EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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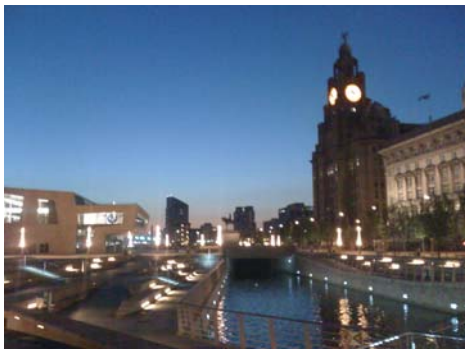
The Impact of Mobility of Workers and Enterprises on Employment Rights



FINAL REPORT

Held at the Cunard Building, Pier Head, Liverpool

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GENERAL REPORT

1. Introduction

The 13th Annual Congress of the European Association of Labour Court Judges took place on 26th and 27th July 2009 in the opulence of the Cunard Building Conference Centre in Liverpool, United Kingdom. The subject of the Congress was "The Impact of Mobility of Workers and Enterprises on Employment Rights.

The Congress was attended by 27 Judges from 17 countries of the European Union and the EEA. Before the Congress the delegates had prepared National Reports based on a questionnaire.[1] These reports were incorporated into a Synthesis[2].

The keynote address[3] was given by Dr Brian Doyle, Regional Employment Judge based in Manchester and former Professor of Law, University of Liverpool. His address was followed by a Panel Session on – "The effect of the recession on protectionism and mobility of labour", chaired by Prof Alan Neal, professor of law at the University of Warwick, with Charlotte O'Brien and Dr. Samantha Currie of University of Liverpool Law School. The programme for this Congress is attached[4].

Following the panel discussion, the Congress had three technical sessions, chaired and introduced by the delegates, followed by a plenary session. A contemporaneous record of the discussions was kept.[5]

This Report is prepared from this information.

2. Background

The wide-ranging importance of the subject we were debating was brought home to us by the serendipity of a Conference hosted at the Liverpool Conference Centre by the Liverpool Law School on "A Single Market for the 21st Century, Challenges & Perspectives". This Conference concentrated on the commercial impact of the Single Market Review, but included a session on "Social Dumping and Labour Rights after *Viking* and *Laval*" which brought home the wider significance of our subject.

The mobility of workers within the European Union (and indeed from outside the European Union) has significant socio-economic and commercial impacts. These were examined by our academic panel and, also, by many of the

[1] Appendix I
[2] Appendix II
[3] Appendix III
[4] Appendix IV
[5] Appendix V

delegates. Immigration is an emotive and important issue and we heard a good deal both about the plight of migrant workers who have been exploited by their employers and the impact, both perceived and actual, on the employees within the host country of a large influx of migrant workers, many travelling within the rights and freedoms guaranteed by the European Treaty, but other coming in illegally, both from the EU (in breach of transitional quotas) and from countries outside the EU.

As Labour Court Judges it was not our role to comment on these wider issues, but we did deal in some detail with the labour law issues which arise from mobility.

It is a axiomatic that all persons are equal before the law, but the interests of all workers are not the same. The focus of the Congress was on the protection of citizens of the EU and EEA. However, it was brought home to us that there are many EU countries which are experiencing large numbers of legal and illegal immigrants from countries outside the EU. These people have equal human rights, but they may have little or no protection from labour law.

Thus, United Kingdom, Ireland, Germany, Netherlands and France are experiencing large numbers of migrant workers from the newer EU countries, such as Poland, the Baltic States, Hungary and Romania, but also from all over the word, China, Vietnam, India and Pakistan, the West Indies and Africa. Meanwhile, Hungary and Czech Republic, for example, are experiencing inward migration from Ukraine, Belarus as well as from Vietnam, Italy has over a million immigrants from Romania and Albania, many of them part of the black economy, and Malta has many illegal immigrants from North Africa.

Immigration anomalies were brought out, particularly focussing on the impact of tighter immigration controls in United Kingdom, which leave, for example, a visiting musician, resident in Austria, who is a Canadian citizen, needing a work permit to give concerts in the UK and, as a result, being refused entry.

This, however, was not our focus. We concentrated on the balance which national courts and national legislatures have to strike between the free movement of workers, the freedom of establishment and the freedom to provide services, on the one hand, and, on the other hand the protection of workers, through the courts and through the rights of association and collective industrial action.

3. The national courts

There are significant structural differences between the national courts of the Member States. Many labour courts[6] arose out of collective agreements and the role of the social partners. They tend to assume that workers are

[6] Norway, Sweden, Finland & Denmark

members of trade unions and will be supported by their union. In reality, whilst many migrant workers are union members, or entitled to the benefit of collective agreements, many others are outside this protection.

In other countries[7] employment protection is essentially part of the normal legal system. This can create access difficulties for migrant workers, who cannot afford legal representation or who fear the risk of having to pay the costs of an unsuccessful claim.

Nevertheless, all jurisdictions have experienced a significant number of claims from migrant workers who have been exploited by their employers.

4. Migrant workers

The title refers to the "mobility" of workers, but we agreed that the correct term for the workers we were concerned with was "migrant workers". We chose to use, in general, the definition contained in the United Nations *Convention on the Protection of the Rights of All Migrant Workers* which defines a migrant worker as "a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national". Bizarrely, we were told that in the United States of America a "migrant worker" is one who is working in another part of the country from that where he is resident!

We did not spend much time debating the meaning of "migrant worker" because migrant workers are entitled to the same legal protection in each EU country as any other worker in that country. But as an accepted category, they are undoubtedly vulnerable and open to exploitation.

The category of "immigrant" is slightly different, since it suggests a person who has moved to another country on a permanent or long-term basis. Obviously, many of the migrant workers from other EU countries may become immigrants and gradually integrate within the society. For immigrants from outside the EU the problems may relate to work permits and the temporary nature of a permission to stay. This does not apply to EU migrants except those who are under the temporary exemptions referred to above. Time prevented us from dealing with the large numbers of immigrants, legal and illegal, who have come into the EU from countries elsewhere in the world.

We deal later[8] the limitations in the scope of protection for migrant workers who do not come within the definition of "employees" or even of "workers" in European or national law.

5. Industrial unrest

One of the springboards for this conference was the industrial unrest which has led in turn to legal actions.

[7] e.g. Germany, Belgium, Luxembourg, Spain and Italy
[8] Section 10, "Unprotected Migrant Workers"

The cases of *Laval, Viking* and *Rüffert*, which we deal with in detail later, demonstrate that the arrival of businesses based outside the countries[9] has caused organised trade unions to take collective action to try to protect the indigenous workers from under-cutting by migrant workers.

This does not mean that the migrant workers are being exploited. There are significant economic differences between the countries of the EU and this means that migrant workers seeking to work in a more prosperous country may be happy to accept remuneration which is better than they would get in their own country, but less than the protected levels of the host country.

By a further piece of serendipity, similar problems had arisen in the UK since the Congress was mooted. The dispute in the Lindsey oil refinery, while it did not result in any legal action, was an example of a situation where an Italian company, having obtained a contract from the French owners of the refinery, used Italian and Portuguese workers, in part from their existing work-force, to do construction jobs which the indigenous workers felt should be theirs. This had spread, as secondary action, to plants around the UK. Other examples were given, such as Staythorpe, where Spanish and Polish workers were being engaged by Spanish sub-contractors of a German firm constructing power stations in UK.

The United Kingdom has a reputation for having a liberal approach of allowing international competition for contracts and it may be that the problem is more acute in UK than elsewhere, but the message is clear and applies to all EU countries. The freedoms set out in the Treaty are coming up against the entrenched and, arguably, legitimate attitudes of the indigenous work-force, who believe that their community depends on jobs in the locality going to people from the locality.[10]

6. Industrial Rights

The right of employees to form unions and to take collective action against employers to improve their pay and conditions has been fought over in Western Europe for centuries. The story, perhaps, starts with the Tolpuddle Martyrs in 1832 and is enshrined in the laws of all the Member States of the EU. However, their histories have diverged, perhaps most notably with the annexation of unions into the structure of the Communist State and, more positively, with the involvement of unions in Social Partnership.

It is, therefore, surprising that there is no reference to rights of association or the right to take industrial action in the European Treaty. This issue was addressed by the European Court of Justice in the twin cases of *International Transport Workers' Federation v Viking Line ABP*[11]("Viking") and *Laval und*

[9] In these case businesses from Latvia, Estonia and the Poland, operating in Sweden, Finland and Germany respectively
[10] "British jobs for British workers" – Gordon Brown, Prime Minister of the United Kingdom.
[11] *Case* C-438-05

Partneri Ltd v Byggnadsarbetareföbundet[12] ("Laval"). Both of these cases concluded that, even though it is not mentioned in the Treaty or in any Directives, it is referred to in various international conventions –

> "Although the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the court ensures, the exercise of that right may none the less be subject of certain restrictions"[13]

Both of those cases were in the context of national legal systems (Sweden and Finland respectively) which expressly protected the right to collective action. However, while this may be true of all EU states, the extent of that protection will vary from state to state. The central conflict which the ECJ was dealing with was the conflict between the rights of freedom of movement, freedom of establishment and freedom to provide services enshrined in express European law and the rights to take collective action enshrined in national law. The quotation means, however, that if the law of any Member state were to change to remove such rights, then such changes would be overridden by European law.

The European Court of Justice identified three international Conventions which it relied on in reaching the above conclusion.

1) The European Social Charter of 1961 agreed by the Council of Europe (not the EU) states -

> "5 All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interests.
>
> 6 All workers and employers have the right to bargain collectively.[14] "

[12] Case C-341/05

[13] ECJ Judgment in Laval para 91

[14] **Article 6 – The right to bargain collectively**

With a view to ensuring the effective exercise of the right to bargain collectively, the Parties undertake:

1. to promote joint consultation between workers and employers;
2. to promote, where necessary and appropriate, machinery for voluntary negotiations between employers or employers' organisations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements;
3. to promote the establishment and use of appropriate machinery for conciliation and voluntary arbitration for the settlement of labour disputes;
   and recognise:
4. the right of workers and employers to collective action in cases of conflicts of interest, **including the right to strike**, subject to obligations that might arise out of collective agreements previously entered into.

The latter right includes the right to strike.

2) The second international document is the ILO Convention 87 which deals with Freedom of Association and the Right to Organise, but does not include expressly the right to strike.

3) The Community Charter of the Fundamental Social Rights of Workers of 7 December 2000, which has not been incorporated into the Treaty. This deals with freedom of association and the right to organise and not with the right to take collective action.[15]

Surprisingly the Court did not refer to the European Convention on Human Rights.

There is no reason why the rights of association and collective bargaining (as opposed to the right to take industrial action and the right to strike) should come into conflict with the EU rights of freedom of movement, establishment and services. Any worker or employer operating in another country is obliged to obey the law of that country, including these fundamental rights and, since all persons are equal before the law, there is no reason why this should lead to exploitation or discrimination.

The problems which have arisen are that unions have taken collective action. This right is now acknowledged by the European Court, but it seems implicit in its decision that the rights being acknowledged are those which apply in the actual country. The judgments make specific reference to the various restrictions on collective action which apply in the respective countries, such as the "mandatory social truce"[16] prohibiting collective action to vary a collective agreement which apples in Sweden and the restriction, in Finland, on strikes which are *contra bonos mores.*[17]

The specific conflict arising in those cases, therefore, is between the European rights of freedom of movement, establishment and services and the national rights of collective action (albeit under-pinned by the *acqui européenne*)

The Congress, therefore, took some steps to assess the extent to which the right to collective action is accepted as a fundamental right in all Member

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[15] **Article 12**
Freedom of assembly and of association

1. Everyone has the right to freedom of peaceful assembly and to freedom of association at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.

[16] Para 12 of Laval
[17] Para 5 of the Judgment in Viking.

States and the extent of variation in the level and scope of protection in the different Member States. Inevitably that analysis is incomplete.

The essential issue is what amounts to legitimate collective action. Essentially collective action consists of a strike or other industrial action by the employees of a particular enterprise in order to challenge the pay or conditions in that enterprise. However, the actions referred to in these two cases and, indeed, in the UK cases referred to above, relate to attempts by national unions or indigenous workers to prevent other firms from employing people on less favourable terms or engaging workers from abroad. This may be coupled with picketing by non-employees of the enterprise which is being picketed.

In some countries[18] secondary action of this kind is illegal. Equally picketing is restricted and may be forbidden by non-employees of the enterprise picketed. This means that the "rights" being exercised by the unions in *Viking* and *Laval* might be illegal in other countries.

To some extent, the collective action being taken in the industrial cases set out above is akin to the right of freedom of expression and of assembly enshrined in Articles 10 and 11 of the European Convention of Human Rights.[19] This was the right being exercised in *Schmidberger*[20] where the Brenner Pass was closed to traffic by environmental protesters. The European Court of Justice upheld the decision of the Austrian government not to prevent the demonstrators from closing the Pass, even though it obstructed the EU right to the free movement of goods.

The unanswered question, therefore, is whether the right of collective action, referred to in the *Laval* case and quoted above is really intended to assert a specific, enforceable community fundamental right, or whether it is intended to refer to the national rights of collective action.

7. The Protected Freedoms

International law does not allow free movement of workers, free movement of goods, rights of establishment in foreign countries or the right to supply services in another country. The principles of sovereignty, frequently restricted by treaty obligations, allow sovereign countries to restrict immigration, to prevent foreign companies from trading in their country and set up trade barriers against importation of goods.

The concept at the heart of the Common Market was that such barriers would not apply within the member states, though no such rights were given to nationals of countries outside the club, except under bi-lateral or multi-lateral treaties.

[18] e.g. UK, though no action was taken by the employers in the Linsey or Stayforth disputes.
[19] which again is not expressly incorporated into the European Treaty.
[20] Eugen Schmidberger, Internationale Transporte und Planzűge C-112/00

The development of the Common Market into the European Union has brought three specific rights, which are enforceable in the European Court of Justice.

The Congress agreed to use the traditional numbering in relation to the European Treaty and not the new numbering under the Consolidated Treaty.

(1) Free movement of workers – Article 39[20]

> "1. Freedom of movement for workers shall be secured within the Union.
> 2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Members States as regards employment, remuneration and other conditions of work and employment.
> 3. It shall entail the right, subject to limitation justified on the grounds of public policy, public security or public health
>
> (a) to accept offers of employment actually made;
>
> (b) to move freely within the territory of members States for this purpose
>
> (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of national of that State laid down by law, regulation or administrative action;
>
> (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
>
> 4. The provision of this Article shall not apply to employment in the public service."

This right has been at the core of the European community from the start. It is a limited right, in that it refers specifically to workers and not to enterprises or the provision of services. Until the recent accessions of new member states, the problems it gave rise to related to immigration and social security rather than to labour rights. Any EU worker could apply for employment in another EU country for any job outside the public service and he could not be excluded from the job because of his nationality.

This means that EU workers, unlike foreign workers, do not require Work Permits to work in other EU countries. The Congress did consider the position of foreign workers who did require work permits. However, although such workers were within the actual wording of the Congress Title, the core of the Congress involved considering the problems for other EU nationals.

The problem for foreign workers is essentially twofold. Firstly the work permit system restricts entry and, importantly, restricts mobility within the country. This creates a climate of exploitation, since foreign employers who are working legally are aware that if they lose their jobs, they will lose their right to work and to remain in the country. This means, in turn, that, if the employer seeks to exploit them, for example by paying below the minimum wage, or by using bullying tactics, the worker may be unwilling to enforce their rights in the national courts because they fear that the employer will dismiss them and they will not be allowed to find another job.

The other problem relates to the black economy. Many EU countries find it difficult to find people to do low status jobs, such a cleaning, nannying etc. They may be able to find people who are willing to work without work permits, often, but not always, illegal immigrants. These people are even more vulnerable. They have no right to go to the national courts[21] and if they report any problems to the authorities they may find themselves deported.

However, the black economy is not restricted to non-EU workers. Italy, for example, has a large number of Romanian migrant workers, most of whom are illegal because, while they have the right to enter the country, they do not have the right to work because of the transitional arrangements referred to below.

Problems arose with job applications, in relation to transferability of qualifications. A doctor or a lawyer might be refused employment, not because of his or her nationality, but because his or her qualifications were specific to their country of origin.

Further protection for foreign workers was given by the anti-discrimination laws, which outlawed discrimination on the grounds of race, or ethnic origin. However, these problems were fairly limited within the tight, Western European group which constituted the European Community.

Problems also arose where people lost their jobs and sought unemployment benefits or social security benefits in the country they had arrived in and not their country of origin.

It was the accession of the new Member States in two waves, which caused national governments to fear a large influx of people from a country whose standard of living was substantially lower. Such people, they feared, would take jobs at lower rates of pay and damage the prosperity of workers in the host country.

Some countries[22] embraced the new freedom and saw it as an opportunity to expand their labour market and to bring in new skilled workers. Other countries sought special temporary restrictions.

The first wave was in May 2004 with the arrival of the EU8[2321] followed in January 2007 by Romania and Bulgaria.[22] The concerns of the existing Member States were met by transitional provisions in accordance with the 3-2-3 formula, whereby national states could set their own limits on migrant workers from the new member states, initially for two years, with a possibility of extension for three more years and then, in certain circumstances, for a final two years. It is on this basis that Germany and Austria have just obtained an extension to 2011, which will be the final extension under the present treaty. Three countries, Ireland, UK and Sweden disdained all

[21] It was suggested that they were not excluded from court claims in Italy
[22] Notably the UK
[23] Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovakia and Slovenia. EU10 includes also Cyprus and Malta.

restrictions under the 2004 wave. Eight more member states[24] allowed open access from November 2008. In respect of Romania and Bulgaria ten states[25] opened their borders from the start, but the rest have brought in restrictions on the same basis.

The Congress heard some statistical evidence on the impact of the migrations from the new entrants, but it was not the object of this Congress to assess the statistical data or to express any views on numbers. The anecdotal evidence from the delegates was that migrant workers have made a significant impact. All the delegates reported significant numbers of migrant workers within their countries. These included workers within the black economy, who are hard to count, but also workers working within the temporary restrictions placed by the national exemptions and workers who are moving freely between Member States.

We were all agreed that it is important not to treat migrant workers as victims. The right to travel abroad to seek fame and fortune has been an aspiration of ambitious young people since long before Dick Whittington set out from Gloucestershire to London and made his fortune. The majority carry out their work happily and report a good experience. Many will settle in their new country. Many more will return to their native land wealthier and with a wider knowledge of the world.

This was the aim of the fathers of the European Community and, to a significant extent, their aims have been met.

The other side of the coin is exploitation and ignorance. Samantha Currie spoke of her experience giving voluntary advice to mainly eastern European immigrants. She spoke of their ignorance of their rights and the way in which they are treated as a reserve labour force, easy to dispose of in time of recession. Gerrard Boot, from the Netherlands, said that studies showed that 40% of Polish workers said that they were not receiving the minimum wage. Jessica Sellin from Germany said that the migrant workers had the same rights as German workers, but did not necessarily know of their rights or how to enforce them. Often they were not members of unions. In speaking of illegal immigrants, Abigail Lofaro of Malta pointed out how everyone knows about the black economy, but it produces no cases in the courts.

It was apparent that migrant workers are often seen as a problem by the indigenous population and, in turn, suffer problems themselves of exploitation and ignorance.

[24] Spain, Finland, France, Greece, Portugal, Italy, the Netherlands and Luxembourg
[25] the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Poland, Slovenia, Slovakia, Finland and Sweden

(2) Freedom of Establishment – Art 43[26]

> "Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State.
>
> Freedom of establishment shall include the right to take up and pursue activities as self-employed person and to set up and manage undertakings, in particiular companies or firms with the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provision of the Chapter relating to capital."

The Article goes on to provide for Directives, but judicial consideration has been of the Article itself.

The right of establishment does not impact directly on migrant workers. However, a company from an EU State who opens a branch or sets up an establishment in another EU country may well either recruit employees from his home country or post existing employees to the host country. Alternatively, a foreign worker may wish to act in a self-employed capacity in another EU country.

The problems which have arisen have not so much been direct bans on foreign businesses, but the placing of barriers in their way. This can take the form of registration requirements, such as the obligation of a company seeking to work in another EU country to join the local Chamber of Commerce or to submit applications in the local language.

Many of the issues relating to rights of establishment involve competition and commercial law, rather than labour law and it is here that the University of Liverpool Conference referred to above developed themes, such as the use of environmental objections to developments by incoming businesses, which went outside our remit and area of expertise.

Many of the disputes which have arisen have related to the provision of services, rather than rights of establishment. There are considerable overlaps between these two Articles, but for example the *Viking* case relates specifically to rights of establishment in relation to the re-flagging of a ferry from Finland to Estonia and attempts to prevent that ferry from operating into and out of Finland when its sailors were no longer subject to Finnish labour law.

[26] Article 49 of the Consolidated treaty

(3) Right to the provision of services – Art. 49

> "Within the framework of the provisions set out below, restrictions on freedom to provide services within the Union shall be prohibited in respect of nationals of Members States who are established in a Member State other than that of the person for whom the services are intended."

It is apparent from the examples set out above that many of the conflicts arise from foreign businesses who have obtained contracts to carry out services in the host country. Many of these contracts are in the building trade. Having obtained the contract, the contractor is often reluctant to make use of indigenous labour and uses contacts in his own country to obtain workers, who then work either as migrant workers or as posted workers.

In so far as they are migrant workers, they are entitled to the same rights and subject to the same obligations as indigenous workers, but their attitudes may be different. They may choose not to join unions and may not seek the protection of collective agreements. Even if they are working on the same conditions, they may be seen as challenging the hegemony of local workers, who believe that they have a right to what jobs there are in their own land.

8. Posted workers

Posted workers are protected by Council Directive 96/71. This gives posted workers protection against exploitation, but it also, in practice, protects indigenous workers from posted workers who are happy to work at lower wages and less favourable conditions than the indigenous workers.

There was some heated debate about whether the true purpose of the Directive was to protect posted workers or to discourage them.

The European Court of Justice has taken a libertarian approach to the Directive. This approach received some support and much criticism.

Article 3 of the Directive provides –

> "Member States shall ensure that…the undertakings referred to in Article 1(1) guarantee workers posted to their territory the terms and conditions….which in the Members State where the work is carried out are laid down
> - by law, regulation or administrative provision, and/or
> - by collective agreement or arbitration awards which have been declared universally applicable"

This protection is plainly limited. We have previously[27] considered the extent to which collective agreements are applied outside the actual parties to the agreement. There are some countries,[28] where collective agreements have not been officially declared to be universally applicable, but where they have

[27] In our Congress in Oslo in 2007
[28] For example Italy

been treated as the industry norm. The restrictive terms of the Directive mean that a posted worker moving into a sector where there is a strong and generally accepted collective agreement is not entitled to the benefits of that agreement because it has not be "declared universally applicable".

The free market approach of the ECJ was demonstrated in *Ruffert*[29] where the Court went beyond the direct application of the Directive to prevent a German lande from requiring a public sector contractor to pay the minimum wage "prescribed by a collective agreement".

This was a provision which applied to all contractors and not just to posted workers and the provision did not breach the Directive directly since it provided greater protection to workers than the Directive did. However, they interpreted the Directive purposively in the light of the Freedom to Provide Services[30] thereby making it illegal to require this level of protection for employees of public contractors even though it provided this protection to all workers - indigenous, migrant and posted.

The feeling among the delegates was that the posted workers' Directive had done little to protect posted workers. This was perhaps indicated by the fact that the United Kingdom has not passed any legislation to enact the Directive, taking the view that it is already covered by existing UK law.

The problems of posted workers can, however, be exaggerated.

- They have the same protection as migrant workers, namely they are entitled to the protection of the laws of the host country.
- They have the benefit of anti-discrimination laws.
- They may well have contractual rights relating to their country of origin.

The anti-discrimination laws were not discussed in detail at the Congress. However, the UK delegation raised specifically a number of anti-discrimination claims brought by migrant workers[31] working in the UK who claimed that they were being treated less favourably than British workers on the grounds of their race, ethnic origin or nationality.

The Freedom of Movement provisions of the Treaty[32] provide express protection from discrimination based on nationality between workers of the Member States. The Racial Discrimination Directive[33] expressly excludes discrimination on the grounds of nationality[34] (possibly because it is directly protected in the Treaty) but it does involve protection from discrimination on the grounds of racial or ethnic origin.

[29] *Rüffert v Land Niedersachsen* C-346/06
[30] Article 49
[31] In this case Polish workers working in the UK
[32] Article 45.2
[33] 2000/43.EC
[34] Article 3.2

It can be assumed, therefore, that national courts would compensate people for discrimination against posted or migrant workers based either on their nationality or on their racial or ethnic origin.

Although such litigation is common-place in the UK, it appeared from the comments of delegates that it is rare in other EU countries, even through the protective legislation is in place. It is difficult to analyse why this should be so.

The problems which did arise in national courts appear to come more from restrictive legislation which may impact on posted workers, migrant workers or both.

This was most clearly emphasised by *Commission of the European Communities v. Luxembourg.*[35] This case emanated, not from complaints by posted workers or foreign businesses brought in the Luxembourg courts, but from action by the European Commission to challenge Luxembourg legislation seeking to implement the Posted Workers' Directive.

This led to some passionate exchanges. The problem related to provisions by the Luxembourg legislature under 3.10 on public policy grounds. As stated by the Court this provision is a derogation from the general right of posted workers to be in the same position as indigenous workers. The ECJ was very clear that this may have been a derogation from their obligations to posted workers, as permitted by the Directive, but did not dilute Luxembourg's obligations under Article 45 – freedom to provide services. As a result it was not justified.

The outcome of our discussions were that the Directive has a dual and contradictory purpose. On the one hand it is intended to protect posted workers from poorer EU countries being exploited by employers in the richer countries. On the other hand, it is intended to protect workers and employers in the richer countries from competition from businesses based in the poorer countries, who may seek to use their own workers to carry out work in the richer country. In the words of one delegate – "the intention was not to protect workers, but to protect contractors in rich countries".

It seems clear that the ECJ is currently interpreting the Directive in a liberal or libertarian way i.e. providing only minimum protection for posted workers, thereby making it easier for their employers to compete for contracts in other EU countries. Whether or not that is desirable is really a political rather than a legal issue and, therefore, one on which we are reluctant to comment, though it was clear that our delegates themselves had differing views.

[35] C-319/06

9. Unprotected migrant workers

Our final technical session, like much of the Panel Discussion, concerned the difficulties suffered by foreign workers who were not protected by the posted workers' Directive. These include people from another EU country who are not "employees" or "workers" as defined in the Directive, people from outside the EU moving from other EU countries and illegal immigrants.

Several delegates emphasised the problems posed by large numbers of foreign workers working in the black economy. In short, "real life does not follow the legislation". The extent of the black economy is referred to above.[36] For labour judges, the problem is stark. Illegal workers have no rights and the only way of dealing with the problem is through the criminal law.

Self-employment, real or artificial, has long been a judicial problem. Should we expand the definition of employment or indeed the definition of employer to include sole workers and employees to small sub-contractors as coming within the scope of the enterprise? Or should they be allowed to choose their status? The same applies to flexible hours contracts, which may entitle the employer to demand long hours of the employee, but leaving the right for the employer to cut off the hours provided at will.

The problem of transitional restrictions imposed by the E8 on workers from new EU countries is still with us. At the date of the Congress Germany and Austria still had restrictions, but other countries, such as the Netherlands, are trying to bring such workers within the scope of collective agreements, partly to provide them with protection, but also to prevent what is seen as unfair competition.

People of non-EU nationality working legally in EU countries expect to be able to move freely across boarders, not only for leisure, but also for work. An example was given of a pianist who was a Canadian citizen of Chinese origin who worked as a professor in Austria, but played in a trio based in Stuttgart, Germany. His trio had an engagement in the UK. He was astonished to be refused entry to the UK because he did not have a work permit. It was felt that this was an absurdity, which should not have been allowed, but it emphasised the limitations upon the central EU principle of the free movement of workers.

The problems emanating from the black economy were discussed. As an Italian delegate said "The harder it is to get work permits, the more black economy you have". The same applies to protective EU and national legislation.

Charlotte O'Brien and Samantha Currie, from the University of Liverpool, who took part in our panel discussion emphasised the disadvantages faced by

[36] Page 9

migrant workers, particularly from outside the EU. Although these people are not posted workers, they have, in theory at least, the benefit of EU employment and industrial rights, but all the statistics show that they are disadvantaged. They work longer hours for less pay than indigenous workers. They are less likely to be union members and are, therefore, likely to be excluded from the benefit of collective agreements. They often work in industries, such as catering, which have no collective agreements.

The specific legislative gap is that their work permits often restrict them to the particular job, which means that if they lose that job they lose their right of residence. This puts them in an exceptionally weak position to enforce their employment rights, even if they are aware of them. This has led to some abuse of the most disgraceful kind, where migrant workers on work permits are treated as slaves and are unable to break away because the alternative is deportation.

Other problems relate to access to justice, which we will address at a future Congress. They may not speak the language of the host country. They may not be aware of their rights. They may not know where to turn for advice. There is a major problem of non-enforcement of rights, simply because the workers are unaware of their rights or are unwilling to enforce them.

Similar problems arise with migrant workers from within the EU. Gradually, as particular communities become established in the host country, these problems fade, but our Liverpool University lecturers were able to recount from voluntary work the severe problems suffered by, for example, Polish workers in Liverpool, who were looking for help with exploitative employers.

10. Conclusions

The problems we addressed are complex and intractable. They are inherent in the nature of a Union made up of sovereign states and forming part of a global economy. The rights of freedom of movement for workers, establishment and freedom to carry out services have helped to energise the EU and to combat protectionism. The interests of workers and employers vary. Established indigenous workers do not wish to lose rights won over centuries of struggle. Migrant workers are more interested in bettering themselves, though they do not want to be exploited by unscrupulous employers.

Different countries are moving at different speeds in opening up their economies, but one thing which became clear is that migrant workers are here to stay and that they exist in all the countries of the EU. Every country has a poorer neighbour which is a source of cheaper labour and whose inhabitants are keen to better themselves.

The role of national governments, the courts and the EU is to regulate this complex exercise. We must try to ensure that freedoms inherent in the “global village” can be exercised, protect all workers from exploitation and

discourage protectionism. The framework is there in EU legislation and the laws and practices of the Member States. There were, however, very considerable concerns about the difficulties faced by migrant workers, not only in the employment field but, perhaps more, in the field of social rights. Many of the problems of evasion and enforcement apply to all non-unionised workers. Sham self-employment, zero hours contracts, excessive deductions for accommodation, payments below the minimum wage – these abuses are not restricted to migrant workers, but they impact more heavily upon them, if nothing else because they are new to the labour market and therefore likely to be working in marginal industries.

Despite all this, there is reason for optimism. There is a growing willingness to welcome foreigners, especially within the EU, but the changing framework is a challenge to ancient prejudices and the price of freedom is eternal vigilance. Migration has always given rise to problems as well as opportunities, but history shows that migrant groups gradually become assimilated and, even if they retain a separate identity, they become more knowledgeable about their rights and more willing to enforce them.

23rd September 2010 Colin Sara

Appendix I

Questionnaire

EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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ANNUAL CONGRESS – LIVERPOOL – 26TH & 27TH JUNE 2009

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"The impact of mobility of workers and enterprises on employment rights"

QUESTIONNAIRE

prepared by Taco van Peijpe and Colin Sara

To be answered by all National Delegation in respect of their national laws.
Please reply to admin@ealcj.org.

This questionnaire is intended to be used as a springboard for national reports dealing with the specific issues of this Congress. We hope that you will use it as a basis for explanation rather than feel confined to the exact format of the questionnaire.
Some questions (in particular those concerning collective agreements and the posting of workers) cover matters which we discussed in a different context at the Oslo congress in 2007. You may find it useful to use the reports of that conference. In the mean time the ECJ has given its decisions in the cases *Viking* (C-438/05; collective action and freedom of establishment), *Laval* (C-341/05; posting and collective action), *Rüffert* (C-346/06; posting and collective agreement), *and Commission v. Luxembourg* (C-319/06; posting and employment law). Please refer to the impact of those judgments when relevant.

Theme I: collective action to protect workers from international competition

1. Collective action and demonstrations

- Has there been any resistance to the exercise of rights of establishment by business based outside your country, but within the EU?
- Have there been demonstrations or other action against foreign workers exercising their rights to freedom of movement?
- Give a brief summary of the right (freedom) to collective action for workers and the restrictions on that right in your country. Pay attention inter alia to: the right to strike, secondary actions (solidarity actions, boycott) and picketing.
- have the cases of *Laval* and *Viking* in the European Court of Justice had any impact on the approach of unions and courts in your country to collective actions with the aim to protect workers from international competition?

Theme II: protecting the rights of posted workers
(You may find it useful to look at two documents of the European Commission: *Commission's services report on the implementation of Directive 96/71/EC,* SEC(2006) 439, and: *Communication from the Commission(…) Posting of workers in the framework of the provision of services,* COM(2007) 304).

2. Posted workers

- How has the Posting of Workers Framework Directive 96/71 been implemented in your country?
- Does your national legislation ensure that all of the matters mentioned in Article 3(1), second indent, under(a)-(g) of the Posting Directive are guaranteed to posted workers?

- Article 3 (1), second indent, under © of the Posting Directive mentions minimum rates of pay. How is the concept of minimum rates of pay defined in your national law and/or practice?
- Which parts of your national labour law are applied as "public policy provisions", mentioned in Article 3(10), first indent, of the Posting Directive?
- Has your country implemented Article 3(9) of the Posting Directive, concerning temporary agency workers? If so, are the terms and conditions which are guaranteed to the temporary workers the same as those which apply to regular employees? (see also Article 5(1) of the Temporary Agency Directive 2008/104/EC).
- To what extent do collective agreements apply to workers who are employed by employers in another Member State and posted in your country?
- Could you mention any litigation or conflicts related to the posting of workers in your country?

Theme III rights and interests of workers moving between member states (otherwise than through posting)

3. Migrant workers, employed in the Member State where the work is carried out (Article 39 EC)

- What proportion of workers in your countries are migrant workers from other countries in the EU (or EEA)?
- How are Article 39 EC, Regulation (EEC)1612/68 and Directive 2004/38/EC, which establish the freedom of movement for workers, enforced in your country?
- Is there a provision for claiming compensation for discrimination against workers on the grounds of nationality (Art. 39.2)?
- Are there any limitations on the right of free movement as provided for in Article 39.3?
- Which functions in the public service in your country are not open to foreign nationals (Article 39.4)?
- To what extent are collective agreements of your country applicable to foreign workers employed in your country?
- Could you mention any relevant litigation concerning your country in relation to the free movement of migrant workers?

4. Self-employed persons and service providers (Articles 43 and 49 EC)

- Self-employed persons and service providers who do not fall within the scope of workers in the meaning of article 39 can enjoy the freedoms of establishment (Article 43 EC) and of services (Article 49 EC). Are these self-employed persons, who in fact may be economically dependent on a single "employer", without having employment contracts, subject to exploitation by employers in your country?

- Are there any restrictive laws, which make it difficult for self-employed persons from other Member States to set up establishments or to provide services in your country e.g. requirements to register business, or to join local guilds or Chambers of Commerce?
- Are there any other restrictions on foreign nationals from the EU or EEA who wish to carry on business in your country? In particular are small sub-contractors restricted by rules intended to ensure that they meet required skill levels?
- To what extent are collective agreements of your country applicable to self-employed persons?

30th April 2009

Taco van Peijpe
Amsterdam

Appendix II

Synthesis

EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

ANNUAL CONGRESS – LIVERPOOL – 26TH & 27TH JUNE 2009

"The impact of mobility of workers and enterprises on employment rights"

SYNTHESIS OF NATIONAL REPORTS

Definition and scope.

This questionnaire is intended to be used as a springboard for national reports dealing with the specific issues of this Congress. We hope that you will use it as a basis for explanation rather than feel confined to the exact format of the questionnaire.

Some questions (in particular those concerning collective agreements and the posting of workers) cover matters which we discussed in a different context at the Oslo congress in 2007. You may find it useful to use the reports of that conference. In the mean time the ECJ has given its decisions in the cases *Viking* (C-438/05; collective action and freedom of establishment), *Laval* (C-341/05; posting and collective action), *Rüffert* (C-346/06; posting and collective agreement), *and Commission v. Luxembourg* (C-319/06; posting and employment law). Please refer to the impact of those judgments when relevant.

Theme I: collective action to protect workers from international competition

1. Collective action and demonstrations

1) Has there been any resistance to the exercise of rights of establishment by business based outside your country, but within the EU?
2) Have there been demonstrations or other action against foreign workers exercising their rights to freedom of movement?
3) Give a brief summary of the right (freedom) to collective action for workers and the restrictions on that right in your country. Pay attention inter alia to: the right to strike, secondary actions (solidarity actions, boycott) and picketing.
4) Have the cases of ***Laval* and *Viking*** in the European Court of Justice had any impact on the approach of unions and courts in your country to collective actions with the aim to protect workers from international competition?

Austria	1) No. 2) As Austria is traditionally a country with many foreign workers, even though not mainly from EU countries, there have been no such demonstrations. 3) The freedom of assembly is a constitutional right, but there is no such thing as an individual or collective right to strike. Strikes are not explicitly forbidden by law. In any case violence executed in connection with a strike is strictly forbidden. The works council has the right to summon a works assembly. This is very formal and works assemblies with the sole or main purpose to prevent work for the duration of the assembly are not legal. The legal dispute in the form of strike, secondary actions, solidarity actions and picketing does not play a decisive role in Austria. For many decades either the social partners a conciliation board (to enforce works agreements) or the labour- courts have dealt with problems that in some other countries may be a reason for strike or boycott. Boycott is almost unknown as an instrument of labour dispute in Austria. 4) These cases were discussed intensely and may have sharpened awareness for the potential of conflicts but had otherwise no impact so far. 5)
Belgium	1) On 21 December 2005, the three representatives trade unions even wrote a joint letter to the Minister of Labour in which they expressed their concerns cases similar to Laval were under consideration in Belgium at that time (see next point). The Minister to intervene in the legal proceeding,

	maintaining that the right to strike had to take precedence. The Court did not follow this proposition. [37] 2) When the Laval and Viking case were brought before the European Court of Justice (...), cases similar to Laval were under consideration in Belgium at that time. The company S., a producer of processed meats, stopped hiring Belgian temporary workers, replacing them with Poles/Silesians (having a German passport) who were made available via a Dutch temporary work agency. The trade unions called a strike and the management abandoned its plans. [38] The right to strike has not been incorporated into the Belgian Constitution. 3) The right to strike is acknowledged in several international instruments, which Belgium has ratified. Belgium has a monistic law system which regulates the relationship between national and international law.[39] Article 3 of the Essential Services Act of 19 August 1948 - workers has the right to (...) not perform their work due to a strike (and that) taking part in a strike, even a wildcat strike is not illegal. The Court of cassation only issued a statement with regard to strikes i.e. a collective and temporary decision of workers to stop working.[40]There is no explicit regulation concerning collective action. The legitimacy of each case is judged separately by the court. Violence is not tolerated. Examples: If workers who "sit-in" by not leaving the plant but stay at work peacefully, the court may not interfere. If dockworkers refuse to prepare a ship for departure, ship owners will use the concept of boycott, which is not considered legitimate. The case law defines boycott as an act of violence predating the ratification of the European Social Charter. Some labour courts recognised the legitimacy of a solidarity strike in the past. Any dismissal arising from the actions was rejected because of its unlawfulness. Belgium has no legal framework for the settlement of industrial disputes and trade union and employer's organisations have elaborated noncommittal dispute- resolution procedures. Conciliators appointed by the Crown to mediate between conflicting parties, can

37 Professor dr. Patrick Humblet (Ghent University) *"The Laval and Viking Cases: Freedom of Services and Establishment v Industrial Conflict in the European Union",* Roger Blanpain, Andrzej M. Swiatkowski (eds), Kluwer Law International BV, The Netherlands, p. 15.

38 Professor dr. Patrick Humblet (Ghent University) *"The Laval and Viking Cases: Freedom of Services and Establishment v Industrial Conflict in the European Union",* Roger Blanpain, Andrzej M. Swiatkowski (eds), Kluwer Law International BV, The Netherlands, p. 15.

39 K. Abelshausen, S. Claessens, S. Francken and Y. Mondelaers The Right to Strike: A Comparative Perspective. A study of national law in six EU states, ed. A. Stewart & M. Bell, The Institute of Employment Rights The People's Centre, Liverpool, p. 10.

40 P. Humblet, in "The Laval and Viking Cases: Freedom of Services and Establishment v Industrial Conflict in the European Union", Roger Blanpain, Andrzej M. Swiatkowski (eds), Kluwer Law International BV, The Netherlands, p. 18

	intervene in industrial disputes but cannot force the disputing parties to cooperate.[41] 4) The trade unions were not very pleased with the legal precedents contained in Laval and Viking, but they put them into perspective rather quickly. [42]
Czech Republic	
Estonia	
Finland	1) No. 2) No. 3) Even in the absence of a specific provision, the Constitution of Finland has been deemed to ensure the right to industrial action as a fundamental right, primarily as part of the freedom of association. However, the right to industrial action is restricted during the period of validity of collective agreements or collective civil servant agreements. A collective agreement obliges the associations and employers bound by it to refrain from any action of pressure directed against the collective agreement as a whole or against any particular provisions thereof. Furthermore, the associations which are bound by the agreement are required to ensure that the associations, employers and employees subordinated to them and covered by the agreement refrain from any such action and that they do not violate the provisions of the collective agreement in any other manner. With regard to civil servants, corresponding peace obligations, going even further in some respects, exist. Industrial actions not directed at the collective agreement such as genuine sympathy actions or political actions are allowed also during the collective agreement period. 4) No. Viking has been the only case of this kind. Normally foreign workers are covered by generally applicable collective agreements and that is why the unions have not had any special need for collective action to protect Finnish workers from competition.
France	
Germany	
Hungary	1) I believe that there is some resistance because of the unknown environment, but at the same time it is also attractive because of the new possibilities.

41 P. Humblet, "Cross-border collective actions in Europe: A legal challenge, a study of the legal aspects of transnational collective actions from a labour law and private international law perspective", Filip Dorssemont, Teun Jaspers ans Aukje van Hoeck, Intersentia, Antwerp-Oxford, 2007.

42 P. Humblet, in "The Laval and Viking Cases: Freedom of Services and Establishment v Industrial Conflict in the European Union", Roger Blanpain, Andrzej M. Swiatkowski (eds), Kluwer Law International BV, The Netherlands, p. 19

	2) The trade unions have demands that if there is a collective redundancy, the employment relationship of the foreign workers should be terminated (first). The trade unions also recommended in a proposal of the collective agreement to regulate that the employer won't employ foreign workers. Both attempts were refused by the employers. 3) The Hungarian Constitution states that everyone has the right to establish or join organizations together with others with the objective of protecting his economic or social interests. The right to strike may be exercised within the framework of the law regulating such right. A majority of two-thirds of the votes of the Members of Parliament present is required to pass the law on the right to strike- the Act VII of 1989. The court practice interprets the social and economic interests broadly: it contains not just better working conditions but also questions of economic and social policy if it has a direct impact on the workers. As the right to strike is not limited solely to industrial disputes that are likely to be resolved through the signing of a collective agreement the government can and has taken part in the negotiation. Strikes of a purely political nature are illegal and prohibited. The Act regulates a compulsory negotiation before the strike action with the exception of sympathy or solidarity strike negotiation is not necessary. The sympathy strike is legal and lawful if the basis strike is legal and lawful. It is prohibit to strike for the following; • for an aim that is unconstitutional, • for an aim that is not part of the workers' sociology and economic interest, • if the parties preliminary to strike does not take part in a conciliation procedure, • if the aim of the strike is change of a valid collective agreement under the effect of the collective agreement • The aim of the strike is an individual act of the employer that the court should be asked to change. There is no exact rule for picketing. The Act regulates only that the decision to take part in a strike action should be voluntary. If the workers take part in a legal strike, they shouldn't be forced to stop striking. We have a case (the court haven't decided it yet) where the employer employed new, foreign workers instead of the workers who take part in the strike. The question is that does it constitute a force to the workers to stop the strike or not. 4) Unfortunately we don't have any case connected to international competition.
Iceland	
Ireland EAT and Ireland	

Lab	
Italy	1) Till today is not known any dispute about the exercise of rights of establishment by non-Italian business based in EU. 2) Even in the absence of a specific provision, the Constitution of Finland has been deemed to ensure the right to industrial action as a fundamental right, primarily as part of the freedom of association. 3) However, the right to industrial action is restricted during the period of validity of collective agreements or collective civil servant agreements. A collective agreement obliges the associations and employers bound by it to refrain from any action of pressure directed against the collective agreement as a whole or against any particular provisions thereof. Furthermore, the associations which are bound by the agreement are required to ensure that the associations, employers and employees subordinated to them and covered by the agreement refrain from any such action and that they do not violate the provisions of the collective agreement in any other manner. With regard to civil servants, corresponding peace obligations, going even further in some respects, exist. Industrial actions not directed at the collective agreement such as genuine sympathy actions or political actions are allowed also during the collective agreement period. 4) No. Viking has been the only case of this kind. Normally foreign workers are covered by generally applicable collective agreements and that is why the unions have not had any special need for collective action to protect Finnish workers from competition.
Lithuania	1) Immigration for the purposes of employment is still a recent and not very widespread phenomenon in the Lithuanian context. Each year the Government establishes a global placement quota for foreign workers, except EU citizens, and their family members. However, very often the quota is not entirely filled. Employment of foreign workers does not yet constitute a problem in the Lithuanian context. There have been a few cases when foreign businesses in Lithuania have been rejected due to ecological reasons but not because of employment of foreign workers. For example, the construction of a chemical factory close to Klaipeda harbour and pig

	farms by the rivers and lakes. 2) No, there haven't been any. 3) The Labour code of Lithuania provides the right to strike for employees/group of employees if a collective dispute is not settled or a decision adopted by the Conciliation Commission, Labour Arbitration or third party court. Prior to the strike, the specific procedures must be fulfilled: the organisers (the trade union or association of trade unions) must have the approval of the two-thirds of the collective expressed by the secret voting. The employer must be given an at least seven days' written notice of the beginning of the intended strike. Strikes are prohibited in the internal affairs, national defence and state security systems, as well as in electricity, district heating and gas supply enterprises, first medical aid services. A legal vacuum exists regarding the right to strike in the sector or national level where there are no rules on how to organise the strike. When a strike is called, the employer or the entity to whom the demands have been submitted may apply to the court with a petition to declare the strike unlawful. The court shall hear the case within ten days and shall declare a strike as unlawful if the objective of the strike contravenes the Constitution of the Republic of Lithuania, other laws or in breach of the procedure. 4) It's hard to say about influences because of reasons mentioned above: the employment of foreign workers is not significant and trade unions are not massive.
Lux	1) No. 2) No. 3) There is a specific procedure in our labour law concerning collective action for workers which is defined by articles L. 163. and L. 164 of our Labour Law Code; in summary, the National Conciliation Office is competent to solve and/or settle collective litigations in the field of working conditions or to give its opinion about the demands concerning the Declaration of general obligation of collective agreements in the field of national or socio-professional dialogue. Before any strike action or lock-out litigants have to be brought before the National Conciliation Office. It has to be explained that collective litigation in the field of collective agreements regard either the refusal of the employer to start collective negotiations or the disagreement about one or more stipulations of the collective agreement. The conciliation procedure is terminated either by the signature of a collective agreement or by a non-conciliation Act. Finally, employers are found to have dismissed, discriminated, disadvantaged or threatened the employees

	being members of the negotiation commission or of the equally composed commission of the National Conciliation Office will be condemned to damages. Tom Moes' replies contain the complete applicable articles in their French version. 4) No.
Malta	1) And 2) to this date there have been no demonstrations or other actions against foreign workers exercising their rights to freedom of movement. 3) Article 42 of the Constitution of Malta is the primary legislation dealing with the collective rights of every person. No person shall be hindered in his right peacefully to assemble freely and associate with other persons and in particular to form or belong to trade or other unions or associations for the protection of his interests. The law may lay down provisions restricting this right to what is reasonably required in the interests of defence, public safety, public order, public morality or decency, or public health, and also for the purpose of protecting the rights or freedoms of other persons. Legal provisions may impose restrictions upon public officers. These narrowly interpreted restrictions must be reasonably justifiable in a democratic society. Any law prohibiting the holding of public meetings or demonstrations in any one or more particular cities, towns, suburbs or villages shall be held to be a provision which is not reasonably justifiable in a democratic society. Industrial Relations are regulated by the Employment and Industrial Relations Act. Trade unions and employers' associations enjoy limited immunity with regards to acts alleged to have been done by or on behalf of the same trade union or by or on behalf of an employers' association. In terms of article 64 of the Act, an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort or quasi-tort on the grounds only that it induces another person to break a contract of employment. An important aspect of immunity is that, in terms of the law, an act done by a person in contemplation or furtherance of a trade dispute and in pursuance of a directive issued by a trade union, whether he belongs to it or not, shall not be actionable in damages on the ground only that it consists in a breach of a contract of employment and therefore the employer is not entitled to terminate the contract of employment of, or discriminate against, any person doing any such act, and shall not constitute a break in the service of such person. This particular feature of immunity is however restricted, in that it does not apply to particular employees listed in the law itself, as for instance a particular number of employees who are required to maintain the continued and uninterrupted services and required to be manned at all times for the continued

	provision by the Government of essential services to the community. A list of such employees and the number of the said employees is annexed to the Act. Article 65 of the Act regulates peaceful picketing and holds that it shall be lawful for one or more persons in contemplation or furtherance of a trade dispute to attend at or near a place where another person works or carries on business. An inroad to article 42 of the Maltese Constitution is found in article 67 of the Employment and Industrial Relations Act which states that the holder of an office in the public service declared by the Prime Minister to be an office the holder whereof may not be a member of a trade union in respect of which he may be required to represent or advise the Government in industrial relations with the union or unions representing its employees. 4) With regards to the Courts, we do not know of any legal proceedings initiated at our Courts after these landmark judgements and tackling the right to take collective action Vis a Vis the freedom of establishment of undertakings.
Netherlands	
Norway	
Slovenia	
United Kingdom	

Theme II: protecting the rights of posted workers

(You may find it useful to look at two documents of the European Commission: *Commission's services report on the implementation of Directive 96/71/EC,* SEC(2006) 439, and: *Communication from the Commission (…) Posting of workers in the framework of the provision of services,* COM(2007) 304).

2. Posted workers

1) How has the Posting of Workers Framework Directive 96/71 been implemented in your country?
2) Does your national legislation ensure that all of the matters mentioned in Article 3(1), second indent, under (a)-(g) of the Posting Directive are guaranteed to posted workers?

3) Article 3 (1), second indent, under © of the Posting Directive mentions minimum rates of pay. How is the concept of minimum rates of pay defined in your national law and/or practice?
4) Which parts of your national labour law are applied as “public policy provisions”, mentioned in Article 3(10), first indent, of the Posting Directive?
5) Has your country implemented Article 3(9) of the Posting Directive, concerning temporary agency workers? If so, are the terms and conditions which are guaranteed to the temporary workers the same as those which apply to regular employees? (See also Article 5(1) of the Temporary Agency Directive 2008/104/EC).
6) To what extent do collective agreements apply to workers who are employed by employers in another Member State and posted in your country?
7) Could you mention any litigation or conflicts related to the posting of workers in your country?

Austria	▪ The implementation was mainly conducted by article 7b of the Act on the Adjustment of Labour Law. Examples - **Article 1** : An employee who is posted for continuous work to Austria by an employer whose corporate domicile is in an EU member state has a mandatory claim during the period of work in Austria to the following (non-exhaustive) list:- ▪ payment guaranteed by act, statutory law or collective agreement, that comparable workers at this location can claim, ▪ to paid leave according to article 2 of the Annual Leave Act (Urlaubsgesetz) if the leave entitlement according to the provisions of the home country is minor; after the posting period the worker keeps his claim for the proportional difference between longer Austrian annual leave and the one granted by the workers home state ,according to the duration of posting e.g. annual leave in Austria is 30 work-days (including Saturdays i.e. 5 weeks) If the claim in the home country is 20 days and the worker is posted in Austria for 6 month he keeps the claim for the difference for the half year that is 15 minus 10 therefore 5 days.) **Article 2**: For a posted worker who has to do repair - or assembly work in connection with the deliverance or instalment of machines or facilities article 1.1.) is not applicable, if the work can not be done by domestic workers and the posting period is no longer than 3 month. Article 1.2.) is not applicable if the work does not

	last longer than 8 days. For workers employed with typical building work (for example masonry, digging work) article 1 is fully applicable from the first day of posting. **Article 3**: Employers mentioned in article 1 have to notify any posting to Austria to a special centre of coordination for the control of illegal employment (established with the treasury department) the latest a week before commencement of work. If there are works which have to be done without delay in cases of catastrophes, the notification has to be made immediately before work starts. **Article 8**: the parties of collective agreements have to give access to those agreements in an appropriate way. Violations of the duties of the employer or his representative will be fined up to 726 Euro. If temporary agency workers are posted to Austria, Article10, 10a 12a and 16a of the Austrian Temporary Agency Workers Act grant the rights mentioned in Article 3 a) -d) of the Directive 96771/EC. ▪ Yes. In addition to the aforementioned Provisions, the Equal Treatment Act is applicable to posted workers as well. ▪ For most industries and trades there are collective agreements which guarantee a minimum fee for different activities dependent on the kind of work ,the qualification of the worker, the duration of work in the business and comparable criteria . The federal labour ministry can fix minimum wage rates for certain industries or trades if and when so required by the employees´ association and if employers associations do not exist in this industry. ▪ All acts and provisions concerning security of work and protection of workers, maternity protection and the protection of children, youth and of disabled persons, including the Working Hours Act and the Working Break Act. ▪ See above. ▪ If a special provision (like the above mentioned AVRAG) does not command that certain parts of a collective agreement (like the demand for the collective minimum fee) are applicable for posted workers as well, only employees of the domestic employer are within the scope of the collective agreement. ▪ There are no cases concerning posted workers from another EU member states. A conflict solved by the Austrian Supreme Court in 2002, regarded an Austrian worker, who was - inter alia - of the opinion not approved of by the Supreme Court, that Article 7b AVRAG is contradicting the Posting Directive.
Belgium	1) Act of 5 March 2002 implementing Directive 96/71/EC of the European Parliament and of the Council of 16

	December 1996 concerning the posting of workers Belgium.[43] Royal Decree of 29 March 2002 laying down arrangements for implementing the simplified establishment and social documentation system for undertakings posting workers to Belgium and defining the activities in the construction industry mentioned in Article 6, § 2, of the Posted Workers and Social Documentation Act.[44] 2) Site of the European Commission Directorate-general for Employment, Social Affairs and equal opportunities, National information: • Work periods and rest periods [Article 3(1)(a) of the Directive] - Labour Act of 16 March 1971, Public Holidays Act of 4 January 1974, and the industry-wide labour agreements given binding force by Royal Decree. • Paid annual holidays [Article 3(1)(b) of the Directive]– Articles 3–8 of the Coordinated Acts of 28 June 1971 on annual holidays for employees)and Articles 35, 36, 60 and 61 of the Royal Decree of 30 March 1967 laying down the general arrangements for implementation of the Acts on annual holidays for employees. • Pay [Article 3(1)(c) of the Directive] - Cross-industry (national) and industry-wide labour agreements setting minimum pay rates • Rules concerning hiring-out of workers and terms and conditions which apply to temporary workers [Articles 3(1)(d) and 3(9) of the Directive] • Rules concerning terms and conditions of employment of pregnant women and women who have recently given birth [Article 3(1)(f) of the Directive]. • Rules concerning terms and conditions of employment of children and young people [Article 3(1)(f) of the Directive]. • Equality and non-discrimination [Article 3(1)(g) of the Directive] 3) In Belgium, the minimum wage of gainfully employed persons is fixed by collective agreements. In principle, the minimum wage scales are laid down per sector by the competent joint committee. The collective agreements concluded within these committees include provisions designed to determine the general basis for calculating wages/salaries according to the various levels of

43 Moniteur Belge, 13 March 2002.

44 Moniteur Belge, 17 April 2002.

	qualifications and posts. For workers posted to Belgium, only the collective agreements that have been declared to be generally binding (i.e. those subject to penal law) are applicable. If that undertaking belongs to a sector for which the joint committee has not laid down any minimum wage scale, the level applicable is the average minimum monthly income that has been determined at inter-professional level (i.e. applicable throughout the private sector). 4) Site of the Federal Public Service Employment, Labour and Social Dialogue: An employer who posts his workers to Belgium must, for work carried out in Belgium, comply with the working, wage/salary and employment conditions laid down by Belgian law, administrative regulations or agreements which are subject to the provisions of penal law (art. 5(1) of the Act of 5 March 2002). This rule is without prejudice to the application of any foreign working, remuneration and employment conditions that are more favourable for the worker concerned. The concept of working, remuneration and employment conditions subject to penal law comprises a very wide range of regulatory provisions (acts and royal decrees) and provisions laid down in agreements (generally binding collective labour agreements). As these provisions are subject to penal law, they come under public law. They are essential provisions safeguarding the rights of workers". 5) Temporary agency contracts may be concluded in four specific cases (replacement of a worker whose contract has ended, performance of an exceptional task, etc.). There are also time restrictions on the use of agency work and special authorisation is needed in some cases. Hiring out of workers is forbidden in Belgium (except for agency temping) whenever the employer's authority is transferred to the user. However, there are two exceptions to this prohibition, providing the social legislation enforcement authority is informed or gives consent (collaboration between two undertakings belonging to the same economic entity or temporary performance of specialised tasks requiring a special professional qualification). 6) An employer who employs posted workers in Belgium must comply with the terms and conditions of employment, work and pay laid down in Belgian collective agreements which are extended by royal decree and thus applicable to all employers and employees of the whole private sector, a given sector or a sub-sector. These extended agreements are subject to penal sanctions.[45] 7) None mentioned.

45 R Blanpain, "Freedom of services in the European Union, Labour and social security law: The Bolkenstein Initiative", Kluwer Law international, The Netherlands, 2006

Czech Republic	
Estonia	
Finland	1) By legislation. The implementing statute is the Act on Posted Workers (1999, as amended). 2) Yes. 3) Minimum pay is normally determined by collective agreements. If a collective agreement is not applicable to an employment relationship, the employee shall be paid a reasonable normal remuneration for the work performed. 4) The provisions concerning night and Sunday work, the employees' right to pay in the case on impediment to work and the right to assembly. 5) Yes. The same terms and conditions are applied. 6) Posted workers enjoy the protection of the generally applicable collective agreement, applicable to the field in question, as regards annual leave, working time, occupational health and safety, and minimum pay. 7) There have been some industrial actions in construction branch (strikes and blockades) to pressure the employer to apply the minimum provisions of the collective agreement concerned.
France	
Germany	
Hungary	1) Contrary to other EU Member States, there is no separate legislation in Hungary for the regulation of posting (assignment and/or the hiring-out) of workers only - Act XXII of 1992 on the Labour Code (LC). Posting means that the employer oblige its employee to work temporarily at places other than the normal place of work for economic interests, on condition that the posted employee continues to work under the employer's directions and instructions during this period. Examples of some limitations to posting: I. A woman to work in another town from the date when her pregnancy is diagnosed until her child becomes three years old. A man bringing up his child alone may not be obliged without his consent to work in another town until his child becomes three years old. II. Posting may not result in a disproportionate harm for the employee, especially with regard to his position, skills, age, health condition or other circumstances. I. Posting may not exceed 44 working days by calendar year, unless specified otherwise in a collective agreement. If the duration of the posting exceeds 4 hours within one working day, it should be taken into account as one working day. II. If the employer exercised its right for posting several times in a calendar year, the duration of these should

	be aggregated. A collective agreement may deviate from this rule. III. Should the employee perform tasks besides his own which belong to other jobs in a way that the respective durations of the tasks belonging to two jobs may not be separated; the employee is entitled to extra remuneration. IV. For posting, the employer is obliged to pay the necessary and reasonable extra costs arising during the employee's posting, apart from the statutory reimbursement of costs as determined by Act CXVII of 1995 on the Personal Income Tax. 2) These are provided for by Section 106/A of the LC, which requires that in the case of an employee of a foreign employer working in the territory of the Republic of Hungary under an agreement with a third party under posting (assignment or hiring-out) of workers, the rules of Hungarian labour law shall apply to the employee with regard to working time and resting time, paid annual leave, minimum wage, hiring-out of workers conditions, conditions of occupational safety, recruitment and employment conditions for pregnant women and those caring for infants, as well as for young employees and the requirement of equal treatment. 3) Section 106/A - term minimum wage includes the personal basic salary, compensation for extraordinary work and remuneration for work performed abroad. The amount of the monthly minimal wage in Hungary in 2009 is 71.500 HUF. (1 £ = cca. 330 HUF) 4) & 5) 5) Provisions of Section 106/A do not apply to the staff of an employer engaged in commercial shipping employed on a sea-going vessel (Section 106/B of the LC). Provisions of Section 106/A do not apply to an employee engaged in the first assembly or installation of the product under the shipment contract regarding the minimum annual paid leave and the minimum wage if the duration of posting does not exceed eight days, except when activities as defined in Section 106/A (2), that is, the construction, repair, maintenance, reconstruction or demolishing of buildings are performed. Hungarian employers should ensure that provisions of Sections 106/A and 106/B be applied to an employee posted to their sites by the foreign employer in line with Section 106/A. 6) Employers engaged in construction works, such as the building, repair etc are governed by the provisions of the collective agreement covering the whole sector or sub sector, with regard the particular conditions, when more favourable for the given entitlement. 7) No litigation or conflicts related to the posting of workers in

	Hungary.
Iceland	
Ireland Lab & Ireland EAT	
Italy	1) By legislation. The implementing statute is the Act on Posted Workers (1999, as amended). *2) Yes.* 3) Minimum pay is normally determined by collective agreements. If a collective agreement is not applicable to an employment relationship, the employee shall be paid a reasonable normal remuneration for the work performed, if the employer and the employee have agreed on the essentially lower remuneration. 4) - provisions concerning night and Sunday work - the provisions on the employee's right to pay in the case on impediment to work, - The right to assembly. 5) Yes. The same terms and conditions are applied. 6) Posted workers enjoy the protection of the generally applicable collective agreement, applicable to the field in question, as regards annual leave, working time, occupational health and safety, and minimum pay. *7) There have been some industrial actions in construction branch (strikes and blockades) to pressure the employer to apply the minimum provisions of the collective agreement concerned.*
Lithuania	1) The directive 96/71 has been implemented in Lithuania by the "Law on guarantees for posted workers" that binds the employers to ensure a number of minimum standards including maximum working time, paid annual holidays, rates of pay, prohibition of discrimination at work etc. This Law is specific and is above the Directive itself because it is applied to the relations where a worker is posted to perform temporary work in the territory of another Member State but also it is applied for a worker posted from another state to perform temporary work in the territory of the Republic of Lithuania. 2) Our national legislation ensures that all the matters mentioned in Article 3(1) are guaranteed for posted workers. The article 4 of the "Law on guarantees of the posted workers" states that the posted worker

	must have all existing provisions of the regulatory enactments of the state to whose territory he is posted to, including extended sectorial or territorial collective agreements in spite of the law applicable to the particular employment contract or employment relationship. Lithuanian legislation states the necessity of applying the provisions of minimum working conditions in all branches of industry. 3) The minimum rate of payment in Lithuania is determined by the law and is indexed according to the inflation every two years. An alien's pay shall not be less than that paid to a resident of the Republic of Lithuania for performing equal work. 4) Article 4 of the "Law on guarantees for posted workers" gives an opportunity for parties to apply the more favourable legal provisions than the minimal in that particular country: 5) The temporary agency workers are treated equally as the posted permanent workers. 6) Article 4 of "The Law on guarantees for posted workers" states that collective agreements, including extended sectoral or territorial collective agreements, are applied on posted workers without any exceptions. 7) The posting of workers from other countries in Lithuania has been very rare. I don't know of any such cases or litigation processes.
Lux	1) & 2) The Directive 96/71 EC of the European Parliament and the Council of December 16th 1996 has been implemented in our legal framework by the law of December 20th 2002 and is incorporated in our Labour Law Code, the law of 2002 having been abrogated by the July 31st 2006 law creating a Labour Law Code. The Code is applicable to all workers having a professional activity on the territory of the Grand-Duchy of Luxembourg and to the workers temporarily detached all legal, governmental, administrative dispositions, as well as the dispositions of collective agreements having received a Declaration of general obligation, concerning the employment contract, the social minimum salary, the working time, the paid holidays, the legal festive days, the regulation of part-time work, the non-discrimination, the collective agreements and the security and health of workers on their work place. The provisions of this article apply to all employees, regardless

	of their nationality, working for any company, regardless of its nationality and its legal office. Detachment of a worker is defined as being the one executed for a short or determined period on behalf of the company on the territory of the Grand-Duchy of Luxembourg in the framework of a contract concluded by the sending firm and the recipient company of the service which has its activity in Luxembourg and concerns mainly the construction activities. The above mentioned legislation has therefore not been extended to other activities. The Labour inspection office is charged with the control of the application of the law and that the workers having been detached take legal action in order to enforce their rights regarding working and employment conditions that are guaranteed by articles L. 141-1 to L. 141-4 of the Labour Law Code regardless of the faculty, according to international conventions concerning judiciary competence, to intent a legal action before the competent jurisdictions of another country. Tom Moes' replies contain the complete applicable articles in their French version. 3) Labour Law Code (article 1 of the 2002 Act) and article L. 141-1. (1) constitutes policy dispositions of national public order applicable to all workers having a professional activity on the territory of the Grand-Duchy of Luxembourg and to the workers temporarily detached all legal, governmental, administrative dispositions, as well as the dispositions of collective agreements having received a Declaration of general obligation, concerning the employment contract, the social minimum salary, the working time, the paid holidays, the legal festive days, the regulation of part-time work, the non-discrimination, the collective agreements and the security and health of workers on their work place. Furthermore, the provisions of this article apply to all employees, regardless of their nationality, working for any company, regardless of its nationality and its legal office. 4) See above article L. 010-1 (1) of the Labour Law Code. 5) See above article L. 010-1. (1) Point 7. of the Labour Law Code: "… constitute policy dispositions of national public order applicable

	to all workers having a professional activity on the territory of the Grand-Duchy of Luxembourg and to the workers temporarily detached all legal, governmental, administrative dispositions, as well as the dispositions of collective agreements having received a Declaration of general obligation, concerning (…) the regulation of part-time work "; the terms and conditions which are guaranteed to those workers are the same as those applicable to regular employees. 6) See above article L. 010-1. (1)11. of the Labour Law Code: "… constitute policy dispositions of national public order applicable to all workers having a professional activity on the territory of the Grand-Duchy of Luxembourg and to the workers temporarily detached all legal, governmental, administrative dispositions, as well as the dispositions of collective agreements having received a Declaration of general obligation, concerning (…) the collective agreements"; 7) Only Commission of the European Communities v. Grand-Duchy of Luxembourg: [June 19th 2008] ECJ.
Malta	1) An amendment to the existing Employment and Industrial Relations Act (Ch 452.82) was issued on the 1st January 2003 with the specific intent to give effect to the relevant provisions of the EU Council Directive 96/71/EC. 2) The Posting of Workers Directive (Directive 96/71) was implemented in Maltese law by Legal Notice 430 of 2002 (Subsidiary Legislation 452.82), the Posting of Workers in Malta Regulations. The equal treatment provisions of article 3 of the Directive are also guaranteed in regulation 4 of the mentioned Maltese Regulations. This regulation holds that the conditions of work which are given to employees posted in Malta shall not be less than the minimum conditions of work given to a comparable employee at the same place of work. Moreover, all posted employees shall be entitled to receive equality of treatment as the comparable employees. The regulation goes on to define the concept of equality of treatment by laying down a non-exhaustive list as directive 96/71 itself, that is, maximum work periods and minimum rest periods, minimum rates of pay, including overtime rates as applied to various classes of employees, equality of treatment between

	men and women and other provisions of non-discrimination etc. and the conditions of hiring out of workers, in particular the supply of workers by temporary employment undertakings. 3) According to Maltese Labour Law, minimum rates of pay are established by three main sources. First, a minimum wage is fixed on a yearly basis by a national standard order issued under the Employment and Industrial Relations Act. Secondly, with regards to particular sectors of industry, the so-called Wage Regulation Orders establish particular rates of pay for every sector. Thirdly, collective agreements agreed to between management and labour at an enterprise level can also set minimum rates of pay applicable in the enterprise concerned. 4) The Maltese regulations on posted workers did not adopt 'public policy provisions' in terms of art 3 (10) of the Directive. 5) The Maltese Regulations have not directly implemented article 3 (9) but it is clear from regulation 4 thereof that the principle of equality of treatment applies irrespective of the nature of the employment contract of the posted employee (regulation 4 (2) speaks of 'all posted employees'). With regards to the provisions of the new temporary agency directive, Malta is still in the process of implementation of the said directive. 6) Article 4 of Subsidiary Legislation 452.82 provides for those posted workers authorised to work in Malta. Such employees are to receive at least the minimum conditions of work enshrined in existent collective agreement regulating the employment of local comparable workers. Furthermore, they are entitled to the same employment rights and health and safety rights under Maltese law. 7) None.
Netherlands	
Norway	
Slovenia	
United Kingdom	

Theme III rights and interests of workers moving between member states (otherwise than through posting)

3. Migrant workers, employed in the Member State where the work is carried out (Article 39 EC)

1) What proportion of workers in your countries are migrant workers from other countries in the EU (or EEA)?
2) How are Article 39 EC, Regulation (EEC) 1612/68 and Directive 2004/38/EC, which establish the freedom of movement for workers, enforced in your country?
3) Is there a provision for claiming compensation for discrimination against workers on the grounds of nationality (Art. 39.2)?
4) Are there any limitations on the right of free movement as provided for in Article 39.3?
5) Which functions in the public service in your country are not open to foreign nationals (Article 39.4)?
6) To what extent are collective agreements of your country applicable to foreign workers employed in your country?
7) Could you mention any relevant litigation concerning your country in relation to the free movement of migrant workers?

Austria	1) I could not get access to actual, reliable numbers but according to statistical material dated from 2007 less than 1 % of the workers in Austria are migrant workers from other EU (EEC) Member States. 2) Everyone who thinks that his or her right deriving from any of these provisions is violated can take legal action. 3) Unlike provisions in the Equal Treatment Act, that the mere violation of some provisions entitles a person to compensation, if a worker suffers a financial loss due to discrimination on grounds of nationality he or she can take legal action. 4) It has to be judged in the individual circumstances, whether the behaviour of a person endangers public order, security or health and only than can appropriate measures be taken against this person. 5) According to the jurisdiction of the European Court, in Austria, these are the typical functions (as diplomats, judges) in administration of justice, army, police, civil servants in ministries, leading positions with the national bank and comparable positions in the administration of the federal countries and the municipalities. It is the leading opinion, that only occupations with sovereign authority can be reserved for Austrian citizens. 6) If a person is employed by a domestic employer who is subject to a collective agreement, this is applicable to the employee as well. 7) None.
Belgium	1) Foreign shares in Belgian employment in 2005 (n x 1000), Belgian nationality, 3895, Other EU-15, 227.[46] 2) & 3) Since the ECJ case law about Moroccans in the nineties (C-18/90, Kziber, 1991), Belgium has had a broad

[46] Guy van Guys, Higher Institute of Labour Studies, K.U. Leuven, Eurofound, 31 May 2007.

	application of non discrimination on the basis of nationality, even for non EU workers. The ECHR case law also seems applied. [47] 4) Since 1 May 2009, workers from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia have been allowed to come and work in Belgium without a work permit. However, this measure does not apply to workers from Romania or Bulgaria. 5) In principle, employment in the public sector in Belgium is quite open to EU citizens except when there is direct or indirect participation in the exercise of powers conferred by the public law.In practice, there does not seem to be much refusal of access to employment or of professional advantages due to language requirement, recognition of professional experience or of diplomas. It is almost impossible to have a better picture of the true employment situation for EU citizens in the public sector as no specific statistics are available on that question.[48] 6) Collective agreement shall be binding on: • the organizations which concluded it and the employers who are members of such organizations which have considered the agreement, as from the date of its coming into force; • the organizations and employers subsequently acceding to the agreement, and the employers' members of such organizations, as from the date of their accession; • employers who become affiliated to an organization bound by the agreement, as from the date of their affiliation; • all the workers in the service of an employer bound by the agreement (Act respecting collective industrial agreements and joint committees, Dated 5 December 1968, article 19).The clauses of an agreement concluded in a joint body which deal with individual relations between employers and workers shall bind all employers and workers other than those referred to in article 19, who are covered by the joint body. An agreement concluded in a joint body may be declared generally binding by the Crown at the request of the joint body or an organization represented on the same.

[47] Jean-Yves Carlier and Jean-Pierre Jacques, Report for the European Commission on the Free Movement of Workers in Belgium in 2007.

[48] Jean-Yves Carlier and Jean-Pierre Jacques, Report for the European Commission on the Free Movement of Workers in Belgium in 2007.

	7) ECJ, Case C-415/93, 15 December 1995, Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal Football Club Liégeois SA v Jean-Marc Bosman and others. Free movement of workers (professional football players).The Court considers that Article 39 of the EC Treaty precludes the application of the rules laid down by sporting associations with regard to transfers of professional players and to nationality clauses.
Czech Republic	
Finland	1) The statistics from 2006 show a number of roughly 4000 registered migrant workers coming from other EU or EEA countries, while the number of those coming from outside the EU was ca. 8000. The main part of foreign workforce consists of posted workers but about only a small share of the whole workforce, ca. 2.1 million, of the country. 2) By legislation. 3) Yes, in the Non-Discrimination Act (2004). 4) No. 5) For instance the office of police and judge and some posts in the service of foreign administration. 6) To the same extent as to the Finnish workers. 7) No.
Estonia	
France	
Germany	
Hungary	1) The number of the EEA migrant workers in Hungary is lower than 2% of the total number of employees. The number of migrant workers from the EEA area, according to the statistics in 2007, was 18.600. 2) Hungarian legal norms on access to employment are implementing the Accession Treaty. There is reciprocity and 12 months rule of employment of EEA nationals in Hungary. This means that restrictive implementation of labour authorisation on not-opened states' citizens has also remained. The obligation, from EC law, to provide for free access to the labour market for workers performing a service contract in terms of freedom to provide services – with exception of Austria and Germany - is not expressly regulated. 3) Constitutional ban on discrimination in Art.70/A called the EqualA on equal treatment and promotion of equal opportunities. Not only the EqualA contains provisions on non–discrimination in employment, but also the Labour Code. Discrimination based on nationality is prohibited; such negative discrimination can be punished by a fine. EqualA expressly refers to employment. It is regarded as particular violation of the principle of equal treatment if the

	employer inflicts direct or indirect negative discrimination upon an employee. The principle of equal treatment is not violated if proportional, justified by the characteristic or nature of the work and is based on all relevant and legitimate terms and conditions, or arises directly from a religious or other ideological conviction or national or ethnic origin fundamentally determining the nature of the organisation, and it is proportional and justified by the nature of the employment activity or the conditions of its pursuit. 4) And 5) Certain positions shall be fulfilled by Hungarian nationals only: Member of the Constitutional Court, chair of country municipal or judges, officers (members of police, national security services, professionals of defence, border-guard, catastrophe-management, emergency management, customs, fire brigades and officers in penology institutes etc.).According to the amendment adopted before accession, EEA nationals and their family members can be employed as clerks (e.g. file manager) in leading or confidential position, provided they have the necessary Hungarian language knowledge to work in the given position. As regards public servants, there is no nationality requirement however; the minister can precondition to conclude a public servant contract beyond the requirements of the Act. In this way the minister (in a decision, circular letter or in decree) may determine working positions in which an applicant must be a Hungarian national with clean criminal record in full age, e.g. security or asset-guard of archives and public collections (museum) must be a Hungarian national unless the minister of culture and public education accepts it. This acceptance is totally discretional. Public servants employed in each unit of National Defence must be Hungarian nationals. Unless the minister of justice allows exception, a public servant in the prison system (must be a Hungarian national. Top leaders in institutions run by state and the minister responsible of national heritage must be Hungarian nationals as well as the director of National Administration on Ancient Monuments. 6) Employers engaged in construction works, i.e. building, repair, maintenance etc are governed by the provisions of the collective agreement covering the whole sector or sub sector, with regard the particular conditions, when more favourable for the given entitlement. 7) There is no litigation or conflicts related to the free movement of migrant workers in Hungary.
Iceland	
Ireland Lab & Ireland EAT	

Italy	1) The statistics from 2006 show a number of roughly 4000 registered migrant workers coming from other EU or EEA countries, while the number of those coming from outside the EU was ca. 8000. However, the main part of foreign workforce consists of posted workers, although no precise statistics of the latter are available. Altogether, we are talking about only a small share of the whole workforce, ca. 2.1 million, of the country. 2) By legislation. 3) Yes, in the Non-Discrimination Act (2004). 4) No. 5) All functions for which Italian citizenship is required to be employed. This is usually required for the employment of a public servant but since 1998 (Act 1998/80) the public service is open to all EU citizens; they are excluded only from posts in which the servants are invested with executive or governmental powers. For instance, the office of police and judge and some posts in the service of foreign administration. 6) To the same extent as to the Finnish workers. 7) No.
Lithuania	1) Immigration is growing. About 3000 migrant workers began to work in Lithuania in 2006, more than 4000 people - in 2007. The emigration from Lithuania was massive in the period from 2003-2006, about 400 000 people left. Now the emigration has declined. The structure of immigration to Lithuania has remained relatively constant, with the majority of immigrants still coming from Belarus, Latvia, the Russian Federation and the Ukraine. 2) The Regulation (EEC) 1612/68 is applicable directly. The provisions of the Directive 2004/38/EC were implemented in “The Law on the legal status of aliens”. Some articles of this law are the same as those in the Directive. 3) There are several possibilities to claim compensation for discrimination at work on the grounds of nationality and on the other grounds as well. The Constitution of the Republic of Lithuania and the civil code of Lithuania allows for the court to adjudge the non-pecuniary damage. Article 96 of Lithuanian Labour code provides guarantees upon admitting to work. It says that it shall be prohibited to refuse to employ on the grounds, amongst others, of the national origin. Article 129 of the Labour code says that an employer may terminate a non-term employment contract with an employee only for valid reasons and a legitimate reason to terminate employment relations shall not be, amongst others, gender, sexual orientation, race, nationality, language, origin, citizenship and social status,

	belief, marital and family status, convictions or views, membership in political parties and public organisations. The Law on equal treatment was issued as implementation of the Directive 200/78/EC. According article 11 of this law a person, who thinks that the discriminatory actions specified in this Law have been directed against him or that he has become a subject of harassment, shall have the right to appeal to the Equal Opportunities Ombudsman. 4) Some limitations exist according to the Law on legal status of aliens: foreign national, except the EU citizens, must obtain the work permit if he/she intends to work in Lithuania. EU citizens are not required to have work permits. 5) There are special requirements for the persons entering the Civil Service: they shall have the Lithuanian citizenship and a command of the Lithuanian language. The Lithuanian language proficiency requirement shall be waived for public employees performing economic or technical functions. 6) The collective agreements are applicable to foreign workers without exceptions. 7) No
Lux	1) In our country almost 120.000 non-residential workers cross daily the border in order to work in Luxembourg. The total amount of residential and non-residential employees is 380.000. These migrant workers come mostly from France, Germany and Belgium. 2) In Luxembourg the freedom of movement for workers is totally guaranteed. 3) There are no discriminations between national employees and non-national workers. 4) None 5) Generally all functions concerning national sovereignty are not open to foreign nationals. These are functions in the armed forces, the governmental administration, the law enforcement forces (police, customs …) and magistracy. 6) The collective agreements are fully applicable to foreign workers. 7) To our knowledge there has not been any litigation concerning the free movement of migrant workers. It is to be mentioned that migrant workers are allowed, as national and residential workers, to participate in the personnel's delegations elections in their enterprises and firms and that they can even be elected as delegates.
Malta	1) As on January 2009, 2.5% of the workforce is composed of migrant workers from EU/EEA countries. 2) Any EU/EEA/Swiss national (except for Romanians and

	Bulgarians) and the spouse / dependents of and accompanying such citizen, for whom an employer applies for an employment license with the Employment and Training Corporation, can immediately start working with the employer since a provisional employment licence valid for 30 days, is provided to the applicant (the employer) on submission of the application. The definitive employment licence is valid for a maximum of one year and needs to be renewed annually. An application for a new licence needs to be submitted in case of a change in employer. NB The employment licence is granted automatically and no restrictions are being enforced. This process will be retained for the first seven years after 1st May 2004. Such a licence is not required for self-employment. Romanians and Bulgarians, and the spouses / dependents of and accompanying such citizens, do not enjoy an automatic right to work in Malta. Since Malta decided to apply transitional arrangements in respect of workers from these States, such citizens are also required to apply for an employment licence. However, their application would have to be considered on its own merits and in the light of labour market requirements. A similar process is followed for Third Country Nationals. 3) Currently the Employment and Industrial Relations Act does not include a provision for compensation for discrimination against workers on the grounds of nationality. 4) And 5) The Judiciary, Armed Forces, Police, security services, tax authorities, diplomatic staff and positions within the Cabinet of Ministers are not open to foreign nationals. 6) Collective agreements are defined as '…an agreement entered into between an employer, or one or more organisations of employers, and one or more organisations of employees regarding conditions of employment…' Thus such collective agreements are at an enterprise rather than at national level. Citizens of EU member states who are employed by a local firm have all the benefits stemming from any existent collective agreement. 7) None mentioned.
Netherlands	
Norway	
Slovenia	
United Kingdom	

4. Self-employed persons and service providers (Articles 43 and 49 EC)

1) Self-employed persons and service providers who do not fall within the scope of workers in the meaning of article 39 can enjoy the

freedoms of establishment (Article 43 EC) and of services (Article 49 EC). Are these self-employed persons, who in fact may be economically dependent on a single "employer", without having employment contracts, subject to exploitation by employers in your country?
2) Are there any restrictive laws, which make it difficult for self-employed persons from other Member States to set up establishments or to provide services in your country e.g. requirements to register business, or to join local guilds or Chambers of Commerce?
3) Are there any other restrictions on foreign nationals from the EU or EEA who wish to carry on business in your country? In particular are small sub-contractors restricted by rules intended to ensure that they meet required skill levels?
4) To what extent are collective agreements of your country applicable to self-employed persons?

Austria	1) I would not say so in general, even if the self - employing persons is dependent on a single contracting party. But there is sometimes no clear borderline between such persons, and others who want to perform as employees/workers but are forced to work as self - employed persons otherwise they will not get an occupation whatsoever. If these persons can prove in court, that they have done work which is typically done by an employee in subordination, they are treated as such. Some labour law provisions (for example the Temporary Agency Workers Act or The Labour and Social Court Law) are applicable to self - employed persons who are economically dependent on a single person or business. 2) No. 3) Only if domestic sub - contractors have to prove a skill level before they can start business, a comparable confirmation is demanded by the foreign person. There is the exception of the knowledge of the German language if it is essential for the job. 4) No.
Belgium	1) EU citizens do not need a professional card in order to be self-employed. 2) & 3) The law regulates the access to several professions where a certificate from the Chambre des Métiers et Négoces must be obtained before being entered in the trade register.

Czech Republic	
Estonia	
Finland	1) No. 2) No. 3) No. 4) Collective agreements are in Finland applicable only in employment relationships.
France	
Germany	
Hungary	1) Yes. A number of sham (a pretend contract) contracts with a self-employed person where the real intention/will of the parties is to have an employment relationship. Sometimes the elements of the contract show that it is a real employment relationship. Mostly, employers are encouraged to have a contract with a self-employed person because of the lack of the guarantees of the employment relationship. 2) It is necessary to have residence permit. In case of certain work/function, it is necessary to prove his/her qualification by a certificate. It is also questions that which certificate is suitable and which are not. There are also works where necessary to possess permission given by a state authority. 3) We don't have knowledge of any other restriction. 4) Collective agreements are not applicable to self-employed persons at all.
Iceland	
Ireland Lab & Ireland EAT	
Italy	1) No, as far as I know. 2) No. 3) No. 4) Collective agreements are in Finland applicable only in employment relationships.
Lithuania	1) N/A 2) Every person, either Lithuanian or foreign national, must obtain the Business certificate, which confirms the payment of the required fixed amount of income tax for carrying on independent activities included in the list of activities that is established by the Government of the Republic of Lithuania. 3) As far as I am concerned, there are no such restrictions. 4) There are four types of collective agreements in

	Lithuania: national, industry, regional and companies. All of these are written agreements concluded between the trade union organisations and employers organisations. Some self-employed persons are united under the Small and medium-size business association. However this association does not have the collective agreement with the Government yet.
Lux	1) Labour law courts endeavor in cases dealing with self-employed or independent persons to qualify the relationship between these persons and a virtual " employer " as an employment relationship: i.e. the courts search in the facts of the case if there could be established subordination ties between these persons in order to provide the independent person with the whole protection of labour law provisions (cf. Labour Law Court of Esch-sur-Alzette, July 2nd 2002, SCHOUX Eliane v. KIES Christiane and ETAT DU GRAND-DUCHE DE LUXEMBOURG: in this case Mrs. SCHOUX, an estate agent, tried to prove that her relationship with KIES was characterized by subordination ties). Labour Law Courts are rather liberal in qualifying these relationships as employment relationships in order to avoid exploitation by employers. 2) The bill concerning the transposition of Directive 2005/36 EC about a) the general recognition of formation titles and professional qualification b) temporary service providing will soon is adopted by the newly elected Parliament. This law shall guarantee persons having acquired their professional qualification in a Member state the access to the same profession and the exercise of this profession in another Member state with the same rights as the nationals, thus respecting the principles of freedom of services and of freedom of establishment. So there are no restrictive laws for self-employed persons from other Member states to provide services or to set up establishments or to join their profession. 3) No. 4) The collective agreements provisions are not applicable to self-employed persons.
Malta	1) Self-employed persons seeking to set up a business in Malta have every right and go through the same process of registration as a local businessman. The only requirement is that they prove that they are citizens of an EU member state (presentation of passport is deemed sufficient). This policy is adopted by the various registration/licensing authorities like the Commerce Division and Malta Financial Services Authority. Membership to the local Chamber of

	Commerce is open to citizens of member states as long as they have a business interest in Malta. To become members, applicants from other EU states have to go through the same application procedure as local entrepreneurs. It is noteworthy that currently, several senior members of the Malta Chamber of Commerce actually originate from other EU member states. 2) See above. 3) As stated above self-employed do not require an employment licence. 4) As explained above, collective agreements are at an enterprise level, rather than on a national scale. Therefore if a self-employed person is legally employed, affiliated to a trade union and a collective agreement is in force, s/he will enjoy the benefits of the said agreement.
Netherlands	
Norway	
Slovenia	
United Kingdom	

Prepared by Dawn Shotter and Elaine Donnelly June 2009

Appendix III

Keynote Address

EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

13th Congress
Liverpool, UK
25-27 June 2009

"The Impact of Mobility of Workers and Enterprises on Employment Rights"

KEYNOTE ADDRESS

Dr Brian Doyle
Regional Employment Judge
North West England

INTRODUCTION

I am delighted to be asked to present the keynote address at the start of the 13th Congress of the European Association of Labour Court Judges. What I propose to do is speak in general terms to the themes of the Congress and to indulge myself a little in a *tour d'horizon* of the employment rights of mobile or migrant workers as they appear to a British employment lawyer and employment judge in 2009.

LIVERPOOL

But first I would like to welcome you all to Liverpool and to the Cunard Building.[49]

It is fitting that the Congress should choose this city and this location to consider the mobility of workers. Liverpool was founded as a statutory borough in 1207 and it was granted city status in 1880. It has a population of some 435,000 and it lies at the centre of the wider Liverpool Urban Area, which itself has a population approaching 820,000. The expansion and urbanisation of Liverpool was largely as a result of its status as a major port. By the 18th century, trade from the West Indies, Ireland and mainland Europe, coupled with close links with the Atlantic slave trade, furthered the economic expansion of Liverpool. Substantial profits from the slave trade helped the city to prosper and grow. By the close of the 18th century Liverpool controlled over 41% of Europe's slave trade commerce and 80% of Britain's.

By mentioning the Atlantic slave trade, I do not thereby intend to link or to compare slavery with the mobility of labour in modern times. However, as we shall no doubt discuss at this Congress, many migrant workers in Europe 'enjoy' poor working conditions and sub-minimum wages. There are also small groups of workers across Europe today — often or nearly always women, working in the underground economy (e.g. the sex industry or domestic service) — for whom the term 'slavery' might be apposite to describe their servitude and social status.

By the early 19th century, 40% of the world's trade passed through Liverpool's docks, contributing to Liverpool's rise as a major city. Liverpool's status as a port city has contributed to its diverse population, which draws from a wide range of peoples, cultures, and religions. That has undoubtedly contributed to the city's recognition as a World Heritage Site by UNESCO.

Liverpool is home to Britain's oldest black community, dating to at least the 1730s. It also contains the oldest Chinese community in Europe. The first residents of the city's Chinatown arrived as seamen in the 19th century. The city is also known for its large Irish and Welsh populations. Following the start

[49] I have drawn upon http://en.wikipedia.org/wiki/Liverpool (last accessed 19 June 2009). Where possible throughout this paper I have referenced easily accessible Internet sites, such as Wikipedia, which can be used as a launch pad to more scholarly and rigorous sources.

of the Irish Potato Famine in 1740, two million Irish people migrated to Liverpool in the following decade, many of them subsequently departing for the United States. By 1851, more than 20 per cent of the population of Liverpool was Irish. In 1813, 10 per cent of Liverpool's population was Welsh. Today, not surprisingly, many Liverpudlians are of Welsh or Irish ancestry. As of 2005, an estimated 92.3 per cent of Liverpool's population is White, 1.9 per cent Asian or Asian British, 1.8 per cent Black or Black British, 1.9 per cent mixed-race and 2.1 per cent Chinese and other.

Relevant to our discussion of the mobility of labour is the state of Liverpool's modern economy. The period post-1945 saw a long decline in Liverpool's economic status, evidenced by labour unrest, high unemployment, appalling social deprivation, poor inward investment and a flight of capital to other cities or countries. But since 1995, the city has seen an economic recovery and urban regeneration, although the city remains a comparatively poor relation to other major British cities. The regeneration of the city has been on the back of inward investment through a large growth in private and public sector services, especially in central government provision, in the financial services sector and in the so-called 'new media'. Yet, strangely, Liverpool remains a city which exports its labour to other parts of the country and of Europe. Its population peaked in the 1930s at about 850,000; by 2000 it was about 440,000; while latest estimates are at about 435,000 and stabilising.

THE CUNARD BUILDING

It might be appropriate also to link our present venue to the themes of the Congress. The Cunard Building is one of the so-called *Three Graces* that adorn the waterfront here.[50] Built between 1914 and 1917, its architectural style is a mixture of Italian Renaissance and Greek Revival. Until the 1960s it was the headquarters of the Cunard shipping line. It also housed passenger facilities for Cunard's trans-Atlantic liner services departing the Liverpool port. Today it is owned by the Merseyside Pension Fund and its tenants are public and private sector services providers, including the Employment Tribunals for this part of North-West England. It is notable that literally thousands of British, Irish and European migrant workers would have left from here on the start of a journey to a new life and new employment opportunities in the United States. In turn the Cunard line will have provided many employment opportunities to migrant workers, especially from the developing countries, who will have settled in Liverpool and elsewhere within Britain.

Let me return now more directly to the themes of our Congress.

[50] I have drawn upon http://en.wikipedia.org/wiki/Cunard_Building (last accessed 19 June 2009).

MIGRANT OR MOBILE WORKERS

The difficulty that we shall face over the next two days of discussion is in agreeing who it is that we are discussing and what is the size of the problem (if a problem it actually is) that we are considering.

I prefer to use the term 'migrant worker' rather than 'mobile worker', as in British employment law and practice a 'mobile worker' is more usually regarded as one whose contract of employment requires them to be willing to move at the employer's behest between sites, branches or operations controlled by that employer. That is a concept which is often at the heart of disputes about redundancy selections and offers of alternative employment.

If I use the term 'migrant worker', however, it does not seem to me that it is a term that has any universally agreed definition. The United Nations *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* defines the term 'migrant worker' as referring to 'a person who is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national'. In the United States this would be a 'foreign worker'. In other contexts it can mean a peripatetic worker or one who is mobile within his or her own country, albeit for different employers. In the United States, confusingly, that is the sense in which the term 'migrant worker' is used.

Generally speaking, we are concerned with migrant workers in the UN sense of that term. However, as will be seen, we also need to be aware of how the employment rights or expectations of non-migrant, indigenous workers interact with or conflict with the employment rights or expectations of migrant workers competing or working alongside them. We shall see also that it is important to keep separately in mind the potential difference in treatment in employment law of 'posted workers' as opposed to 'migrant workers'.

STATISTICS

The problem of definition is seen most acutely in statistical surveys of so-called 'migrant workers'. In a keynote address, I must necessarily be selective. I cannot begin to do justice to the rich complexity of the statistical debate about the numbers of migrant workers and how those numbers are calculated; but perhaps I can give you a badly drawn picture. Drawing upon British sources, for example, one possible measure of the numbers of migrant workers entering an economy or labour market is registration for national insurance purposes.

One such measure published in September 2002[51] calculated that in 2000-01 150,600 migrant workers arrived in the UK and registered for a national insurance number. Over 40 per cent of these migrant workers were European, the majority of which came from within the European Union. While over 200 countries of origin were represented, about half of all migrant workers came from only 10 states, 9 of which were part of the EU or the (British) Commonwealth.

In 2007 a series of parliamentary questions were asked by British parliamentarians with a view to ascertaining the size of the migrant population of the UK. A number of UK government departments were involved in the attempt to provide an authoritative answer, drawing upon the well-respected Labour Force Survey. However, there was little agreement about the accuracy of the data or the definition upon which it was based. Nevertheless, the then UK Statistics Commission (now the UK Statistics Authority) estimated that between 1997 and 2007 the number of people in employment in the UK increased by between 2.1 and 2.7 million. It posited that between 50 and 80 per cent of this increase was accounted for by foreign or migrant workers.[52]

To take a final example, the difficulties that arise in this field might be best illustrated by a Monitoring and Assessment Note issued by the UK Statistics Authority (UKSA) in March 2009.[53] This was in response to press comments about the timing and content of a news release from the Office of National Statistics (ONS) on 11 February 2009. The ONS had reported that in 2008 there had been a 0.2 per cent (59,000) reduction in the employment of all workers in the UK, but that in the same period employment of non-UK born workers had risen by 214,000 to 3.8 million. The UKSA's Note demonstrates the socio-political sensitivity that surrounds the issue of migrant workers in the UK, a sensitivity that is likely to be replicated in other EU states which have a measurable or sizeable migrant worker population.

This leads me to the question of the effect of the current recession on the mobility of workers and upon the social, legal and economic status of migrant workers at this time.

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[51] Vicki Robinson, 'Migrant workers in the UK' (September 2002) *Labour Market Trends* 110(9), 467-476. See http://www.statistics.gov.uk/articles/labour_market_trends/Migant_workers_sept2002.pdf (last accessed on 19 June 2009).

[52] UK Statistics Commission, *Foreign Workers in the UK: Briefing Note* (December 2007). See http://www.statscom.org.uk/C_1238.aspx (last accessed 19 June 2009).

[53] UK Statistics Authority, Monitoring & Assessment Note 3/2009 (16 March 2009). See http://www.statisticsauthority.gov.uk/assessment/monitoring-and-assessment-notes/monitoring---assessment-note-3--ons-news-release-on-uk-born-and-non-uk-born-employment.pdf (last accessed on 19 June 2009).

RECESSION

This morning Professor Alan Neal, Professor Louise Ackers and Dr Samantha Currie will lead our discussion of the effect of recession on protectionism and the mobility of labour. I do not wish to steal their thunder, but I would like to make some observations on this theme from the perspective of an employment judge.

It is a trite observation that in times of economic recession leading to increasing unemployment and social displacement, labour courts and employment tribunals will experience an impact upon their workload and the type of employment rights disputes and litigation they handle. Unpublished statistics for the Employment Tribunals in Great Britain show a reduction in new cases in 2008-09 over 2007-08 of 20 per cent (150,000 cases compared with 190,000 cases). However, when multiple cases are stripped out of the data (for example, the large-scale equal pay claims in the national health and local government sectors), and focus is made upon individual rights cases only, the picture is of an actual increase in caseload of 17 per cent (63,000 cases against 54,000 cases).

Anecdote and simple observation suggest that the rise in individual employment rights cases is most acutely felt in disputes over redundancies and insolvency-related dismissals. What we do not know, and what we are unlikely to know from such analysis of the data as is possible, is what impact this is having upon mobile or migrant workers. We know from observation that migrant workers have been heavily represented in recent years in disputes about unpaid wages, unpaid holiday pay, minimum wage issues, working time problems, health and safety breaches, unfair dismissals, and race discrimination: especially in seasonal agricultural working, the care home sector, the building trades, and in the construction and road haulage industries. We do not yet know whether migrant workers are bearing the brunt of the recession in recruitment and selection cases or in redundancy exercises.

But what is likely to be the economic impact of the recession on migrant workers?

Research by the respected think tank, IPPR (Institute for Public Policy Research), published in February 2009, shows that during an unprecedented period of inward migration to the UK during 2004 to 2007 (the period of accession of the new EU Member States) the effects on the UK labour market were very small.[54] The study pre-dates the current recession, but demonstrates that immigration to the UK was already in decline as the first signs of recession were appearing. The authors of the report argue that the

[54] Howard Reed and Maria Latorre, *The Economic Impacts of Migration on the UK Labour Market* (Economics of Migration Working Paper 3), IPPR, February 2009. See http://www.ippr.org.uk/publicationsandreports/publication.asp?id=649 (last accessed on 19 June 2009).

effects of migrant workers upon employment and wages are virtually zero or even slightly positive. They conclude that migrant workers are sensitive to economic change and that they will leave the UK labour market as they perceive the recession taking hold.

However, it may not be easy to persuade (in particular) unskilled and semi-skilled workers competing for fewer jobs during a recession that migrant workers pose no actual threat to their labour market opportunities or that the economy may actually benefit from their presence. Events this month in Belfast, when 20 Romanian Roma families had to be re-housed following threats and violence against them and their property, suggest that immigrants generally and migrant workers particularly can easily become targets for discontent during periods of economic recession and growing rates of unemployment. The relative success in the UK local government and European Parliament elections this month of the anti-immigration party, the British National Party (BNP), and the anti-EU party, the United Kingdom Independence Party (UKIP), also illustrates this point.

COLLECTIVE ACTION

In our First Technical Session this afternoon we shall be examining the use of collective action to protect workers from international competition. In the British context this is both timely and topical.

Last Friday some 650 construction workers involved in building a new plant at the Lindsey oil refinery in Lincolnshire in Eastern England were dismissed for taking part in unofficial industrial action at the plant. The origins of the present incident are to be traced to events that occurred at the oil refinery in January 2009.[55]

After a competitive tendering exercise, the Italian construction contractor, IREM, had obtained a £200m (€180m) construction sub-contract with the US firm, Jacobs, to build a hydro desulphurisation unit at the Lindsey oil refinery site, owned by the French company, Total. On 28 January 2009, some 800 local contractors went on unofficial strike following the appointment by the Italian company of several hundred European (mainly Italian and Portuguese) contractors to work on the site. The dispute quickly attracted an air of xenophobia, causing at least one trade union (UNITE) to refute that characterisation of it. Instead the dispute became superficially one about the application of the EU Posted Workers Directive to the Italian and Portuguese workers. The argument became polarised around the British workers' fear that collectively negotiated terms and conditions in the local labour market were being undercut by the Italian company employing its own workforce on Italian terms and conditions, and that local workers were being prevented from applying for employment on the site. The dispute nicely illustrated the tensions between article 49 of the EC Treaty on freedom to provide cross-

[55] See http://en.wikipedia.org/wiki/2009_Lindsey_Oil_Refinery_strikes#cite_note-14 (last accessed on 19 June 2009).

border services and the supposed safeguards for migrant workers in the Posted Workers Directive.

Unofficial industrial action is usually unlawful under British collective labour law, as is the picketing and blockading that the site soon attracted. Meanwhile secondary industrial action, of equally doubtful legality, broke out elsewhere in support of the Lindsey strikers. On 30 January 2009, about 700 workers at the Grangemouth Oil Refinery in central Scotland walked out in solidarity with the Lincolnshire strikers. They were also joined by 50 workers in Aberthaw, in South Wales; 400 at the ICI site in Wilton, on Teesside; and walkouts also took place at the British Petroleum complex in Saltend, Hull.

The two main trade unions involved, UNITE and the GMB, agreed to talks with Total brokered by the state-funded Advisory, Conciliation & Arbitration Service (Acas). An agreement was reached on 5 February 2009 and the strikers returned to work on 9 February 2009. Total agreed to create 102 new jobs reserved for British workers, in addition to those already granted to the Italian contractor. Acas later reported that the Italian company, IREM, had not broken EU or British labour law in employing its own workforce at Lindsey, but it highlighted the tensions that competing EU laws had created at a time of economic recession and a depressed local labour market.

Unfortunately, the unofficial industrial action at the Lindsey oil refinery resumed on 11 June 2009. The cause on this occasion was not directly the employment of migrant or posted workers. It was the dismissal of 51 workers for redundancy, in circumstances where the workers argued, but Total denied, that there was a job security agreement in place since the earlier dispute in February 2009. The redundant workers argue that recruitment of workers was taking place elsewhere on the site and that their redundancies amounted to victimisation for their involvement as activists in the industrial action earlier in the year. Sympathy strikes at the Fiddlers Ferry Power Station in Cheshire followed on 15 June 2009 and again at Aberthaw in South Wales on 17 June 2009. The strikes escalated on 18 June 2009, with walkouts at Drax Power Station and Eggborough Power Station in Yorkshire and Ratcliffe-on-Soar Power Station in Nottinghamshire, BP Saltend, and the BOC oxygen plant at Scunthorpe.

This culminated in the dismissal of about 650 workers at Lindsey last Friday 19 June 2009, with Total indicating that they had until 1700 on Monday of this week to reapply for their jobs. In turn, this resulted in walkouts at the Stanlow oli refinery in Cheshire, again at Aberthaw in South Wales, the Ferrybridge power station in West Yorkshire, the Staythorpe power station in Nottinghamshire, and the Ensus chemical complex on Teesside.[56] Total appeared also to refuse to attend collective conciliation talks brokered by Acas. By Monday of this week, demonstrations and sympathy action had spread to other employers, workforces and sites; while the Lindsey workers burnt their dismissal letters in symbolic protest.

[56] See http://news.bbc.co.uk/1/hi/uk/8108941.stm (last accessed on 19 June 2009).

I should add two brief footnotes here before moving on to the next theme.

First, it is notable that nearly all the recent case law on migrant workers at the European Court of Justice concerns workers in the building trades and the construction industry.[57]

Secondly, in Britain, recent attention has focused upon a so-called 'black-list' of trade unionists and activists in the construction industry maintained by a body known as the Consulting Association. Construction companies were enabled to identify potential trouble-makers for an annual subscription and an individual search fee. Action by the UK's Information Commissioner has led to a successful prosecution of the Consulting Association under the Data Protection Act. The disclosure of the existence of the long-suspected black-list has led to a growing number of Employment Tribunal claims by those whose names appear on the list. They are bringing claims against construction companies who they allege have refused them employment or have dismissed them because of their perception as trouble-makers. These claims allege breach of British employment law aimed at discrimination against trade union members and activists.[58]

POSTED WORKERS

None of the incidents of industrial action at Lindsey (or further afield) have so far attracted legal action or labour court litigation, despite the heady mixture of complex EU employment law, relatively weak British employment rights, and a labyrinthine structure of collective labour law that appears not to protect collective bargaining or collective agreements, while restricting British workers ability to take lawful industrial action in support of national or local collective bargaining or prevailing terms and conditions. There is also presently no legal mechanism in British law whereby such terms and conditions readily assume a normative effect for workers generally in a local labour market or any particular industrial sector or activity.

The Posted Workers Directive is the subject of the Second Technical Session this afternoon. That it frequently appears as the villain of the piece is exemplified by the long-running dispute at the Staythorpe power station in Nottinghamshire in the East Midlands.

A £600m (€540m) plant is currently under construction on the site of two former coal-fired power stations at Staythorpe. It is owned by the German company, RWE. Alstom Power Ltd, part of a French multinational conglomerate, has the engineering, procurement and construction contract for the plant.

[57] See Claire Kilpatrick, 'The ECJ and labour law: a 2008 retrospective' (2009) 38(2) June, 180-208.
[58] See Trade Union & Labour Relations (Consolidation) Act 1992, section 137.

In October 2008 workers at Staythorpe protested that British workers were being discriminated against by two Spanish sub-contractors on the site (Montpressa and FMM) and that British workers were being denied employment. Alstom retorted that, while a small number of foreign sub-contractors used their existing employees upon the work in question, the larger number of jobs were being filled by local workers. Protests continued into January 2009, with British workers objecting to Spanish and Polish workers being employed at Staythorpe.

It is perhaps also worth mentioning the posted workers dispute at the Isle of Grain power station construction site owned by the German giant, E.On AG. It is reported in March 2009 that two trade unions, UNITE and GMB, discovered that Polish workers employed by Alstom on the construction work were being paid 30 per cent less than the locally agreed rate. The trade unions threatened to hold a national strike ballot for lawful industrial action. It appears that Alstom then agreed to pay the Polish workers the agreed rate of £14 (€12.60) per hour and the dispute was settled.[59]

THE FREE MOVEMENT OF WORKERS BETWEEN MEMBER STATES

In the Third Technical Session, to be held tomorrow morning, Congress will consider the rights of workers who move between Member States otherwise than as posted workers. Here we shall need to consider articles 39 and 49 of the EC Treaty and whether, and to what extent, the free movement of labour is the poor relation of the free movement of goods, services and capital.

But before we do so, I must share with you some fond memories of the BBC television comedy series produced in 1983 and entitled *Auf Wiedersehen Pet*.[60] This is not totally irrelevant to the theme of the free movement of workers. It is the story of seven out-of-work builders from various parts of England who are forced to look for work in what was then the German Federal Republic (the former West Germany). The title refers to the workers' farewells to their wives and girlfriends – obviously, 'Auf Wiedersehen' being German for 'Farewell', and (less obviously) 'Pet' being a term of endearment in Newcastle and the North-East of England, from which one of the main characters, Oz, hailed. The British workers find work on a German building site in Düsseldorf, but despite promises of hotel accommodation, they are forced to live in a small hut that reminds them of a prisoner of war (POW) camp. The Second World War remains a rich seam for British comedy, even 60 years later! The rest of the series is driven by the interactions and growing friendships between the various characters, until a change in German tax laws forces them to return home. Perhaps the effect of national fiscal policy upon employment rights in the EU could be the subject of a future Congress?

[59] See http://news.bbc.co.uk/1/hi/england/kent/7942585.stm (last accessed on 19 June 2009).
[60] See http://en.wikipedia.org/wiki/Auf_Wiedersehen_Pet (last accessed on 19 June 2009).

I mention the television programme because for many years it represented the stereotypical view of the experience for British workers of article 39 of the EC Treaty on the free movement of labour. I have been unable to find statistical evidence of how many British workers are posted abroad or how many exercise their rights under article 39. Perhaps if you know, you might share that evidence with Congress. However, in 2006, a study by IPPR suggested that 5.5m British-born people live overseas (both within and beyond the EU) and that two-thirds of that number have left the UK to seek employment.[61]

Returning to more orthodox legal materials, we shall need to consider and compare cross-border labour law developments by careful recourse to the most recent jurisprudence of the European Court of Justice. A keynote address is not the place for an analysis of that case law. We shall no doubt spend much time dissecting the post-*Laval* and post-*Viking* cases of *Rüffert*, *Commission v Luxembourg* and *Holmqvist*.[62] In the most recent issue of the *Industrial Law Journal*, the leading UK academic labour law periodical, Dr Claire Kilpatrick of the London School of Economics concluded that:

> 'If there is a moral to these … cases, it is this: beware working mainly abroad while keeping a home-state employer. Unlike those entering the labour market of the country they work in … those with a foot in a number of countries risk the worst of both worlds. Hence, the posted worker … finds himself working abroad, normally in a richer Member State, but not entitled to the same terms and conditions as those in the country he is working in'.[63]

What we see apparently is the ECJ orchestrating an unhappy liaison between article 39 (on free movement of labour and non-discrimination against the migrant worker); article 49 (on free movement of services); and the Posted Workers Directive — in which, as Dr Kilpatrick convincingly demonstrates, the applicable legal instruments remain the same, but their interpretation is revolutionised and what was once a paradigm of strong worker protection is diluted by lowering the article 49 ceiling and then converting the Posted Workers Directive minimum floor of worker rights into an exhaustive and restrictively defined ceiling of rights.

Is it thus better to be a mobile worker (in the British sense of that term, with usually strong contractual rights within the domestic labour market) or a migrant worker (free to make labour market choices across the EU and comforted with article 39 protection) or a posted worker (at the mercy of article 49 market forces and cloaked only in the bare threads of the Posted Workers Directive)?

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[61] Dhananjayan Sriskandarajah and Catherine Drew, *Brits Abroad:Mapping the Scale and Nature of British Emigration* (IPPR, 2006).

[62] *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet Case C-341-05; International Transport Workers Federation v Viking Line ABP Case C-438/05; Rüffert v Land Niedersachsen* Case C-346/06; *Svenska Staten v Holmqvist* Case C-310/07; *Commission of the European Communities v Luxembourg* Case C-319/06.

[63] See Claire Kilpatrick, 'The ECJ and labour law: a 2008 retrospective' (2009) 38(2) June, 180-208 at 195.

CONCLUDING REMARKS

We have set ourselves an ambitious agenda for this Congress. Given that this is the European Association of Labour Court Judges, it is appropriate that much emphasis in our discussions should be placed upon EU labour law on migrant workers, especially since the 2004 and 2007 accessions. However, we should not neglect the EEA countries nor developments in the domestic laws on migrant workers in the individual Members States.

I hope too that we shall find a little time to consider some tangential areas, of which I suggest these as particularly apposite:

- the effect of domestic immigration rules upon migrant workers
- jurisdictional questions arising from EU citizens working for EU employers outside their home state or EU boundaries
- the employment rights of migrant workers from outside the EU and EEA areas
- the interaction of the free movement of capital and the freedom of establishment with the employment rights of both indigenous (home state) workers and migrant or posted workers
- the abuse and exploitation of migrant workers in effectively unregulated areas of the labour market (for example, shellfish gathering by gangs controlled by gangmasters)
- migrant workers who are in debt bondage or bonded labour, often as a consequence or condition of having availed themselves of covert means of illegal immigration into a European state from a non-European state.

I suggest that these last two areas are especially worthy of our examination.

In the UK, one model is provided for by the Gangmasters (Licensing) Act 2004, which established the Gangmasters Licensing Authority. This measure was passed following the Morecombe Bay cockling disaster,[64] in which 21 persons of a gang of illegal Chinese immigrant workers, untrained and inexperienced, were drowned while gathering shellfish in a treacherous coastal area of the North-West of England. While the tragedy was preceded by territorial disputes between the migrant workers and the local British cockle-pickers, the real villains of the piece were the Chinese and British gangmasters and their associates who controlled the migrant workers: doing so blatantly in breach of immigration laws, health and safety regulations, and national minimum wage standards. Successful prosecutions for manslaughter, breach of immigration rules and perverting the course of justice resulted in 2006. Attempts to establish criminal liability for those who bought and sold on the shellfish produce to the restaurant trade, and who

[64] See http://en.wikipedia.org/wiki/2004_Morecambe_Bay_cockling_disaster (last accessed on 21 June 2009).

created the harsh economic and market conditions in which labour standards were so easily sacrificed, were unsuccessful.

Yet despite the advance made by the Gangmasters (Licensing) Act 2004, it is notable that the Act does not extend to regulate gangmaster activity beyond agriculture, food processing and shellfish gathering. The British TUC has been especially critical of the law's limited reach and its failure to extend into other areas of concern, namely, construction, hospitality and care: areas where, variously, East European, Chinese and South-East Asian workers are known to be exploited and exploitable.

It remains only for me to wish you well in our endeavours this weekend and to thank our visiting speakers in anticipation of their valuable contribution to our debate. I hope too that you will enjoy your stay in Liverpool and that our social menu will be as enjoyable as our intellectual agenda will be fulfilling.

Appendix IV

Programme

EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

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Thirteenth Congress of the EALCJ
Liverpool, United Kingdom

PROGRAMME

Thursday 25th June 2009

Arrival of delegates at Jury's Hotel

18.00 – 20.00 Drinks reception at Pan Am Bar – Albert Dock

19.45 Informal dinner at "Gusto's"

Friday 26th June 2009

Conference Suite, Cunard Building, Pier Head Liverpool

9.0 Registration

9.30 Opening. Welcome to delegates by Mr Justice Underhill

9.45 Keynote Address –**"The impact of mobility of workers and enterprises on employment rights**" – Dr Brian Doyle, Regional Employment Judge and former Professor of Law, University of Liverpool".

10.45 Coffee break

11.15 Panel discussion – "The effect of the recession on protectionism and mobility of labour" – Chaired by Prof Alan Neal
- Charlotte O'Brien of University of Liverpool
- Samantha Currie of University of Liverpool

13.00 Lunch

14.00 First Technical Session – " *The use of collective action to protect workers from international competition*"

15.30 offee break.

15.45 Second Technical Session – "*The rights of posted workers under the Posting of Workers Framework Directive 96/71"*

17.15 Close of session

17.20 Optional tour of sections of the Cunard Building

19.15 Formal dinner at "The Athenaeum"

Saturday 27th June 2009

9.30 Third Technical Session – "*The rights of workers, including casual workers, moving between Member States otherwise than through posting"*.

3) Coffee

5) Plenary session – Feedback, synthesis and conclusion.

12.00 Close of Conference.

12.15 Annual General Meeting of EALCJ

13.00 Lunch

14.00 Social Programme – choice of three tours as follows:-

5) Liverpool – Second City of the Empire
6) The "Beatles" Tour – ending with cocktails at "The Hard Day's Night Hotel"
7) A cruise on the River Mersey

18.45 Dinner – "The Place to Eat"
Third Floor, John Lewis, Liverpool One

Appendix V

Notes of Proceedings

EUROPEAN ASSOCIATION OF LABOUR COURT JUDGES

Thirteenth Congress of the EALCJ

CONFERENCE DAY 1
26 June 2009

Opening address by Sir N Underhill

We are pleased to offer this hospitality with this conference as an opportunity to learn and exchange problems, and develop friendships. Michael has a lot to live up to; there was Vienna and Oslo last year. I can't be here tomorrow and need not make the painful choice between the programme, which is one suited to this organisation. The judiciary attracts a number of academics, Brian and Alan Neil, and I am pleased to be here and will sit back and learn something.

Opening address Giovanni Mammone

The impact of mobility of workers, a follow up of the 2007 Oslo conference and the problems on European national systems. At the end of my speech I thank very much the organisers – MHD and all of you for attending.

Key note address – Dr B Doyle copy of keynote address available.

Overnight the Lindsey dispute has been settled. Workers were demonstrating in Paris. The 647 workers will be re-instated, and this will be put to workers by TU by Monday, with a recommendation of acceptance. We

I do not know what was the real source of that agreement that led to re-instatement. Last month, in a less well reported dispute, at a liquefied natural gas terminal in West Wales. 200 workers striked about whether local workers were being given a fair chance to compete alongside posted workers. It was resolved by the agreement that 40 non-UK posted workers would be withdrawn and returned home, and the jobs would be filled with British workers as opposed to polish workers that had been recruited in Poland. I cannot find pride in the resolution of that dispute.

S 1992 TULRA S.137 – we have 30 such cases in this region.
Focusing upon one area of EU law leads us to having to consider closely linked areas.

Questions

A consolidated treaty – free movement is now Article 45 was Article 39. I was referring EC treaty as amended at Nice but before the consolidations.
Art 43 is 49 for the right of establishment in the consolidated version. Right to services is art 49 in Nice treaty and Art 36 in the consolidation.

Q: A large influx of migrant workers in 2004-07 had almost no impact which I found surprising? It was bound to have an effect on wages levels and job opportunities in service industries.

A: it is about impact at macroeconomic terms – it doesn't appear that job opportunities have been reduced, nor does it affect the level of wages. The IPPR report is counter-intuitive, and our intuitive is not borne out by closer analysis.

Charlotte: we are focusing on that set period of time, a lot of migrants filled labour shortages. Timing of the research.

BD: Similar kind of debate to Hong Kong migrants when economy was in good shape and able to accommodate the workers.

AN: they were looking at the impact on social services, not just the labour market. When you look at the age profiles, it is healthy young people coming to work hard and returning home and therefore impact is neutral. New research is taking place about looking at secondary impact – what are the direct measurable consequences. It also asks about people who might have been in the education, and if this has been changed with payment of fees, and the assumption was that student would also do some part-time working. Traditional models were delivering post at Xmas, fruit picking. There was a model to finance that, but those jobs are no longer available as part time seasonal jobs but are full time jobs. Now at university conferences there are permanent staff who speak middle European language and not students, as would have happened ten years ago.

BD: IPPR is a think tank of liberal persuasion.

“The effect of recession on protectionism and mobility of labour”.

Alan Neil: Introducing C O’Brien and S Currie, Liverpool University, who are producing the worthwhile research. I was on a lecture tour in China and brought into contact with movement within a continent. Nobody is affording to buy their export goods and that is having an effect. The biggest issue is now mobile workers who move from provinces to the reach South East corner where wages are generally higher. The migrant workers, 260 million, have all gone home because of the recession and now have to be reassimilated within their home province. We are seeing similar things in EU, with the discussions with potential future members – Turkey, Ukraine and former Soviet Union. These are issues we have to take into account.
Today’s discussion – mobility of labour has a two faceted aspect as well.

C O’Brien: The perspective form which I approach the topic, my main area of research is EU migration law.

1. The impact of the recession impacting upon the rights of migrant workers 2004 and 2008, those who access work in the UK. Migrant workers who derive their rights from Art.39. They are currently subject to transitional free movement in some of the older member states.
2. In terms of their legal rights, in May 2009 the government decided to maintain a Worker Registration Scheme, which was anticipated to end in 2009. Recession was a key influencing factor in the extension of the Workers Registration Scheme. Abolishing the scheme might slightly reduce the work available to UK members.
3. The UK has a reputation as a generous member state in terms of its policy for free movement, but there is less generous aspect. Only EU nationals in work and in continuous employed for 12 months are entitled to rely upon equal treatment.
4. EU nationals in UK have more restricted access to a benefit, e.g. if they have been engaged for registered work within 12 month period. A Polish woman who had worked in Northern Ireland for over a year and she had changed her employer after 6 months but had not registered her new employment. She was living in a Woman’s Aid hostel could not claim for Income Support. This highlights the impact of the system on individual migrants by the continued registration policy.
5. Bulgaria and Romania joined EU and the economic climate had started to change. The UK implemented a worker organisation scheme. There EU nationals are more analogous with the rights of non-nationals compared to the older EU nationals.
6. Social and employment conditions – some evidence e.g. IPP, that migration from EU has started to tail off as recession started to take hold, and many migrants have returned home. Remaining migrants, despite the differences in their legal rights, significant numbers are working in insecure temporary employment. Research has highlighted factory work, hospitality, construction. This recession is most severe in those sectors with migrant workers. They are the first to be let go. They also have to compete with British workers, e.g. a bus company who now have many more British bus workers and who used to have more

migrant workers. But this might be a too simple analysis. An increase in vulnerable employment accompanies a recession.

7. TU has found evidence of employees shifting employees to self-employed so that they have fewer rights and poorer working conditions. Illegal employment is increasing.
8. There is an increase towards racist actions aimed at migrants that goes hand-in-hand with recession. It is impacting on non-nationals right across the board, not just posted workers. Portuguese and Italian workers are experiencing unfavourable conditions so what hope is there for other migrant workers?

Alan Neal – Warning about making simplistic leads about the statistical shifts and what causes those shifts. The question about the realisation that the EU protections can be a barrier outside the member's states and when you fall outside that barrier you are badly off. In UK statistical data the employment rates for that group of migrant workers are much higher than the indigenous British workforce – longer hours (about 4) and younger healthy people coming to work hard and not making a negative impact on the infrastructure.

S. Currie: I have identified a legislative gap as far as migrant workers are concerned, within EU legislation and brought to that my anecdotal evidence via CAB experiences. My premise is that there is a marked difference between migrant workers and others. There are transitional provisions for people who have employment status; there are a number of people who are not covered. They lose their job, become economically inactive and lose migrant worker status that has a direct impact on a number of rights – e.g. housing etc. Also have indirect impact on the employment right and the utility thereof on migrants while they are still in work.

Worker is entitled to equal treatment and access to social and tax advantages, housing access. Loss of worker status there are temporary stopgaps available – involuntarily unemployed but people voluntarily unemployed become "economically inactive" and this has an immediate effect on the right to reside and this can affect the migrants from the recent accession state – JBA.
The indirect effect, the problem is the label of voluntarily unemployed. Workers are concerned as being identified as this. Case law is vague as to what that means. There is reference to misbehaviour. Common sense means that people want to leave a job because not been paid enough, want to relocate for family, etc. This has an impact on their ability to seek alternative job, e.g. relocation and you lose your right to go on the housing list. The burden of proof, they can say they have been exploited but there are employers who will claim in retrospect that there was misbehaviour if they are retaliating to an allegation of exploitative behaviour. They are scared of finding themselves in this position, and will put up with less than the minimum wage. They live in a certain place and have to pay exorbitant rent for it. Migrant forgoes accessing their employment rights because they want to stay in their jobs because there is no transition whereby they can find alternative work. In a recession – migrant workers are more sensitive to losing their job

and more likely to put up with the conditions of their job rather than loose worker status.

Recession exacerbates this problem through spurious allegations to cut down and get rid of them without making them redundant. If redundant they are involuntarily unemployed. This is a possible transition gap, because there is no easy way for people to stop themselves being made voluntarily employed.

AN: the way in which non-legal relationship impact upon people seeing to enjoy protection of employment rights. We have examples: CA 2005, a Croatian worker was found not to have the right to bring a discrimination claim. The rights are out of reach, and mechanisms for them are not available. You find that a lot of the sharp end research has come from experience with CAB – alarming in areas of social welfare and benefit. We have a variety of jurisdictions, mixing social and labour law. There is a health and safety aspect, and a lot of research has emerged about dangers with migrant groups with problems of language and no access to true protection.

Discussions and comments

Netherlands: The story about the fear of becoming voluntarily unemployed. We have similar systems and fears, but there is heavy burden of proof to explain a certain worker is to be voluntarily employed and without benefit. The same is true in dismissal litigation – for a worker to go to court; he may say I better not because it could have adverse effects. He may look forward to a fair trial when his employer is trying to set up a story, it would be hard for his employer to prove his case.

Germany: Minimum wages – in our country we have just had a discussion about this because we are facing general elections. The guarantee of minimum wages for workers, in our country we have a kind of minimum wages and the employer, if he doesn't want to keep them, he evades law and tells them from next month you pay not £100 but £150 for your room and food. Legal or discrimination?

Netherlands – a gap between the official figures. A labour inspector controls employers who pay minimum wage and last year only 300 fines were ordered. Polish workers were interviewed and that 40 percent of them did not get minimum wage. Officially there is hardly any problem but in reality there is.

AN: This is an area where we don't get the papers coming before us?

Germany: they don't know their rights, language, and so a great number of cases don't some to us. Once the foreign workers have access to the labour market they have the same rights. The only advantage for employers to employ foreign workers is that migrant workers are not members of a trade union. Agreements can apply only to members of trade union and trade associations, not migrant workers.

UK: Trade unions – I'm ignorant as to the extent they see it as part of their role to protect the interests of migrant workers. Other countries?

UK: in the NW we are seeing polish national cases, by far the largest group, rarely represented by TU. They have discovered their rights through local Catholic Church and Polish centres. They come to use with a headline problem e.g. wages non payment, but is also failure to pay the minimum wage £5-6.00.

Italy: difference is between social security – it is essential that the worker is a member worker. Outside the union, North Africa, Russia etc, for these there is no social security. They have no particular right, but they can ask for wages but not social security.

S Ireland: We have had a significant change in the economy. We had 400,000 foreign nationals, 50% of the migrant workers would be polish/eastern European and the other part Chinese. A lot have not got good English, which means they require representation. If they lose their jobs, which they have, construction industry is 60% down, all are entitled to agreement rates for certain jobs and they were on very good money. When they lost their jobs, some of the families were in England, and they moved to London to try and get jobs in the Olympic building. They make an application to us for a redundancy payment. They have to go back in Poland, and we have difficulty advising them of Tribunal dates, and if they don't' we can make an order. They don't turn up, and they have lost a substantial redundancy payment – 5/6 000 Euros and all the other rights as well. Also a problem in relation to time limits, 6 months from the date of the breach to make a wages act claim. We do not have legal aid, we have CAB, but they are not experts in this area. Migrant workers on the face of it are not treated disadvantageously, but because of these difficulties they are at a loss.

Austria: we have a problem with illegal work. In some of the new countries there are places known where unemployed workers from new member states gather and wait for being asked to work in the underground. It is heavily fined, but people use such sources of cheap workers, especially in the building sector and care home sector. These persons become regular black workers, and it can cost Austrian people. People who work in care homes cannot enforce minimum wage. It is unspoken and not well-recorded, but the government who knows about it doesn't do anything. The laws are not executed. After the traditional period we will have to deal with it.

Malta: we have the same situation, Libyan illegal immigrants which Libya and EU knows about it. Laws are not being enforced. They are supposed to register and get a permit to work, but not all are doing this. Not in homecare but in building trade. It has affected us. Hardly any cases are being brought to court- no civil cases and yet everyone knows about it. You see them in packs – police turn a blind eye.

AN: laws not applied.

UK: you get agencies with high numbers of East European who works in companies that have their own permanent workforce. The employer will tell the agency the production line is closed and people are told every night that there is no work for them. They are employed as a flexible worker by the agency, guaranteed 100 hours of work at the discretion of the agency. It takes away a lot of security and is disadvantageous compared to the permanent workforce, undermining protection of national labour law.

AN: Creativity on the part of employers on their relationship and employment practices is starting to impose real challenges on who is worker/employee and who is in the protected category.

Hungary: in Hungary there are agencies that are paid a fee to organise an employment relationship. There is a lot of false information. Doctors and nurses come to England for higher wages.

AN: there is evidence that with the change of political regimes after 1980's, employees basic skills to a high level to a technical competence are no longer produced, and trained workers are advantageous.

We have no minimum wage – employer must pay insurance but under the table they get much more money from our foreign employers. Polish people in gold mines and then Vietnamese engaged by the agency of labour whose programme is unfair. 8000 Vietnamese are illegally engaged, a 60,000 community. We can see workers from the East come to our country, Germany or Austria. In a period of 4 years, 2012, it is necessary to have permission for working.

S Ireland: would it be possible by tomorrow morning about how the case load has raised i.e. in Stuttgart it has doubled.

AN: Even an impressionistic sense on caseload and make up of cases would be very valuable, to be followed up in the next week or so. In China it has doubled every 6 weeks in the last 2 years, so access to justice is a real issue. Secretariat could take this up.

Samantha: Minimum wage and taking money from migrants in other ways. There are plenty of examples of this. It is technically illegal under UK law because of the way minimum wages are calculated. But they don't come to light. The gap between official figures and reality, statistics are unreliable but there are numerous examples where the figures to not give the true picture. In UK we only monitor migrants that register on the worker registration scheme. There is no mechanism for de-registration. Trade union issue – I come across conflicting reports. Polish migrants not always able to tap into TU, but in academic conferences 2004/05, Polish workers were reinvigorating the TU, who are in a difficult position now with the recession biting because TU is being put under pressure by British workers. TUC has done research into migrant workers. There has been an increase in illegal employment in Austria, which along with Germany has restriction process with a resulting increase in

illegal employment. You have limited rights of access, but the effect of it is to divert people in the shadow economy. If lifted, it may not be such a problem.
Austria and bogus self employment, case C16107, involving infringement of freedom of establishment.

Charlotte: The use of different contractual terms within the same company, especially low hour flexible contracts. This has massive implication because the migrant worker is prepared to alter all their employment rights. Statutory rights suppressed in the contract. Health and safety – lorry drivers are accidents waiting to happen. They drive for 20 hours straight to earn money and not lose their job.

The high burden of proof – my observation is that the ECJ takes a broad view of what constitutes voluntary unemployment. Even if there is a high burden, the DWP, will make instantaneous decision based upon what they have been told by the employer. You can appeal, but it takes time, resources and literacy. I recently dealt with a case and the Polish worker went back to Poland.

Minimum wage issue is a case of how to enforce what is illegal. Deductions up to a certain point are legal. If made via wages check there is not much enforcement of the process. People I see do have advice from a TU.

AN: thanking speakers. This a real challenge. The non-enforcement of existing rights, the role of inspectorate and access to justice where an inspectorate is not available. They may only be vaguely aware of their rights, and may not understand. It leaves us as not the best people to use as the level of entry because there are assumptions about access to knowledge, resources. Interesting when we touched upon illegal work, we then lose our jurisdiction. These are routes when people suffer disadvantage. Even if you try and enforce rights, you can lose those rights. Questions about the trade union role are sharp. Should it be jobs for local or migrant workers – the TU is in an impossible position. There are conflicts on sourcing etc, insuperable problems in a world that has dismantled most of the collective bargaining.
The research available were we look to see the impact of migration – Select Committee in House of Lords: they were looking a the wage impact of migrant workers in UK, and when they looked at the resident worker whose wages had been adversely affected by immigration, they said the groups most likely to be affected was earlier groups of immigrants and ethnic minorities. We are not likely to see the pre-knock on effects – we see selection for redundancy, choice out of a group for economic reasons. China – social stability has been the driver for labour law reforms, and our labour law and employment protection have been dismantled over twenty years. The bigger picture of social instability and economic downturn might give us a window of opportunity.

Collective action as a means of protecting workers from international competition – where does European collective labour law come from? It is not an area EU can legislate on. The EU court has given decisions about the right to collective action – it finds it in principles, international treaty and documents

and also the practices of the countries. Who says there is a fundamental right to take action? Many of our countries do have provision in the constitution or elsewhere, but most of this part of labour law is made by the European labour judges. We develop this in the national context which has been taken over by the European court. In listening to the discussion this morning, for non UK citizen, the role of labour relations and the unions are different. Even terms like “walkout” I can’t even translate it in Dutch. This is everyday speech. The way of handling this right and collective action is very different. What is in our minds as labour judges?

Topics important in relation to the recent cases of the EU Court (V Luxembourg). The impact of ECJ cases can go either way, a clear restriction as laid down in the Laval case. But, the principle and unrestricted recognition of the existence of the fundamental right to collective action can make a more liberal right in some countries. Some countries can have different problems with the case to other cases.

The right to strike/freedom to strike is protected – the issues to discuss are secondary actions – are they legal and how does this relate to the European court? Proportionality test – ECJ has pointed out that in order to be legal in collective action in defence of the rights of workers which at the same time constitute a restriction, it must be proportionate. What is the proportionality test? It is not clear. We need to reach a point where we know the problems we have to face on the proportionality test.

Overview

Sweden and Finland case, which had a funny end. Should sailors be allowed to take part in a collective action to force the employer to apply a collective agreement? ECJ decision comments on it. A big issue was that the employer is intending to pay for the high cost of the Nordic agreement. The ship was sold to Sweden. Be very suspicious about expostulating ideas about facts. Danish labour court there was collective action to apply Danish minimum wages to posted workers from another member state, that wages were so fundamental that it was not possible to describe the strike as illegal.

Ukraine – freedom of establishment, but the case was withdrawn and didn’t come to judgment.

Belgium- 2005 strike that did not come to a case but almost did. It was a strike against a replacement of workers in the food industry. Workers were hired by a temporary work agency based in the Netherlands. The workers were not posted workers because either they were employed by a Dutch employer or worked in Belgium. Germany had a case against the removal of establishments – Poland and Romania. There was trade union who demanded in a redundancy situation that foreign workers would have to leave first. In the end, nothing came of it.

What did TU ask?

Hungary: 2 cases- 1 were where the company decided collective redundancy. Slovenian employees were dismissed instead of Hungarians. In the second case there was a strike – they wanted a collective agreement with Hungarian workers but there are international standards. Only for this, "we don't want foreign workers working in this company". If there is one legal demand the whole strike is legal.

Q: this would not have consequences for the collective agreement.

Yes, if the collective agreement said we want foreigners out it would be illegal.
In Ireland protection is done not by striking when there is the right, there is immunity from a tort. We shall see when this can/cannot be applied.

In Lithuania you can ask the judge about the strike. There is a right to collective action for the individual rights of the worker. If the worker uses this right there can be no retaliation because he took part in an action. This is not the same in all of our countries. In Sweden, far more important is what is set down in the directive. There is a broad recognition of the right so strike, but not as broad as the ECJ thought. ECJ: under ECJ law, a misunderstanding, what is illegal is the boycott – members of the union will not cooperate in offering services on behalf of the union.

Germany: constitution has a provision about collective bargaining – a freedom of association. Case law of the federal labour court includes the right to strike. I've recently read a case before the Federal Labour Court, this right to strike was opened up a little better.

Germany: June 2007.

Taco: there was change in the case law where it used to recognise the right to strike only in connection with a collective agreement where the workers were on strike, but now it has opened up a little and there is some possibility ...The European Social Charter recognises the right to strike in a broad manner.

Germany: it was a decision taken when the trade union proclaimed to strike in favour of the workers for another factory. They might have the right to strike for the purpose of a linked collective agreement.

Taco: If Laval case was applied the staff would be illegal because of secondary action. Other documents including the Lisbon Treaty is of interest, and the European Social Charter for the recognition of the right to strike as a fundamental right without national legislation coming in. Last year human rights court gave judgment on Art.11 and it changed the case law. In a Turkish case, European Court has explicitly recognised the right to bargain collectively and the basis of the Human Rights Convention. For all of us, being aware of these changes that are taking place at a European level is important.

Austria: there is very little about the right to bring collective action, but from case law this right is recognised as a fundamental right/freedom.

Austria: No guaranteed right to strike, or take instruments as a guaranteed right. It is heavily discussed that there is the right of assembly and collective action. If legal action is taken by the employer the judge has to decide whether there was good reason for the action taken. Is the employer violating the right of employees by not granting that person security? Part of the employment agreement is that if employer doesn't fulfil his duties, the employee cannot do work. Sometime, in special cases e.g. captain Austrian airline some years ago tried to get a better collective agreement. It was tolerated, there was no final position whether the walk out was legal or not. That wasn't the point it is not illegal. In labour court you have to give evidence that there is a good reason for the action.

Taco: illegal workers who lays down tool for Health and safety.

Austria: A good reason to stop working. The trade unions do not have more rights than individual employees, but if an employer dismisses employee because they are taking part in a strike the Court has to deal with this. It didn't get to the Supreme Court and we didn't need to make a specific statement but is understood the employee does not get wages during the strike.

Taco: When the right to strike is not practiced so much, you do not have so much certainty.

The EU stance is a broad recognition in the course of case law, which covers in principle the recognition of the right to collective action as a fundamental right, in all countries, even Sweden. EU court in Luxemburg does not regulate the right to strike in member states, and can the infringement be justified? It appears only in the case law of the ECJ. If there is a conflict between national proactive and European law? It does not open the door so wide for member states if there is a restricted law. Wouldn't it be strange if the fundamental right to collective action was given by the European Court, and then individual countries could work out practices at home?
In Austria, cases which the EU court dealt with did not put down this restriction. Transport Workers federation was conducting secondary action.

It seems that the way the EC dealt with secondary action is open and broad and doesn't ask for restrictions.

Ireland: You are only allowed to have secondary action if there is a link between employers i.e. supporting employer. Any decision by any worker to strike, there is no right but it is permitted.

Taco: Same as Sweden.

Ireland: You need procedures.

Taco: Bargain or go through arbitration.

Ireland: Art 40 sets out specified and unspecified rights.

Taco: developments in case law – Germany, Austria and Ireland, you could reason towards a more liberal attitude – human rights being taken into accounts.

Close discussion on secondary action and discuss proportionality. One of the issues about Laval is what did ECJ mean about the proportionality test?

Overview of how we deal with proportionality? One country says that no such test is needed – Sweden. In the otter countries, in applying and using the right to strike, we must observe proportionality. There are 2 ideas:

1. A formal one – application of collective action must not go beyond what is needed.
2. Another test weighs interests involved – how importance weighs the interests of parties.

Germany: right of employees and interest of new employer. You have 2 different constitutional aspects – another approach to the problem. Another perspective – proportionality involves the interest of workers and fundamental right of the employer. In Germany proportionality is based on fundamental rights of workers within the union.

Helmut: Whether the worker who is a member of the trade union and he wants to go to work, workers who want to strike must be protected.

Proportionality and weighing all of the interests and all of the parties involved. A combination of what I have meant so far, proportionality would be that the judge only put involved influences into one basket.

UK: it is the right to take industrial action, the right of establishment. An express right not a general question of balances and influenced. A person who sets out to damage that person's right to strike would be told you can't do that.

Taco: we have different concepts of proportionality and it is not clear what the ECJ means. EU has further demands for the legality of the action – a legitimate aim. The way in which the ECJ and fundamental rights appeal to me that the EU code created a hierarchy. Does collective action restrict freedom of movement and can it be jostled? Does the collective not go beyond what is necessary to achieve the objective? Conflicting fundamental rights of environmentalists to demonstrate and use their freedom of expression. In that case the court used the words balancing of interest, this is evidential, if I look the rest – which fundamental right of the people should prevail?

Leval: See if there is a restriction on freedom and then seek for a justification. We should be prudent in reading these cases. Only have 2 cases but more might's follow.

Czech: balance of interest is a fact and I put a question to myself, what was the interest if the protector of nature stopped.

Taco: remedies and sanctions in remembering the different ways in which the right to collective action is protected. / Illegal collective action – what happens next? Here are also differences.

End of session

Second Technical Session – "The Rights of Posted Workers under the Posting of Workers Framework Directive 96/71.

Tom Moes

In Luxembourg and implementation in 2002 – last year 18 June 2008 judgment in the case. In Laval and Viking cases, the ECJ – the Court refers to a nucleus of rules, there must be only some nucleus of some rules, a minimum and not a maximum. Lux protection was too high. A standard protection for posted workers. Lux has implemented the Directive falsely and with insufficient clarity. Freedom of providing services had to prevail above the other provisions, and the ECJ has become more liberal in construction of the Viking cases.

Italy: Implementation of the Directive is very similar. Reference is made to the national collective agreement – it is a direct way to apply the legislation to these workers.

Germany: Controversial topic because it is a high cost country with high wages. The problem is that posted workers must have minimum social rights guaranteed. The 1996 Act is protectionism and every member state has to ask the reason why – protecting the German market. Difficult to draw the line between prohibition of competition and protection of workers. We have minimum rights and we cannot widen it. The Directive has to respect the system of balancing and anything beyond this is a breach.

UK BD: they have many problems with posted workers. Directive has not been implemented, and we took the view that it pervades our system of the law. We are troubled, Clare Kilpatrick quote, is typical of academics view of where the jurisprudence of EU has taken us, which is workers' rights have been sacrificed for freedom to provide services.

A Neal: Another example of ECJ where the courts will have to decide. With common law situation the judges are free to fill some of those gaps, even if you can't find the implementation provision it is there somewhere. It leaves

the judge in an impossible situation, at level of ET and EAT. We now have big holes.

Italy: the same rights with Italian workers are extended to posted workers. There is no case on this matter, but the academy says that this way is too wide and should be more restrictive. It is an important debate, because the proceedings against Lux were a move by the commission, and the position of employer is in some way conditioned by the too wide interpretation. This is particular point of view, and we must discuss this.

Belgium: We have very wide provisions, so the concept is very wide – acts, royal decrees. They are subject to criminal law.

Ireland: Posted Workers Directive – the intention was to protect the interests of industry and ensure Portuguese contractors undercutting German contractors would use a little bit of their competitive edge by safeguards being applied. I'm not surprised that the ECJ took the view that it should be interpreted in such a way so as to reduce the level of protection.

Lux: interesting point is the objective of the Directive.

Germany: approach of the directive is to define fair competition. What does this mean? To guarantee to posted workers the highest level of workers protection. It can be interpreted according or in breach of the Treaty. Germany has a core of basic rights to all workers, rest periods, holidays, and that it where it starts to cost the employer. Germany doesn't have statutory minimum wage and the level of wages paid to posted workers is fixed by the country where the posted worker comes from. Posted worker only comes for a short time to Germany, and this is legitimate.

UK: BD Posted workers directive has taken us by surprised – we viewed it as a labour law measure and it has turned out to be a composite law. It is interesting to study the composition of the bench can pre-determine the legal approach. The composition of the first chamber was a competition law chamber and we may need to keep a close eye on how labour law is dealt with. Which judicial membership is deciding the issue?

CS: We are seeing a conflict of attitude within different countries. It depends on the objective and effect. The stated objective is to give posted workers protection, but in the Lux case it look as if the court took the view that it is a protective measure. The interpretation, the impression given is that the whole regulations are to discourage posted workers and not protect them. Are migrant workers beneficiaries or are they being exploited?

Netherlands: Case law does not constitute so many problems - that has to do the way our labour law is structured. What we did with the implementation legislation was almost copy the text of the posted directive. Politically, we have problems in dealing with rights and interests on workers from low wage counties. It must be possible to post workers for a short time without having too much to do with the regulations and the conditions that apply to that

country. What is temporary – nowhere to be found in directive or case law. It is temporary as long as there is an intention he will be going back to his country. Why should a posted worker who has been in that country for some time be treated differently to a migrant worker? It is a flaw in the Directive. The public policy perception – the Court uses a narrow concept in the Lux case, but it does leave things open whether Lux made it clear that it was public policy, Postal services and free movement – Court interprets the Directive and sets out a national level of protection. We are interpreting the Directive – you cannot restrict the freedom of services if you don't have a public interest to justify it. Public interest justification and you may restrict freedom of services. Court not given a definition for minimum wage i.e. all levels of wages mentioned in a collective agreement, Health and safety etc are areas of protection and member states are free to find the protection in a general manner. I do not know how high the level of freedom extends. E.g. a hosting member state there is a reciprocal agreement that extend the rights to 5 weeks paid holiday and the 5 weeks should be provided to the employee as a protection measure. I don't know where a maximum could end.

Hungary: the labour court copies the Directives in relation to the maximum working time, and other new regulations e.g. posting time maximum is 44 days each year, and pregnant woman protection.

Czech: we have incorporated the directive in our labour code, and the minimum working hours, wages etc are allowed.

Finland: We have the same rights for posted workers.

UK: It was recognised when the Directive came the UK was comfortable, but a pragmatic view was taken that largely the employer would not need to apply them. But there are disputes arising concerning lower paid workers being brought in when there is a downturn in the economy.

Germany: Posted workers concept is also in social security's measures with a time limit of 12 days set out. They have a strong link in the labour market of the host country. It is an unclear regulation. Protectionist aim – Germany has extended to the cleaning and construction, and nursery as well, the possibilities of exemptions of the rules because the directive said it was short terms postings. Directive is used to implement minimum wages, for national politics we broadened the scope of the law.

Austria: In the national report it is said the posting for workers in the framework Directive was implemented by the special act and an adjustment of labour law. Every occasion we cannot adjust if there is no special law implemented. It is no more that the Directive itself. A posted worker has the claim for Austrian annual leave during the posting and he keeps the claim for the difference. I don't know how this is executed. If a worker is in Austria, and the holiday entitlements are different, the worker can claim for the difference. If the worker reaches out to his own company, I don't know how he can to do this.

There are special provisions concerning public rights because the persons are subject to security and administration, no matter whether they are permanent or posted worker under the Equal Treatment Act. Not much Czech.

France: We have to respect public holidays, but we don't know about minimum wages.

Alan Neil: There are sharp issues about the gap between Court of Justice showing signs of liberalism. We are seeing a new style of approach to social policy directives. Look to the motivations and preamble. It shows no sign of the reasoning process. There is no question that if you look at this sort of reasoning, you are seeing what looks like the same arguments in completion law and restrictive measures and measures of equivalent effect. That sends a message for alarm, and we have seen acceleration for a market approach. Does labour law change in a recession – it does, and the national judge is left with scope for interpretation. Alarm bells on social policy and those that concern all of us, because the ECJ is no longer defining narrowly, but we are where this is message applicable more generally. We are seeing a greater degree of interventions; they are going further and saying the old approach is no longer the wanted approach. The challenge is one brought by the member state and the state is not in compliance and then what is the freedom within the derogations built into the directive? There were derogations that reflected values of twenty years ago. We see the Court of Justice saying there is room for derogation by the state, but when it becomes a matter for the national judge that causes problems. Where the state has not done anything (in UK) or has done a little bit or has assumed the existing provisions have already been dealt with, we can have real problems because we are being asked to challenge our own legislator in the name of domestic compliance. The same is happening in competition courts – what happens as the restrictions change in the face of market variations e.g. recession. We are driven by practices of employee enterprises – lawyers finding ways through the holes. We are supposed to close the hole after everyone has gone through it, a perverted way of looking for a stable legislation compared to interpretation and application of principles. We are being asked to fill holes where we are giving no guidance, holes created 20 years ago and where we are expected to possess sensitivity to market forces. We need to produce a formal document to illustrate the problems we are facing, including the move away from euro jargon to an all-embracing notion of the principle of equality. It is giving us almost no law to interpret, and removes some of our legitimacy and the trust employees and employers have in us as specialist in the field.

Day 2

Third technical session.

The rights of posted workers, including casual workers under the Posting of Workers Directive 96/71.

Opening address by Helmut.

Our country has no figures that we can rely upon, and there is a great number of people in care homes sector that we do not know about, people from Poland and the Far East. They are not affected by any directives or provisions. There are others who want to work legally and they face problems – Jessica will give examples.

Example: A friend of mine is a pianist of Chinese origin with Canadian nationality. He is a professor of music in Austria and a member of a concert party, who are quite famous. The first concert was to be in London. He took the plane to London and he was told he was not permitted to enter the country because he doesn't have a work or residents permit and his passport was forged. His passport and mobile phone was taken away and he was locked in the room. He was then sent back to Hamburg and the three planned concerts in England did not take place. He was not a migrant worker; he had a contract with the concert hall and an agency with the UK. Was it right he was sent back?

UK: difficult question for employment lawyers, it is an immigration question. Unless you have a right of entry you are forbidden to come into this country. An EU national has a right of entry to seek work, and your friend doesn't fall into that category – anyone else is not allowed in. We have a strict immigration policy in this country and your friend fell foul. We have 5 categories of potential granting of the right which relate to specialised workers and where the British labour market has a shortage – tier 4. We use the employer as the police force for immigration and work permit matters, and it is their responsibility to check that his or her workforce are entitled to work in UK and if you do not, it is a criminal office. It is designed to cut down on the grey economy. Small employers are carrying out the administration tasks the government should be doing, and there have been complaints. Footballers need to have played for their national side for over 50% of their time.

Q: If he was an Austrian he would be free to enter. What about if he is Polish, would it be easier for him?

UK: He is entitled to enter and seek work. The provisions of services depend on the workers registration scheme.

Q: Self-employed not a worker? He had a job in Austria and was teaching there. Working in Austria legally and the going to UK.

UK: Go back to his real nationality and his best route would be to apply for Canadian citizenship.

Q: Self-employed pianist who wants to apply for a job in Ireland playing drums and gets a job?

Ireland: There are no restrictions for any EU country except Romania, you just walk in.

Q: Austrian drummer seeks a job in Hungary.

Hungary: After accession we do not open to Austria and Germany work permits, reciprocity.

Q: If he was English. They can come without any permit.

Austria: It is vice versa for the new member states that still exist.

Italy: A lot of people from East Europe arrived in Italy, 1 million of Rumanian citizens. This is a problem because all these people arrived in 3 /4 years. I spoke yesterday of this problem, the number is too large and so we have a lot of black workers that are like ghosts – they don't exist. It is not possible to have a pension at the end. All these people can move from Italy and go to other countries and it is possible citizens of a state outside Europe come into our countries, not Europeans. This is a problem of the future.

Q: There is a big problem that the real life doesn't follow the legislation. It is not a question of having transformed the Directive, but none take account of the Directive.

Italy: All the workers that come from other European countries have the same right as other Italian workers.

Q: the great wall – an example of the wall between the national countries and Europe and outside.

Netherlands: there are no exact figures of former eastern European workers. In Rotterdam half a million inhabitants, Netherlands 16 million. 15 thousand Polish workers in Rotterdam and you can guess that the number are high and not officially registered because there is not enough houses and people stay with friends. It will be worse for Romanians, who officially can only come in if they have a job that is allowed. You see hundreds of thousands Romanian cars. The problem is not official law, but it relates to problems as shortage of houses.

Q: 2 countries where legislation is one thing, reality is another. Can anyone tell us in our country reality and legislation is the same.

Germany: Our German 04/05 legislation we have people coming in from outside EU on false residents' permits. Work permit is only given if the work they want to perform doesn't affect a native person and there is no native German or EU who doesn't want to do the job. We don't have this for EU citizens who only need an official certificate. Old age pensioners and students have the right of interest if they have health cover and can provide for their own keep – i.e. they are not gainfully employed. The rules on transitional

restrictions it is only fair. Old member states, the labour market for new EU member states and we are blocking our labour market until 2011.

Austria: the same.

Norway: the same. Last time Sweden didn't have restriction for the new countries but I don't know today.

Hungary: no restriction in Ireland. Sweden and Denmark opened their labour market.

Ireland: That's why they come to Ireland.

UK: market open for all, but restrictions for Romanian and Bulgaria and we have a large number of Polish workers working legally. We have a number of immigrants working illegally. We have working registration which helps our economic system. Bulgaria and Romania need a work permit.

Germany: Employees can be sent to Germany and Austria, but the restriction doesn't not apply to self-employed. Germany and Austria only have these restrictions.

Is there a provision for claiming compensation for discrimination because of nationality?

Lux: new citizens have the same rights as national citizens of Lux. From Italy and Portugal workers come with their families and on the other side we have migrant workers who rise early and cross the border line who go back home in the evening – 120,000 migrant workers cross the border line. We have 380000 workers. In Germany every day people cross the border and there are the same problems. Also members of the trade unions, migrant workers who come across from the border line. Normally people come to us, they go to trade unions and they prepare for the employment tribunal if they are a member of the trade union for over one year. If they are not a member the unions will prepare but not provide a lawyer. I have never heard about cases in the newspapers, not as extensive problem as in Italy and the Netherlands. Migrant workers who cross the border every day have the same legal rights and can claim compensation. It is also forbidden by criminal law.

France: We have anti-discrimination e.g. a high authority against discrimination and nationality.

Ireland: We had one case; it is in the replies here. A Dutch teacher applied to be made permanent and he wasn't granted the application because he couldn't speak the Irish language. ECJ upheld the Irish position.

Italy: There are public workers in which it is possible migrant persons can be imported. The problem is that for European and none European migrant workers and there are some cases on this problem. There is a problem that the worker must make the evidence of discrimination and it is very difficult.

Q: Alan I would like to become judge in London.

UK: the qualification is set out in the statute. Theoretically the answer is yes, but practically unlikely.

Lux: you can become a teacher in Lux but you have to sit an exam in 3 languages, a high level, but yes. What is good for Ireland is good for Lux.

Czech: Some judges working in the Czech Republic. It was mentioned discrimination – it is different in the law between old and new member states because the laws about joining the EU were very hard, to implement the EU directives so it must be said I could only mention the laws where European directives were implemented.

Netherlands: there has been a case where an EU citizen may only be expelled in accordance with the directive. We had legislation that was too wide, not in accordance with the directive.

Ireland: if discriminated they can go before the Equality Tribunal. The answers we gave imply there are general collective agreements all over Ireland. There are not, the catering industry in Dublin may be covered in Dublin but not in Ireland. There is a constitutional provision allowing anyone to associate or disassociate. There was a case where the union tried to get everyone to join it. The employer sacked everybody and employed everybody except one man who refused to join the union which was held to be unconstitutional.

Netherlands: Last year an organisation of employers tried to make a labour agreement with Polish workers and told them that working conditions were better than normal working conditions. There was a heavy protest from the trade unions and the employers withdrew their intention. If they had reached the agreement, it would be an interesting question whether this was valid or not.

Q: Discrimination?

Netherlands: You have to consider whether the working conditions were better or not, but they were better.
Q: it could be discrimination of the national workers.

Ireland: Equal can turn out to be very unequal.

Germany: in case of equality and the same qualification the female person may be favoured because she is female and unrepresented and we have to ask for the grounds that justify it.

Q: Service workers and service providers. Who is self-employed and who is a worker? The ECJ once suggested essential characteristics of a worker – is this helpful to different national concepts of definitions?

UK: I have recently made a reference to ECJ which was withdrawn concerning the subject of employment judges and whether they are workers. The CA said that judges are not workers; the Northern Irish CA said that judges are workers. We do not come within the definition of worker set out in England. They said because we are not working under a contract to do particular work but in public office.

Malta: Not a specific definition in the law. The Industrial Relations Act does not define what a worker is. Judges are considered as full-time workers.

Germany: All judges are workers – no one else works so hard! We are officials and no one would expect us to be worker.

ECJ: You have to be subject to someone else's directions but we are all independent and not dependent on somebody else's direction.

Netherland: Free movement provisions - a worker who is a subordinate worker must have an employer who directs him. A judge gets a workload but is not told how to do it. It is common that for certain purposes of the occupation and employment protection we use this subordination concept, but there are other concepts – economic dependency. Here we see the shift over the last years in the concept of employee. It has become easier for the worker who does not want to pay for social security etc to present himself as a self-employed person. There are tax and social security facility. The situation can be used by employers and workers coming from other countries using their different free movement rights to chose – is it profitable for me to work as employee or self-employed? You cannot put a label on it, but manipulate it. In Austria you have a different regime for the right to establishment as a self-employed person, a posted worker under the freedom of services or a migrant worker employed by an Austrian employer.

Lux: Labour courts endeavour to find the facts in the case.

Germany: we come back to homecare people working who seems to be self-employed and yet work for one single person 2 hours.

Netherlands: This is not always from free will and this is something that we should think about, because they lose the protection as an employee and they are sometimes forced.

Final plenary session

The theme of the Congress and look at the people we as judges are trying to protect. Jessica set out an example at the beginning, an inspiration, the whole subject is a complex one, legal and socio economic.

Three archetypal individuals require freedom and protection. These must be balanced and somebody will say I don't want protection I want freedom.

1. The native worker – the worker working in the country where he or she was a national, e.g. the construction worker and the traditional labour protection theories where he and his grandfathers have fought for fair play and working conditions by making use of collective bargaining and they want to retain this.
2. The sub-contractor at his power station and we have the complexity of different levels of employment and he brings in Italian workers who are willing to work for less pay. May be they had little choice, but they are willing to work for less pay and less conditions. The native worker feels his job is threatened and if he loses his job he may claim unfair dismissal and the right to take industrial action and enter into collective bargaining to stop the Italian workers coming in. How much industrial action is he allowed to take before it becomes an illegal strike? I want to protect my job form all the workers in this plant, he is not allowed to say British jobs for British workers, a statement the Prime Minister said some time ago, contrary to the EU principle. The arrival of foreign workers is seen as a challenge. The UK was a cradle for Industrial Revolution and striking workers were sacked and workers from Ireland were brought in. It is the job that they should be trying to protect and not being xenophobic.
3. The person who wants to come in. A Lithuanian worker who wants to work in Norway, where there is collective agreement. He is working for lower pay but doesn't feel exploited but that he has an opportunity. If we tell him he can't do that, who are we protecting? Norwegian workers equivalent to the UK workers? But he mustn't be exploited. University of Liverpool lecturers discussed the exploitation of migrant workers, they see dissatisfied workers. But there are satisfied workers. We must find the way that ensures workers minimum rights and minimum pay. Hidden discrimination where he loses his job and his right to stay in UK. We do not want him to become part of the "black economy" – the more complex the system of registration and documentation. The same applied to someone outside the EU. We heard of the posted worker – Polish worker who is a skilled plumber and sees an opportunity in Lux and he is posted there. The opportunity in Lux is to provide services at a lower cost than his rivals in Lux provide. The employer is entitled to set up a business or branch in Lux, and he will meet bureaucracy but it is important is it necessary bureaucracy but not red tape.
4. There are the economically dependent people who do not get the employment rights under the law. We see the traditional labour approach which relates it the trade unions where everyone is a member, the CAB volunteer who sees people being exploited by various agencies and who are being exploited and the economic approach that there should be a minimum of regulation and that people should move free. The pianist should not be refused entry because he does not have the right paperwork. There is a big complaint in UK about artists being excluded on spurious grounds.

Self-employed person coupled with agency workers directive may be a suitable subject for our next congress. The problem of self-employed persons and service providers links into migrant workers is a subsidiary and complex issue and there is little more we can say in this time.