legal concept of services, setting aside the unhappy ‘duration criterion’ contained in Article 57 TFEU (50 EC). In this it follows the Court’s case law described above in section 2.1. Hence, it regulates situations which under the traditional establishment/services dichotomy fall in the former, to the extent that they concern service activities. This is why the Directive’s legal base is to

be found not only in Article 55 EC (62 TFEU) on services, but also in Article 47 EC (53 TFEU) on establishment.⁷²

Service providers wishing to establish themselves in another member state, have, in principle, to comply with the host State legislation. This requirement has been tempered, by the Court, through the imposition of the general principles of non-discrimination, necessity, proportionality and mutual recognition. Chapter III of the Directive codifies the relevant case law of the Court in two Sections, one concerning authorisation procedures and the other all other measures restricting establishment.

Such codification does offer some clear added value. First, the codification of the case law into the text of a directive – and its transcription into national law – does away with the casuistic character of the principles developed by the Court and brings them closer to both service providers and to member states' administrations. Second, these principles shift from being *ex post* remedies for service providers into *ex ante* obligations for national administrations. Third, the Directive goes beyond mere principles and offers practical details about their application, something the Court may only rarely do. Fourth, member states' discretionary powers are circumscribed, to the extent that states are subject to reporting obligations on the restrictions maintained/imposed both to one another and to the Commission (Article 39 of the Directive).

3.1.2. Enhancing service provision – to the benefit of EC and TC nationals

3.1.2.1. The provision of information – for prospective service providers

One of the major innovations introduced by the Directive – and the most daunting task for national administrations – is the institution of points of single contact

⁷² See above 1.1.3.

(Article 6) which should be able a) deal with all the necessary applications and documents for taking up the relevant economic activity, b) assist prospective service providers with their applications and c) provide them with all the necessary information. This information should include (Article 7(1)):

- (a) requirements applicable to providers established in their territory, in particular those requirements concerning the procedures and formalities to be completed in order to access and to exercise service activities;
- (b) the contact details of the competent authorities enabling the latter to be contacted directly, including the details of those authorities responsible for matters concerning the exercise of service activities;
- (c) the means of, and conditions for, accessing public registers and databases on providers and services;
- (d) the means of redress which are generally available in the event of dispute between the competent authorities and the provider or the recipient, or between a provider and a recipient or between providers;
- (e) the contact details of the associations or organisations, other than the competent authorities, from which providers or recipients may obtain practical assistance.

Such information should be 'easily accessible at a distance and by electronic means and that they are kept up to date' (Article 7(3)).

As soon as such information becomes available on the web, it is to be expected that private initiative and entrepreneurship will complete it with extra information, on the kind of services already available on the market, practical requirements and tips for the provision of services, data on demand of various services and other packages of electronic data concerning (mainly) professional services. Such information will be primarily aimed at EU service providers. It will, however, also be available to TCNs. The information as such will be as valuable for the former as for the latter.

Indeed, one of the main reasons which renders migration pressures fuzzy and unpredictable – and thus condemns immigration policies to failure – is the erratic dissemination of information about the market conditions pertaining in the host state.⁷³ Greater availability of information is expected to attract more and more suitable migrant workers, both Community nationals and TCNs. Next to this quantitative leap, a qualitative one is also to be expected: since the information provided online will essentially concern service (i.e. essentially white-collar) activities, qualified migration is likely to benefit from the whole transparency process. Further (third), and in relation to the previous point, the desire of member states to attract migrant workers qualified in specific service areas, such as e.g. IT services, may lead to further simplification of the requirements for the take up of the relevant activities; such simplified requirements may be seen as completing the ‘blue card’ system put in place by Directive 2009/50.⁷⁴ In this respect, migration concerns may act as catalysts of reducing red tape and rationalising the provision of services.

3.1.2.2 Consumer protection – for service recipients

Service provision also covers the movement of recipients to meet the providers of their choice - and such movement may constitute migration: studying abroad or receiving long term medical treatments may take several years. In this respect the Services Directive innovates by introducing rules in favour of service recipients. In a short Section consisting of three articles the Directive prohibits restrictions imposed

⁷³ See e.g. Triandafyllidou, A. ‘EU Migration and Asylum Policies’ in Cramme, Olaf (ed) *Rescuing the European Project: EU legitimacy, governance and security*, (London: Policy Network, 2009) 123-135.

⁷⁴ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17. For this Directive see below 3.3.

by the *home* State (Article 19), condemns discriminatory measures liable to be adopted by the *host* State (Article 20) and offers ‘assistance to recipients’ (Article 21).

To be more precise, the recipient’s home State may neither impose any authorisation or declaration requirement nor put limits on the financial aid to which the recipient is entitled, just because they have opted for receiving a given service in another member state. Clearly, the principles established in *Kohll, Smits & Peerbooms* and *Vanbraekel* underpin Article 19 of the Directive.⁷⁵ Similarly, the Court’s judgments in *Trojani*, *Collins* and *Bidar*,⁷⁶ seem to transcend Article 20 which prevents the host state from introducing any discriminatory measure against foreign service recipients. It has to be stressed that – unlike Article 16 of the Directive – the two provisions on service recipients do not exclude services of general economic interest. Hence, they may be invoked by nationals of one member state in order to secure access to services having a social character in other member states.

⁷⁵ Case C-158/96 *Kohll* [1998] ECR I-1931; Case C-157/99 *Smits & Peerbooms* [2001] ECR I-5473; Case C-368/98 *Vanbraekel* [2001] ECR I-5363. For these cases and their progeny see, among many, Cabral, Pedro ‘The Internal Market and the right to cross-border medical care’ (2004) *ELRev* 673-685, Davies, Gareth, ‘Welfare as a service’, *Legal Issues of European Integration* (2002) 27-40 and Hatzopoulos, Vassilis ‘Killing national health and insurance systems but healing patients? The European market for health care services after the judgments of the ECJ in *Vanbraekel* and *Peerbooms*’ (2002) *CMLRev* 683-729, and more recently ‘Health law and policy, the impact of the EU’, in De Burca (ed) *EU Law and the Welfare State: In Search of Solidarity* (Oxford, OUP/EUI, 2005), 123-160. See also;

⁷⁶ Case C-456/02 *Trojani* [2004] ECR I-7573; Case C-138/02 *Collins* [2004] ECR I-2703; Case C-209/03 *Bidar* [2005] ECR I-2119; See in general on the ‘social sensibility’ of the ECJ, Hatzopoulos, Vassilis, ‘A (more) social Europe: A political crossroad or a legal one-way? Dialogues between Luxembourg and Lisbon’ (2005) 42 *CMLRev*. 1599-1635; also, by the same author, “Current problems of social Europe” in J. Baquero-Cruz & C. Closa (eds) *European Integration from Rome to Berlin 1957-2007, History, Law and Politics* (Brussels etc: PIE Peter Lang, 2009) 147-180.

These same provisions may also be invoked by TCNs legally established in a member state. The Court, already in *Svensson & Gustavsson*⁷⁷ has held that, as long as there is a service flowing from one member state to another, it matters little that the recipient of such service is a TCN. The Services Directive itself, in Article 4 (3), defines as recipient ‘any natural person who is a national of a Member State or who benefits from rights conferred upon him by Community acts ... who, for professional or non-professional purposes, uses, or wishes to use, a service’. More interestingly, it may be that Article 20 of the Services Directive, which requires states to ‘ensure that the recipient is not made subject to discriminatory requirements based on his nationality or place of residence’ and that providers established in their territory do not discriminate on those grounds, is the first EC text explicitly to extend to TCNs the principle of non discrimination on grounds of nationality.⁷⁸

The final provision on service recipients aims at making information accessible to recipients and at building up confidence for services offered in other member states: electronic means of communication, single points of contact, simple guides etc, are all available to the service recipients in their home State. This information is different

⁷⁷ Case C-484/93 *Svensson & Gustavsson* [1995] ECR I-3955 annotated by the present author in (1996) *CMLRev* 569-588.

⁷⁸ It should be recalled that nationality is a prohibited ground for discriminating between EC nationals, but as far as TCNs are concerned, the non-discrimination directives refer to various criteria for discrimination which may mirror nationality (ethnic origin, religion, colour) but do not explicitly mention nationality as a prohibited ground for discrimination; see Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303/16; and Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services [2004] OJ L 373/37. The same is true for the proposed Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM 2008 (426) *final*.

from – and adds up to – the one provided under Article 7 (above), as it does not concern the conditions for the provision of services, but rather the opportunities for receiving services in other member states.

3.1.2.3. Administrative cooperation

Administrative cooperation has clearly lost in importance with the abandonment of the Country of Origin Principle (CoOP), since competence sharing and mutual help between home and host state authorities are now less important. However, one cannot dismiss altogether nine (out of 45) provisions of the Directive. Hence, the creation of one or more ‘liaison points’ in every member state, responsible for the exchange of information between national authorities will certainly help the application of the Directive (Article 28). In addition, a ‘European network of Member States’ authorities’ will run an alert mechanism whenever it ‘becomes aware of serious specific acts or circumstances relating to a service activity that could cause serious damage to the health or safety of persons or to the environment’ (Article 32). An electronic system for the exchange of information (Article 34(1)) and some rules on the respective competences of the home and host State complete the rules on cooperation.

All the above are ways to rationalise and adapt the way that national administrations work in order for them to cope more efficiently with the increased mobility of service providers and recipients. The Court’s extended case law shows that the areas in which administrative cooperation is highly deficient are the ones directly connected with

individual rights put at stake by free movement: pension and healthcare rights,⁷⁹ as well as recognition of professional qualifications.⁸⁰

These should be seen together with the SOLVIT system, put into place by the Commission as a means of extra-judicial settlement of disputes related to the internal market.⁸¹ This system consists of a network of online dispute resolution available both to undertakings and to consumers. The ‘plaintiffs’ contact the SOLVIT point of contact in their country. If the complaint is within the ‘tasks’ of the SOLVIT network, this contact point registers it within an electronic database and contacts the SOLVIT point in the member state where the problem has occurred. The latter SOLVIT point, together with the authorities of the state concerned, tries to resolve the problem. This system, after a hesitant start, gains in credibility and the number of disputes settled increasing year after year.⁸² There are, however, two limitations to SOLVIT’s potential. For one thing it has limited competence *ratione materiae*.⁸³ Moreover, SOLVIT has only vertical but no horizontal action: it may mediate only between an individual and a state authority, not between two individuals.

⁷⁹ C-326/00 *IKA v Ioannidis* [2003] ECR I-1703, and for a thorough presentation of this case the comment by the present author in *CMLRev* (2003) 1251-1268; Case C-202/97, *Fitzwilliam*, [2000] ECR I-883. See Moore, “Freedom of movement and migrant workers’ social security: an overview of the case law of the Court of Justice, 1997-2001”, *CML Rev.* (2002) 807-839.

⁸⁰ For which see below 3.4.

⁸¹ COM 2001 (702) *final*.

⁸² See the annual SOLVIT report at http://ec.europa.eu/solvit/site/docs/solvit2008_report_en.pdf

⁸³ SOLVIT’s mandate covers the following areas: Recognition of Professional qualifications and diplomas; Access to education; Residence permits; Voting rights; Social security; Employment rights; Driving licences; Motor vehicle registration; Border controls; Market access for products; Market access for services; Establishment as self-employed; Public procurement; Taxation; Free movement of capital or payments.

Direct administrative cooperation together with cooperation through SOLVIT are means deemed to facilitate the movement of persons within the internal market. They are liable, however, by their very logic, to lead to the rationalisation and simplification of the regulatory environment in general, also to the benefit of TCNs.

3.2. The modification of the Social Security Regulation 1408/71 – extending (home state) regime portability

Regulation 1408/71 on the coordination of social security systems puts into place a system of portability of pension and healthcare rights. This Regulation has been modified at least thirty times, the last important modification extending its personal scope to cover TCNs legally residing within the EU.⁸⁴ This extension was indirectly prompted by the Court's earlier judgment in *Khalil*,⁸⁵ where it held that the personal scope of the Regulation lawfully extended to refugees and stateless people established within the EU.

Regulation 1408/71 has been codified and repealed by Regulation (EC) 883/2004⁸⁶ which will enter into force on the first of March 2010. The new Regulation does not radically depart from the one currently in force. One of the innovations it does introduce, however, is that it prolongs the period during which employees may remain subject to their home state social security system, from twelve to twenty-four months. One further innovation is the abolition of 'Annex VII situations', whereby a person may exceptionally be subject to two social security schemes. Henceforth, a person, who works as an employee as well as a self-employed person in several countries at the same time, will automatically be subject to the social security scheme for self-

⁸⁴ Council Regulation (EC) 859/2003 [2003] OJ L 124/1.

⁸⁵ Joined cases C-95/99 to 98/99 and 180/99 *Khalil ao* [2001] ECR I-7413.

⁸⁶ Regulation (EC) 883/2004 [2004] OJ L 166/1.

employed persons of the state which is already competent for the employed activities (with regard to the totality of his activities). Both modifications strengthen the workers' links with their home countries and should be read together with the Court's case law, discussed above, which recognises a 'regime portability' for posted workers.

3.3. The long term migrants Directive – The Blue Card Directive: mobility of TCNs as service providers/recipients

The Long Term residence Directive⁸⁷ foresees a privileged status for those TCNs who have legally remained within the EU for over five years. This directive is said to institute some kind of 'civil citizenship' for integrated TCNs, running parallel to the European citizenship.⁸⁸ It gives migrants two broad categories of rights. First, the directive gives to long-term migrants a very secure status: life-long right to stay in the member state where they have legally remained for five years (Article 8), automatic issuance and renewal of residence permits (Article 8), protection against expulsion even where public order is at stake (Articles 9-10 and 12), treatment 'similar'⁸⁹ to

⁸⁷ Council Directive 2003/109/EC concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44.

⁸⁸ On the issue of how to integrate immigrants and the role of the long term immigrants directive see, among many, Gross, Thomas, 'Integration of Immigrants : The Perspective of EC Law' (2005) EJML 145-161; Halleskov, Louise, 'The Long Term Residents Directive: A fulfilment of the Tampere Objective of Near-Equality?' (2005) EJML 181-201; Handoll, John, 'The Status of Third-Country Nationals Residing on a Long-Term Basis' in De Bruycker, Philippe (ed) *The emergence of a European immigration policy – L'émergence d'une politique européenne d'immigration* (Brussels: Bruylant 2003), 269-362; Urth, Helen, Building a Momentum for the Integration of TCNs in the EU' (2005) EJML 163-180.

⁸⁹ Though not 'equal'... Art 11 of the directive draws directly on the equivalent provisions of the 'Citizenship directive' 2004/38/EC of the EP and the Council of 29 April 2004, [2004] OJ L 158/77, but does introduce various derogations.

that of nationals of the member state concerned (Article 11) in respect of professional life, access to healthcare social benefits, schooling, pensions etc.

More importantly from the point of view of the present study, second, the directive recognises TCNs the right to free movement within the entire EC, broadly in the same terms as this right is recognised to EC nationals. Therefore, TCNs may a) on the basis of their long term permit travel in any other member state for a period not exceeding three months and b) move (together with their families) temporarily or permanently in any other member state in an employed or self-employed capacity (Article 14). Therefore, they may easily travel abroad as service recipients and, more importantly, may move to other member states in order to offer services there.⁹⁰

A similar right of freely moving to other member states and of getting established there for shorter/longer periods is instituted by the Blue Card Directive 2009/50⁹¹ in favour of the Blue Card holders, after only eighteen months of legal residence in one member state (Article 18). Contrary to the Long Term Residents Directive, however, the Blue Card Directive specifically provides that this right may only be exercised 'for the purpose of highly qualified employment there', therefore excluding self-employed activities. Therefore, from a legal point of view it may not be said that

⁹⁰ It is true that Art 14(5) of the Long Term Residence Directive excludes from its scope 'the residence of long-term residents in the territory of the member states 'as providers of cross-border services'; however, to the extent that this 'exclusion' seems to be in stark contrast with the basic rule of free movement established in Art 14 of the Dir, it should be seen as a vicious offspring of the requirement of unanimity in the Council and should be read restrictively, as meaning that the Dir does not specifically address any of the issues related to cross-border service provision; these are taken care by other texts, most importantly, by the Services Directive.

⁹¹ Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17; on this Directive see Zaletel, Petra, 'Competing for the Highly Skilled Migrants: Implications for the EU Common Approach on Temporary Economic Migration' *ELJ* (2006) 613-635.

Blue Card holders have a right to the free provision of services, since the main feature distinguishing a service provider from an employee is economic independence. In economic terms, however, Blue Card holders will, in the absolute majority of cases, be providing services. Moreover, like any other TCN, Blue Card holders can travel to other member states for short periods not exceeding three months on the basis of their residence card.

Although it is true that Article 56 TFEU (49 EC) and the Services Directive (Article 4(2)) only contemplate the provision of services by EC nationals, they do cover TCNs as service recipients. Moreover, it is difficult to see how the above categories of professionals (long term residents and Blue Card holders) providing services will, in practice, be deprived of the benefits of the said rules. Therefore, it may safely be said that the directives on Long Term Residence and the Blue Card – two migration legislative instruments by excellence – will have a double effect on service provision within the EU: for one thing there will be increased offer and demand of services and, presumably, greater service mobility; this, in turn, will trigger the application of the rules on the free provision of services in situations they were not contemplated for.

3.4. The new ‘general system’ on professional qualifications

Mutual recognition of diplomas and professional experience has always been one of the objectives of the Treaty. What is now Article 53 TFEU (47 EC) has grounded the issuance of numerous ‘transitory’ measures of recognition of professional qualifications already since 1964,⁹² then the issuance of the sector specific directives for six health professions, architects and lawyers in the ‘70s and 80s and, finally, the

⁹² See Directive 64/222/EEC [1964] OJ L 56/857; Directive 64/427/EEC [1964] OJ L117/1863; Directive 68/364/EEC [1966] OJ L 260/6; and many other directives, repealed by Directive 2005/36/EC for the mutual recognition of professional qualifications [2005] OJ L 255/22.

General systems in the '90s.⁹³ All these legal instruments have now been either repealed or consolidated and extended by Directive 2005/36.

Directive 2005/36 innovates in at least three ways. First, it is much more flexible than the pre-existing General Systems in that it foresees five different levels for the recognition of equivalence (Article 11), starting from the mere 'attestation of competence' delivered as proof of a simple training course, three years experience or general primary and secondary education and going up to a 'diploma' certifying at least four year post-secondary education. Second, in doing so, it allows more extensively for professional experience to be taken into account. Third, it also allows for qualifications and professional experience acquired in non-member states to be taken into account. Article 3(3) expressly states that 'evidence of formal qualifications issued by a third country shall be regarded as evidence of formal qualifications if the holder has three years' professional experience in the profession concerned on the territory of the member state which recognised that evidence of formal qualifications. Article 14(5), on the other hand, deals with professional experience and foresees that 'if the host Member State intends to require the applicant to complete an adaptation period or take an aptitude test, it must first ascertain whether the knowledge acquired by the applicant in the course of his professional experience in a Member State or in a third country, is of a nature to cover, in full or in part, the substantial difference'.

⁹³ Council Directive 89/48/EEC on a general system for the recognition of higher-education diplomas awarded on completion of professional education and training of at least three years' duration [1989] OJ L 19/16; Council Directive 92/51/EEC on a second general system for the recognition of professional education and training to supplement Directive 89/48/EEC [1992] OJ L 209/25, modified several times; both these Dirs have now been repealed and replaced by Directive 2005/36/EC of the European Parliament and of the Council on the recognition of professional qualifications [2005] OJ L 255/22.

All three innovations are important for EC nationals. They are also extremely important for TCNs since their qualifications are likely to have been achieved in non member states and will be more difficult to compare with 'equivalent' study levels in the member states. Moreover, the fact that experience acquired in third countries may be 'validated' ex post, after three years of exercising the corresponding profession is extremely valuable for TCNs.

Formally, the scope of Directive 2005/36 seems to be contemplating EC nationals as being the only beneficiaries of the rights it organises. However, the Long Term Resident's Directive foresees that '[l]ong-term residents shall enjoy equal treatment with nationals as regards : [...] c) recognition of professional diplomas, certificates and other qualifications in accordance with the relevant national procedures'.⁹⁴ A similar clause is foreseen in favour of the Blue Card holders by the relevant directive.⁹⁵ In an oblique, though clear, way the scope of the General System for the mutual recognition of professional qualifications is being extended to cover TCNs who fall within the scope of these two directives. By the same token, the provisions of the General System briefly presented above become all the more important for encouraging (qualified) TCNs migration into the EU.

4. The impact of the GATS

4.1. Introducing the GATS

In the GATS the WTO signatory states have, for the first time, agreed on disciplines for the free trade of services. The GATS covers all services, subject to exceptions. It covers all kinds of service trade across the borders. These are typified under four

⁹⁴ Directive 2003/109 above n 87, Art 11(1).

⁹⁵ Directive 2009/50, above n 91, Art 14(d).

modes. *Cross-border provision* (mode 1), whereby a service provided in one state is used by a recipient in another state, typically making use of ICTs; *consumption abroad* (mode 2), where the recipient moves towards the provider's state, there to receive the services offered (typically tourism, health, education); *commercial presence* (mode 3), whereby the provider establishes a branch, subsidiary etc in another state, in order to provide services; and *presence of natural persons* (mode 4), whereby service providers move to another state themselves or post their personnel.

The GATS concerns measures which affect trade in services in one of the above ways, provided they emanate from governments and public authorities at all federal levels, as well as by non governmental bodies in the exercise of delegated powers – but it does not cover 'private measures'.

Measures affecting trade in services are essentially non-tariff ones and, typically, are not imposed at the border. They follow more and more sophisticated policy objectives than regulations affecting trade in goods. Broadly, restrictions in services trade may account for one of the following four objectives: a) prevent market abuse, b) make it up for the lack of information and information asymmetries, c) rationalise and internalise the cost of externalities, d) secure public policy (social, distributional etc) objectives.⁹⁶ The scope of the GATS is widened by the fact that it concerns measures 'affecting' – not only those specifically 'regulating' or 'governing' – trade in services. Because of its scope being so wide, the breadth of the obligations imposed by the GATS is limited and varies from one state to another. Indeed, the GATS imposes two

⁹⁶ This is just one classification among many, taken from Adlung, Rudolf & Mattoo, Aaditya, 'The GATS' in Mattoo, Aaditya, Stern, Robert & Zanini, Gianni (eds) *A handbook of international trade in services*, Oxford (OUP) 2008, 48-83, 68.

series of obligations.⁹⁷ *First*, it imposes limited unconditional obligations. These boil down to the duty a) not to discriminate between service providers of the various WTO members, by virtue of a general most favoured-nation (MFN) clause (Art. II), b) to ensure transparency when adopting and implementing the various trade-related measures (Art III) and c) to put into place some procedural safeguards at the service of foreign service providers (Arts VI, IX e.a.).⁹⁸ These ‘unconditional’ obligations are themselves subject to exceptions.

Second, the GATS signatory states have undertaken conditional obligations, also known as ‘specific commitments’ in respect of two legal obligations: market access (Art. XVI, covering essentially – but not exclusively – quantitative restrictions and measures having an equivalent effect) and national treatment (Art. XVII, non discrimination between domestic and foreign service providers). Signatory states have filled in ‘schedules’ annexed to the GATS agreement, whereby, for each of the two above legal obligations – and for each one of the four modes – they commit to a variable degree of liberalisation, on a service by service basis.⁹⁹ For each one of the two disciplines (market access and national treatment) and for each mode of supply states have a) specified the restrictions thereto, b) imposed no restrictions or c) declared themselves unbound (no liberalisation at all). In areas where states have made commitments, some additional disciplines apply as of right, without any

⁹⁷ In reality there is also a third category, consisting of commitments which apply as of right (i.e. they do not need to be specifically ‘scheduled’) but only in the areas where states have made commitments, see eg Art VI.

⁹⁸ *Ibid*, 63.

⁹⁹ Services are classified in eleven broadly defined categories, plus one residual category, which are further broken down into 160 sub-sectors; the main 12 categories are: business services, communication services, construction, distribution, education, environmental services, financial services, health and social security, tourism and travel, recreational and cultural services, transport, other.

declaration being necessary (e.g. Art. VI). States may also offer additional commitments (Art. XVIII). These schedules are extremely long (more than 30.000 pages for all signatory states) and difficult to read and there are virtually not two states having made identical commitments.¹⁰⁰

4.2. The GATS and migration: present and (tentative) future

Commitments in respect of mode 4 of the GATS are the least numerous and the most restricted of all. In the original negotiation of the GATS the intention was that there would be a rough reciprocity between liberalisation under mode 3 (establishment of service outlets through FDI) which was mostly in the interest of developed countries and mode 4 (temporary migration abroad) which was expected to be of more interest to developing countries. Such reciprocity never occurred despite (or because of) mode 4 negotiations being extended several months beyond the official end of the Uruguay round. More than two-thirds of the commitments offered concern executives, managers and specialists and about one third of these are limited to intra-corporate transfers.

The extent to which modes 3 and 4 are substitutes or complements one to the other is disputed among GATS specialists.¹⁰¹ A further dispute, and a more relevant one for

¹⁰⁰ Even the EU member states have made a body of common commitments and additional individual commitments.

¹⁰¹ Mode 4 could be seen as a first step, involving less permanent delocalisation and less FDI, towards mode 3, while in practice it is clear that the movement of persons will very often occur in the framework of intra-corporate mobility; moreover both modes correspond to the same pattern of trans-border service provision, whereby the provider moves in the territory of the recipient. In general for the relationships between the two modes see Alan Winters 'The temporary Movement of Workers to Provide Services (GATS Mode 4)' in Adlung, Rudolf & Mattoo, Aaditya, 'The GATS' in Mattoo, Aaditya, Stern, Robert & Zanini, Gianni (eds) *A handbook of international trade in services*, Oxford (OUP) 2008, 480-541, 497; see also Allison Young 'Where Next for Labor Mobility under GATS' in

the purposes of the present contribution, is whether mode 4 GATS should be seen as entailing migration. According to trade negotiators, people providing services under mode 4 are not entering the local labour market because their stay is temporary, they do not form part of 'labour', they are not seeking residency or citizenship status. Immigration officials, on the other hand, argue that 'temporary' often extends to periods as long as three years and therefore, even if service providers do not seek to, they do in fact participate in the local labour market by providing a service a local person could probably do. 'From this point of view, service providers have entered the local labor market and are implicated in local labor an employment market conditions, including those arising from personal taxation, union representation and employer tax burdens in relation to employees. The service provider is therefore a "laborer" with all the accompanying economic and social linkages'.¹⁰² This vision is further strengthened by the way in which statistical data is kept: in the 'Statistical Yearbook' published by IMF, when service providers move across the borders for less than a year, their wages are registered as income for the sending state, while for longer periods service providers are considered to form part of the host economy and only their remittances towards the home state are taken into account.¹⁰³

Irrespective of the position adopted in the above dilemma, it is beyond any doubt that the GATS does not cover pure immigration control and police measures, typically in the form of entry conditions, visa requirements, extraditions etc, as this would seriously mingle with state sovereignty and could not possibly be subject to an unconditional MFN clause, such as GATS Article II. The GATS does, however, cover

Sauvé, Pierre & Stern, Robert (eds) *GATS 2000, New directions in services trade liberalization*, Washington DC (Harvard/Brookings Institution Press) 2000, 184-210, 189.

¹⁰² Allison Young, in the previous n, 186.

¹⁰³ *Ibid*, 193.

most other policies affecting migration. In the areas where signatory states have made commitments under mode 4, and unless they have made express reservations, they may a) neither restrict market access by imposing quantitative restrictions, either in absolute numbers or connected to an economic needs test, b) nor deviate from national treatment by imposing special requirements for access to or exercise of the service activity concerned. In the few areas where WTO states have made full commitments under mode 4 (if any), their obligations are very similar to the ones stemming under Article 56 TFEU (49 EC) for EC member states.

Despite the fact that states have avoided making substantial commitments under mode 4, they are, nevertheless bound, by the unconditional obligations of the GATS. This may have practical effects, in more than one ways. For one thing, the MFN obligation prohibits any discrimination between different foreign service providers; therefore, any facility (if any) offered to the nationals of one signatory state should be opened up to all the others. Second, according to Article III, states are to inform one another of all existing and forthcoming measures affecting the application of the Agreement. This obligation, if properly implemented,¹⁰⁴ would account for a very high degree of transparency in respect of measures affecting service provision, such as opening hours, price levels (if regulated), territorial restrictions, conditions for access to the various service activities, national monopolies etc. Such transparency would, on its own, and without any further ado, affect migratory flows, both quality and quantity wise. Third, regarding professional qualifications and experience, Article VII GATS specifically provides the possibility for bilateral, plurilateral or, indeed, multilateral agreements of mutual recognition. These, whenever adopted, will also exert pressure on migration flows. Last but not least, whenever states have not declared themselves

¹⁰⁴ Which is far from being the case at present.

to be 'unbound' by the GATS, and irrespective of the amount of restrictions they have scheduled in respect of mode 4, the 'additional obligations' become applicable as of right. In this respect, Article VI of the GATS, may be of paramount importance: it requires states to a) administer measures in a reasonable, objective and impartial way; b) to make sure that service providers obtain reasoned decisions in respect of the exercise of their activity subject to some kind of judicial control and, most importantly c) to make sure that the technical standards applicable to service provision are proportionate and objectively justified.¹⁰⁵

All the above obligations, stemming both from the specific commitments and from the unconditional obligations, are liable to receive special weight if combined with EC law: European migrant workers already enjoy a number of substantial rights and, it is questionable whether, such rights should not be extended to TCNs under the MFN clause contained in Article II GATS. The main legal reason justifying preferential treatment of EU compared to non EU nationals, is Article V GATS allowing derogations for regional agreements of economic integration. However, the precise content of Article V is disputed in legal doctrine,¹⁰⁶ and a restrictive interpretation thereof is favoured by many authors. Indeed, it is questionable whether Article V also covers new measures (i.e. measures adopted by the regional organisation after the entry into force of the GATS), or whether it has been used as a

¹⁰⁵ This clause may be seen as reflecting the issue of prior notification of technical standards organised by Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, [1998] OJ L 204/37; this Directive repealed Directive 83/189; its scope was extended by Directive 98/48/EC [1998] OJ L 217/18 to cover information society services.

¹⁰⁶ See e.g. Stephenson, Sherry, 'Regional Agreements on Services in Multilateral Disciplines: Interpreting and Applying GATS Article V' in Stephenson, Sherry, (ed) *Services trade in the western hemisphere, Liberalisation, integration and reform* (Washington DC: Organisation of American States, Bookings Institution Press, 2000), 86-104.

means to allow the integration into the GATS of already existing organisations. More importantly, it is argued, that Article V GATS should be interpreted in parallel with the equivalent provision of the GATT (Article XXIV) and should only allow derogations in respect of measures which are strictly necessary to the fulfilment of the Regional organisation's objectives – a test which makes measures subject to a test of necessity and proportionality.¹⁰⁷

Finally, it should be kept in mind that the re-scheduling of GATS mode 4 is one of the major objectives underpinning the current (Doha) round of negotiations under the WTO. Therefore, if the effects of GATS mode 4 have gone unperceived up until now, this is very likely to change in the near future.

5. Conclusion

It is now well documented and widely accepted that democratic states have limited leeway in (not) accepting migrants for the purpose of family reunification, or when such immigrants seek asylum. In respect of economic migration, on the contrary, there is a widespread belief that states are not bound by any legal obligations. The preceding analysis shows that this perception is inaccurate and that there are various sources of legal obligations concerning economic migrants, whether they are self-employed or in a subordinate employment situation. These obligations are more or

¹⁰⁷ See e.g. Bartels, Lorand, 'The legality of the EC mutual recognition clause under WTO law' 8 *Journal of International Economic Law* (2005) 691-720; also available in Shiubhne, Niamh Nic (ed), *Regulating the Internal Market* (Cheltenham/Northampton: Edward Elgar, 2006), 322-353; also Beviglia Zampetti, Americo, 'Market access through mutual recognition : the promise and limits of GATS article VII', in Sauvé, Pierre & Stern, Robert (eds) *GATS 2000, New directions in services trade liberalization* (Washington DC: Harvard/Brookings Institution Press, 2000), 283-306; it is true that both authors reason by reference to the application of mutual recognition, but the reasoning is valid for any type of measure conferring preferential treatment to some but not all WTO states.

less compelling, depending on their source, and are more or less far reaching, depending on the degree of maturity of the relevant rules.

Being an early starter, the EU has a clear advance over the WTO, in relation to the free movement of workers. This advance explains that in the EU, the shortfalls of free movement – in particular in the form of social dumping – have already surfaced. In the framework of the WTO, the members of which are far more numerous and way more heterogeneous, a similar level of free movement of professionals is not to be expected any time soon, even if the Doha round concludes successfully. If in the field of trade in goods, the GATT was able to get around social dumping by the imposition of anti-dumping duties, a comparable technique is hardly imaginable in the GATS framework, as it would run counter to the very principle underlying free trade, i.e. comparative advantage.

The rules described above, however, imperfect and problematic as they are, produce a secondary effect not directly perceptible at first reading. In the EU, this secondary effect, progressively developed by the Court's case law on free movement, has been termed 'European citizenship' and has been written into the Treaty text itself. This consists of a series of procedural rights recognised to all European citizens when moving to another member state (and lately also even when they are not moving). Article VI GATS, which becomes applicable 'automatically' as soon as a signatory state offers some commitments in its schedules under mode 4, also provides for a series of procedural rights in favour of service providers moving in other states. Could we then talk of the forthcoming emergence of a 'global citizenship' for economic migrants?