

MIGRANT WORKERS VERSUS POSTED WORKERS

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ABSTRACT

Landmark European Court rulings, in particular *Viking* (Case C-438/05, 11 Dec 2007[2008]), *Laval* (Case C-341/05, 18 December 2007[2008]) and *Rüffert* (Case C-346/06, 3 April 2008) have fuelled debate in the EU on the balance between business rights and social protection measures on the one hand and the European Economic and Social Area versus national and sectoral interests on the other. These rulings have had the effect of giving primacy to the pay and conditions of the countries of the posted workers rather than to the terms of local collective agreements.

European integration is built upon 'four fundamental freedoms', namely the freedom throughout the EU of mobility of capital and workers, and the right of commercial entities to free movement of goods, services and establishment across the borders of the Member States.

In assessing the logic of the rulings, this paper compares the effects on the labour market of trade in commodities, immigration, and import of services including posted workers. The economic benefits from free trade in **commodities** as one of the four 'fundamental freedoms' is not questioned. In what way then are the effects on the labour market different from immigration and posted workers?

Immigration plays an important part in the movement of labour within the EU. In Austria, Germany, Belgium and Sweden, for example, the proportion of foreign born corresponds to that of the United States of America; Switzerland has even higher rates, namely 24.1% foreign-born (2006), the same as in Australia.

In contrast, **services mobility**, involving persons moving across borders, appears to be more limited, at least as far as the scant statistics indicate. In relation to cross-border services, one may distinguish between four modes.

Mode 1: services provided from one country to another electronically, e.g. call centres, business services, etc.

Mode 2: Services provided inside a country to foreign visitors, e.g. tourists, students — in this case, the consumer crosses the border to the provider of the service.

Mode 3: Foreign direct investment via a subsidiary abroad often involves the movement of labour, as key personnel.

Mode 4: Temporary movement of natural persons to provide a service abroad covers the services of posted workers and self-employed persons. These may be regarded as temporary migrants.

Mode 4 is estimated to amount to 1% to 3% of global services trade and to a similar share in employment, although numbers of posted workers relative to migrant workers may increase quickly under the rulings.

What may distinguish migration from posted services is the different impact on public revenues. While migrants pay social security contributions and income tax, posted workers do not contribute to social security funds of the host country. Public revenues from posted workers accrue only from taxation on the added value due to their service. These different forms of taxation may have a different effect on the productive potential of the economy and call for further investigation.

BACKGROUND

Landmark European Court rulings, in particular *Viking*¹, *Laval*² and *Rüffert*³ fuelled the debate in the EU on the balance between business rights and social protection measures on the one hand and the European Economic and Social Area versus national and sectoral interests on the other.

These European Court rulings, so the critics, interfere with national industrial relations policy. In the case of Sweden they challenge the flexible Swedish collective bargaining system of wage determination and question the right of unions to industrial action. In the *Rüffert* case the ECJ went against an earlier ruling of the German constitutional court which had given the system of collective bargaining priority over entrepreneurial freedom on the basis of social policy objectives, namely the protection of workers from unfair wage competition⁴. The ECJ, however, argues that Germany could not restrict the payment of minimum wages to posted workers in public work projects (public procurement) as the Posted Workers Directive⁵ calls for adherence to a legal

¹ Case C-438/05 *International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line*, judgment of 11 December 2007 [2008] All E.R. (EC) 127; See Davies, A. 2008; Novitz, T. 2008; Syrpis — Novitz 2008.

² Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet*, judgment of 18 December 2007 [2008]. Discussed also in Davies (2008), and Syrpis — Novitz 2008.

³ Case C-346/06, *Rüffert v Land Niedersachsen*, judgment of 3 April 2008, discussed in Rödl 2009.

⁴ 11 July 2006 (1 NvL 4/00, in: Entscheidungen des Bundesverfassungsgerichts, Band 116, 202).

⁵ 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 L 18, 21.1.1997, p. 1–6.

minimum wage which is universally applicable. This is an indication that the ECJ is hesitant in supporting collective labour rights, thereby ignoring the fears of workers of cheap labour.

In addition, the European court does not take into account that the wage differences between EU-MS result among other factors from different ways of funding their social protection models. Accordingly, the high wage differentials (e.g. between Latvia and Sweden) are partly the result of high taxation of employees and companies to finance a generous welfare state. By challenging the national mechanism of protection of workers the cohesion of the national welfare systems is being jeopardised (Esping-Andersen 1996).

THE CHALLENGE OF ENSURING A 'SOCIAL' EUROPE

European integration is built upon 'the four fundamental freedoms', namely the freedom of mobility of capital and workers throughout the EU, and the right of commercial entities to free movement of goods, services and establishment across the borders of the Member States.⁶ The conditions under which goods and services may be supplied are laid down in competition law,⁷ while the protection of rights of workers are formulated in the EC Treaty Article 141⁸, furthermore in various directives⁹, culminating in the European employment strategy (EES)¹⁰.

As the EC does not possess the competence to set standards in the areas of pay, the right of association, the right to strike or the right to impose lock-outs¹¹, we are faced with a conflict between national and EU regulations. The judgment of the European Court of Justice indicates the strict adherence to Community legislation concerning the posting of workers to other EU Member States¹², without consideration of national collective wage agreements and the right of unions to industrial action.

⁶ EC Treaty, Title III, Articles 39 – 69 EC. For an exposition on the implications of these provisions, see Barnard, C. 2007

⁷ See Jones, A. and Sufrin, B. 2007, Monti, G. 2007; Odudu, O. 2006

⁸ This provision on equal pay for work of equal value replaces Article 119 of the original Treaty of Rome, which established the European Economic Community.

⁹ Such as Council Directive 75/117/EEC [1975] OJ L 45/19; Council Directive 76/207/EEC [1976] OJ L 39/40; Council Directive 92/85/EEC [1992] OJ L 348/1; Council Directive 97/80/EC [1998] OJ L 14/6; Council Directive 2002/73/EC [2002] OJ L 269/15; and Consolidated Directive 2006/54 OJ L204/23.

¹⁰ See Kenner J., 2003

¹¹ EC Treaty, Article 137(5) EC; for comment see B. Ryan, 'Pay, Trade Union Rights and European Community Law' (1997) 13 *International Journal of Comparative Labour Law and Industrial Relations* 305. For an analysis of the implications of this exclusion, see Case C268/06 *Impact v Minister of Agriculture and Food and others*, judgment of 15 April 2008, especially at paras. 122 – 129.

¹² 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 [1997] O.J. L18/1 - 'Posted Workers Directive'.

For the countries with a long history of unions, collective bargaining and other labour market institutions, the questioning of labour standards, particularly those related to trade union rights and collective bargaining, comes at a time when globalisation and the competitive pressures associated with it, have borne heavily on unionism and traditional labour market arrangements. In the name of a more competitive and productive economy, EU-MS have allowed monetary and fiscal discipline to put pressure on the labour markets, through the promotion of deregulation¹³ and 'flexibility' on the one hand and posted workers, outsourcing and relocation of work facilitated by capital mobility on the other.

IMMIGRATION VERSUS SERVICES MOBILITY IN EU LABOUR MARKETS

Of the 485 million inhabitants in the EU27 in 2006, some 8.3 % or 40 million are international migrants. In Austria, Germany, Belgium and Sweden for example the proportion of foreign born corresponds to that of the United States of America; Switzerland has even higher rates, namely 24.1%, i.e. the same as in Australia. Luxembourg is a special case with more than a third of its population being foreign born. The percentage of foreign-born is around 10 % in most Central and Northern EU-MS, and in some Southern European MS (Greece). The new MS in the East are also attracting increasing numbers of migrants, the leading countries being the Czech and Slovak Republic with more than 5 % foreign-born in 2006 (OECD 2008).

In contrast, services mobility, involving persons moving across borders, appears to be more limited, at least as far as the scant statistics indicate. According to the Communication from the Commission on Guidance on the Posting of Workers in the framework of the provision of services¹⁴ the numbers of posted workers in Germany amounted to 105,900 in 2003, i.e. less than 1% of the workforce. The posted workers tend to be concentrated upon certain industries, namely construction and engineering, homecare and social services, metal industries, security and cleaning. They are more concentrated upon certain labour market segments than immigrants, indicating different logics of recruitment. While immigrants tend to come on an individual basis, posted workers tend to come in teams, implying a different role in the work organisation of companies.

The distinction between migration and trade in services is blurred, however, in the context of temporary movements of workers, as can be exemplified by temporary workers in harvesting. In case the migrant worker (of third country origin) is employed by the local farmer, national immigration regulations apply, while in the case of harvesting services provision by a posted worker from a foreign leasing firm/labour contractor, GATS rules apply.

¹³ For the difficulties in generalising about the case for deregulation of the labour market see Freeman (1998).

¹⁴ MEMO/06/151, Brussels, 4th April 2006.

Given the increasing role of services in employment creation, the numbers of posted workers relative to migrant workers may increase quickly.¹⁵ In view of strict wage regulations and control of working conditions in the case of migrants and the limited controls and controllability of wage and working conditions of posted workers, the posting of workers may actually take precedence over immigration as a tool of companies to satisfy their labour demands in a flexible way. The recent ECJ rulings indicate that the EU means to promote the unrestricted movement of services¹⁶, i.e. short-term labour migration regulated by the Services Directive¹⁷ rather than migration with a view to settlement.¹⁸ This may be one result of the *Viking* and *Laval* judgments, which refer to Article 28 and thus the employers' entitlement to free movement.

IMPACT OF IMMIGRATION VERSUS POSTED WORKERS

Economic impact analyses of migration tend to acknowledge a positive net overall economic effect of immigration. Why then do we restrict immigration and give preference to trade? This may have something to do with the relatively easy measurability of the benefits of trade. In contrast, the net benefits of immigration are not so easy to establish as the boost to economic growth has a downside in costs of migration, which may be deferred and difficult to measure. They may show up in integration costs like bilingual education, prices of scarce resources like housing, in measures to maintain social cohesion, in increased demand for welfare services and/or public infrastructure like health care. Thus the distribution of economic gains from migration across all members/ groups of society remains an open question.

In the case of mode 4 migration/services mobility, it is argued that the economic advantages are more straightforward and similar to the trade in goods (Winters et al.)¹⁹ and therefore less costly than permanent immigration. According to WTO (2004) the main advantage is derived from the temporary character of posted work, thus avoiding additional costs in terms of infrastructure and social and cultural integration associated with permanent immigration.

This raises the question to what extent the preference of institutions like WTO to services mobility is the result of an underestimation of the social costs of trade.

¹⁵ Biffi, G. 2006

¹⁶ Editorial 'Mobility of Services and Posting of Workers in the Enlarged Europe – Challenges for Labour Market Regulation' (2006) 12(2) *Transfer* 137, 138.

¹⁷ Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] O.J. L.376/36 (henceforth 'Services Directive'); see also Woolfson, C. and Sommers, J. 2006

¹⁸ Also the three countries which had granted free mobility of labour to the new EU-MS (10) in 2004, namely Ireland, Sweden and the United Kingdom, joined the rest of the EU-MS in not allowing free mobility of labour to Bulgarians and Romanians in the more recent accession of 2007. See Carrera, S. 2005

¹⁹ See Winters, A., Walmesley, T., Wang, ZK., Grynberg, R. 2003

The use of service providers rather than native or immigrant labour may, however, also impact on education and career choices of local youth, raising issues of longterm competitiveness. This is argued by Teitelbaum²⁰ who sees the shift of US-students away from science doctorates to MBAs and Law degrees as a result of the rising number of foreign-born science students, who have depressed the wages for post doc researchers in science.

The major distinguishing factor between the effect of migration and trade on the labour market is that trade is acting directly on labour demand, in particular on the industrial composition, while migration is affecting the size and composition of labour supply and thus the productive potential. While migration tends to raise the labour supply on the lower and upper end of the skill spectrum, where transferability of skills is relatively high, services mobility mode 4 has the potential to cut into the medium skill segment. This is what we tend to see in the majority of cross-border service provision in Europe, and the ECJ rulings speak a similar language. In any event, migration and trade are inevitably linked with greater wage inequality between industries in the destination countries.²¹

Taxation regimes matter:

A major distinguishing factor between migration and services mobility is the different impact on public revenues as a result of different taxation regimes. While migrants are paying social security contributions which are levied on labour (employer and employee contributions) and income tax, posted workers are employed in their country of origin, thus not paying into the social security funds of the service receiving country. Public revenues from posted workers accrue only from taxation of the imported service (value added tax). Until today the revenues from taxation of imported services accrue to the source country of the posted worker.

The different focus of the two tax systems, the value added tax which focuses on the final product and the taxation of the factor of production, labour, may have a different impact on the productive potential of the economy and the funding of the welfare state. While the value added tax system is fairly harmonised across the EU, this is not the case for labour taxation (income tax and social security contributions), explaining part of the differences in wages between EU-MS. By promoting the posting of workers as distinct from immigration, employment growth in the service receiving country may be compromised thereby jeopardising the quality of social services provision.

²⁰ See Teitelbaum, M . 2003

²¹ This is according to Samuelson (2004) and Andersen — Sorensen (2005).

CONCLUSION

Overall, the rulings of the ECJ are consistent with the EU's 'four fundamental freedoms'. However, they do represent a challenge for many of the national industrial relations systems. In addition, the posting of workers has an impact on public revenues and the funding of the welfare system. An increased use of posted workers may become instrumental in promoting the harmonisation of labour taxation in Europe and thereby socio-economic integration. The challenge in that context will be the establishment of a European Social Model which puts people first and which is a compromise between hard core neo-liberal promoters of the 'minimal state' on the one hand and the defenders of a social democratic powerful state on the other.

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