



CORE ANALYSIS

# Mutual recognition gone wrong? The case of posted workers

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## Abstract

Mutual recognition is a cornerstone of European integration, enabling cooperation across diverse policy fields while allowing the Union to pursue unity without uniformity. Yet, the Posted Workers saga – widely framed as a tale of tension between social rights and economic freedoms – exposes some of its limits. This paper uses the Posted Workers saga as a case study of mutual recognition. Empirically, it draws on the legislative negotiations behind the 1996 and 2018 Directives and case law from *Rush* to *Laval*, to examine legislative intent. The analysis shows that the 1996 Directive was not primarily concerned with protecting workers but with regulating the cross-border provision of labour via the freedom to provide services, through a mutual recognition mechanism. The mechanism was asymmetrical by design: it privileged certain Member States' labour rules over others to address social dumping. The Directive was intended to create a ceiling – rather than a floor – of standards under Article 3(1), subject to narrow exceptions. Conceptually, the paper argues that mutual recognition operates as a generative yet fragile mode of integration. It is generative, fostering coordination between Member States and enabling free movement. Yet it remains fragile where the interpretations of the 'content' of such rules diverge. In the Posted Workers context, such divergence is evident via the conflicting understandings of 'minimum rates of pay'. The paper concludes that while mutual recognition can facilitate diversity, it cannot indefinitely substitute for substantive political engagement in defining the content and scope of shared rules.

**Keywords:** mutual recognition; European integration; posted workers; freedom of services; Laval

## 1. Introduction

Omnipresent yet invisible, mutual recognition is a cornerstone of European integration. It supports European cooperation across a vast, diverse, and ever-growing array of policy fields. From goods<sup>1</sup> to services,<sup>2</sup> pharmaceutical regulation<sup>3</sup> to the recognition of civil and commercial

<sup>1</sup>Regulation (EU) 2019/515 of the European Parliament and of the Council of 19 March 2019 on the mutual recognition of goods lawfully marketed in another Member State and repealing Regulation (EC) No 764/2008, OJ L91/1.

<sup>2</sup>Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L376/36; Art 53(1) TFEU; Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications OJ 255/22; Directive 2006/126/EC of the European Parliament and of the Council of 20 December 2006 on driving licences (Recast) (2006), OJ L403/18.

<sup>3</sup>Arts 28 and 29 of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use, OJ L311/67.

judicial decisions,<sup>4</sup> criminal cooperation<sup>5</sup> to environmental regulation,<sup>6</sup> financial risk regulation<sup>7</sup> to private collaboration,<sup>8</sup> it is central to the way Europe governs. Its strength lies in its capacity to facilitate the pursuit of an ‘ever closer union’ via the non-hierarchical steering, coordination, and cooperation of Member States across a wide array of policy fields characterised by (acute) heterogeneity legally, politically and socially. In sum, mutual recognition allows us to be ‘United in Diversity’. Raising the question: are there limits to our ability to pursue unity without uniformity?

The Court of Justice’s ruling in *Rush Portuguesa* marked the start of one of the most contested sagas in the legal and political history of the Union’s internal market and provides a striking illustration of the limits of mutual recognition. That case ignited a three-decade debate over the meaning of ‘Social Europe’ and the role of the Union in protecting (mobile) workers. It also raised significant questions as to the relationship between social rights and economic freedoms in EU law. These debates remain in many respects unresolved. The Posted Workers Directive was supposed to address many of the issues which emerged post-*Rush*. Yet, the Court’s intervening interpretations of the Posted Workers framework from 1996 reopened the debate, prompting the Directive’s eventual revision via the Recast Posted Workers Directive (2018). That Directive represents an attempt to rebalance the relationship between social rights and economic freedoms in response to the controversial impact of case law. In this sense, the Posted Workers saga is understood, primarily, as a tale about Social Europe.

The contribution of this paper is twofold. First, empirically, the case study examines the Posted Workers Directive and demonstrates that it creates a form of asymmetrical mutual recognition which primarily protects wealthier Member States with higher labour protection standards. The paper shows how the Directive, by enabling the rules of high-wage States to travel across borders while imposing them on lower-wage Member States, supports a version of mutual recognition which can embed and entrench structural preferences via legal infrastructures of mobility, favouring the application of certain national regimes over others. Second, conceptually, the paper uses this example to advance an understanding of mutual recognition not merely as a legal principle or legislative technique, but as a mode of governance that is both generative and fragile. It is generative in that it facilitates cooperation. In the posted workers context, this is achieved via cross-border rule recognition via Article 3(1) of the 1996 framework, which advanced integration by removing barriers to free movement. Yet, it is fragile, as demonstrated in the posted workers context, where divergent social, political, economic and cultural commitments embedded in Member States’ labour systems came into conflict through the EU legal system’s use of mutual recognition. These factors run too deep to be addressed simply by regulating ‘types’ of rules recognised between Member States; they require deeper engagement in meaningful consensus-building regarding the substantive content of such rules at the European level to resolve such conflicts. In the posted workers saga, we see this illustrated via conflicts over what types of remuneration can be included within the notion of minimum rates of pay.

<sup>4</sup>Art 81 TFEU; Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims, OJ L143/15.

<sup>5</sup>Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, OJ L303/01; Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130/01.

<sup>6</sup>Chapter VII of Regulation (EU) No 528/2012 of the European Parliament and of the Council of 22 May 2012 concerning the making available on the market and use of biocidal products, OJ L167/01.

<sup>7</sup>Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments and amending Directive 2002/92/EC and Directive 2011/61/EU (recast), OJ L173/349.

<sup>8</sup>For example, the International Standards Organization (ISO) via ISO 9001:2015 Quality management systems requirements which allows private companies to operate across the international market via recognition of the ISO certification requirements which ensures that products meet certain quality standards and allows mutual recognition of conformity assessments between private actors.

The study employs a mixed-methods approach to examine these issues. The paper utilises doctrinal legal analysis and legislative analysis of the *travaux préparatoires* for the 1996 and 2018 Directives. In terms of legislative analysis, the paper engages in a close reading of the preparatory materials for both Directives, including, but not limited to, the Commission's original proposals and explanatory memoranda; reports submitted to the Parliament and the Council by their respective committees; the compromise texts and working documents circulated during the negotiations; and the observations of other institutional actors recorded in the official legislative files available through the EU's document register. These documents are then analysed to understand what goals and problems arose during the negotiations; how different actors framed these issues; and the reasons they offered to support their positions or undermine another view. The analysis also considers how differing political and legal preferences interacted and evolved to result in the final texts produced. This approach allows me to trace and contextualise the evolution of the negotiations and to clarify the likely intended legal meaning of the texts produced. In this regard, the paper begins by considering the Court of Justice's ruling in *Rush Portuguesa* to assess how judicial interpretation shaped the early debate. Second, the paper moves to examine the legislative response to that ruling in the context of the Posted Workers Directive in 1996. This is achieved via a detailed exploration of the *travaux préparatoires* to understand the institutional and political responses to *Rush Portuguesa*. Third, the paper examines the subsequent interpretation of the 1996 framework by the Court of Justice in the intervening *Laval Quartet* rulings to understand how case law reopened debates over social protection and rights versus economic freedoms. The paper then moves to consider the response to the *Quartet* case law, which took the form of the Recast Directive in 2018, analysing how policymakers sought to rebalance the relationship between social rights and economic freedoms in light of judicial and political developments. I then move to analyse the findings. This process is complemented by a review of the related political science literature and legal scholarship, which informs the analysis and later conclusions. For each step of this process, the paper engages with the relevant political science literature and legal scholarship, considering both supportive and critical perspectives. The literature is used in each section to frame and evaluate the legal and political dimensions of the negotiations on the Directives, the related case law, and to contextualise its empirical findings regarding the negotiations. The integration of all this information into its analysis allows the paper to evaluate the implementation of mutual recognition within the Posted Workers Directives, and to draw broader conclusions regarding the strengths and weaknesses of mutual recognition as a method of European integration.

The paper proceeds as follows. Section 2 presents the paper's conceptualisation of mutual recognition and situates it within the broader literature. Section 3 carries out the empirical and legal analysis of the Posted Workers saga, beginning with the Court of Justice's ruling in *Rush Portuguesa*. It then moves to examine the legislative response via the Posted Workers Directive and its incorporation of a mutual recognition mechanism in Article 3(1), based on the conceptualisation advanced in Section 2. The paper then reviews the *Laval Quartet* case law, which finally resulted in the Recast Directive as a response to those rulings. Section 4 offers an analysis of the case study conducted in Section 3, highlighting the structural asymmetries present in the deployment of mutual recognition revealed by the preceding section. In Section 5, I draw my conclusions, reflecting on the broader lessons for the European Union as a socio-political entity. I consider the limits of our ability to govern via systems of managed diversity, which rely heavily on procedural cooperation mechanisms, such as mutual recognition. Such reliance on mutual recognition overlooks the need to define the substantive content and scope of the types of rules recognised via mechanisms such as Article 3(1) of the 1996 Directive.

## 2. Defining mutual recognition

While initially emerging via the Court of Justice's ruling in *Cassis de Dijon*, mutual recognition has spread beyond the internal market, most notably to the Area of Freedom, Security and Justice.<sup>9</sup> Schmidt attributes its success to its ability to facilitate the non-hierarchical coordination and cooperation of Member States across policy fields. These policy fields are, in her view, often characterised by horizontal level heterogeneity between the Member States. For example, Member States frequently apply different qualification requirements for membership of regulated professionals between jurisdictions, such as nursing or legal professionals. This heterogeneity creates politicisation when the Union pursues positive integration in a new area or seeks to deepen integration in existing areas of cooperation. The Adequate Minimum Wage Directive is a recent example, demonstrating how horizontal level heterogeneity in wage-setting systems and collective bargaining models can create tension when the Union seeks to deepen integration, particularly in the social domain.<sup>10</sup> Integration via harmonisation measures treats the heterogeneity of rules at the horizontal level as a barrier to integration. Harmonisation measures create rules at the Union level (vertical level) which replace all national rules which existed prior. In essence, full harmonisation sees the Union rule become the only rule applicable. Harmonisation unifies not just 'types' of rules applicable between jurisdictions, but also the 'content' of those rules by setting them out in European-level instruments. The creation of shared harmonised rules at the vertical level, which override or replace domestic rules, is, however, often perceived as undermining decision-making autonomy at national, regional and local levels. These vertical rules also have wider implications for communities, affecting social, political and cultural norms and practices of the Member States, which their legal frameworks reflect. Vertical-level harmonisation (wherein we create shared rules at the Union level), therefore, contributes to increased politicisation horizontally (between Member States) and vertically (between the Member States and the Union). The General Data Protection Regulation (GDPR) is a clear illustration of these complexities.<sup>11</sup> In Germany, the harmonisation of data protection rules at the EU level created several challenges. Germany has a strong and deeply embedded history of a strong data protection culture that operates as part of its broader federalist system. The German *Länder* (federal states) were reluctant to confer competence to legislate at the Federal level to the Union. This created tensions during the negotiations at the EU level, as Germany had to balance these internal political conflicts between its constitutional components, with the conservative and business-friendly orientation of federal-level ministries, and its broader social and cultural commitment to ensuring high data protection standards when negotiating its position at the Union level.<sup>12</sup>

In contrast to harmonisation, mutual recognition allows the continued coexistence of a heterogeneity of horizontal level rules by harmonising only the 'types' of rules recognised at the vertical level rather than the substantive 'content' of said rules. The content of the types of rules

<sup>9</sup>Arts 67(3), 70, 81(1), 81(2)(a), 82(2) Treaty on the Functioning of the European Union (Hereafter 'TFEU'); Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L190/01.

<sup>10</sup>Directive 2022/2041 of the European Parliament and of the Council of 19 October 2022 on adequate minimum wages in the European Union, OJ L275/33; See for example the case taken by Denmark wherein the Danish Government argued the Court of Justice should nullify the Directive. Case C-19/23 *Denmark v Parliament and Council* ECLI:EU:C:2025:865.

<sup>11</sup>Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L119/1.

<sup>12</sup>L Jančič, *EU politics and the making of the General Data Protection Regulation: Consociationalism, policy networks and institutionalism in the process of balancing actor interests* (PhD Thesis submitted in partial fulfilment of the requirements of the University of Westminster for the degree of Doctor of Philosophy, 2018) pp 223–4; Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L119/1. (Hereafter the 'GDPR'); For an illustration of these enforcement challenges, see Zell's research on the GDPR. A M Zell, 'Data Protection in the Federal Republic of Germany and the European Union: An Unequal Playing Field' 15 (3) (2014) German Law Journal 461–94, and particularly at 486–94.

recognised, in mutual recognition mechanisms, is normally left to be determined by the Member States. Mutual recognition, therefore, enables the depoliticisation of the pursuit of positive integration by skirting around questions classically linked to harmonisation measures. By saying, we recognise these ‘types’ of rules between jurisdictions, but not specifying the ‘content’ of such rules, mutual recognition avoids the key part of positive integration which often results in political deadlocks; defining the substantive scope and content of such rules.<sup>13</sup> Mutual recognition, therefore, embraces diversity as a gateway to positive integration.

Legal scholars examining mutual recognition draw a variety of conceptual distinctions regarding its form. They highlight the difference between judicial vs regulatory recognition;<sup>14</sup> active and passive recognition;<sup>15</sup> equivalence vs mutual recognition;<sup>16</sup> conceptualise it as a decentralised method of managing regulatory authority;<sup>17</sup> or as an embedded mechanism of cross-border administrative decision recognition supported via composite administrative decision-making procedures, to provide just a few examples.<sup>18</sup> Substantive studies of mutual recognition include Janssen’s seminal work exploring mutual recognition as a legal principle from a cross-policy perspective – meaning she explores its application between policy fields – by comparing its application between the single market and the Area of Freedom, Security and Justice (AFSJ) and considering its broader role in European integration. She has developed a doctrinally grounded, cross-sectoral working definition of mutual recognition from a legal perspective. Her definition is a legal one as it focuses on the legal effects and requirements that mutual recognition generates for Member States’ legal systems. In particular, that an object, activity or decision, lawful in one Member State’s legal system, be accepted as equivalent to such objects, activities or decisions in another Member State’s legal system and generate legal effects within the receiving state’s sphere of legal influence.<sup>19</sup> Van Ballegooij’s work explores mutual recognition deployment in the AFSJ specifically. His research can be contrasted against Janssen’s in that he places at the centre of the study an examination of the tension between mutual recognition and fundamental rights, offering a rich critique of how it obscures rights-based concerns in the EU.<sup>20</sup> Legal scholarship is therefore largely sectoral in focus, approaching mutual recognition either as a doctrinal legal principle or a sector-specific regulatory technique (such as in consumer protection, free movement law and judicial cooperation). Some, albeit more limited, attention is given to mutual recognition’s broader evolution within the Union’s legal and political order and its implications for European integration and governance generally. Political science accounts, by contrast, fill this gap by considering more explicitly the political implications for, and the choices involved in, the Union’s use of mutual recognition. Alter and Meunier-Aitsahalia demonstrated how *Cassis de Dijon* was leveraged by the Commission to overcome political deadlocks in the pursuit of integration via harmonisation.<sup>21</sup> Schmidt explicitly linked the study of mutual recognition with the study of governance, highlighting how mutual recognition was often excluded from conversations on the nature and direction of European integration despite its role in augmenting and regulating the

<sup>13</sup>SK Schmidt, *Mutual Recognition as a New Mode of Governance* (Routledge 2008).

<sup>14</sup>J Pelkmans, ‘Mutual Recognition in Goods. On Promises and Disillusions’ 14 (5) (2007) *Journal of European Public Policy* 699–716.

<sup>15</sup>K Armstrong, ‘Mutual Recognition’ in C Barnard and J Scott (eds), *The Law of the Single European Market: Unpacking the Premises* (Hart Publishing 2002) 225–67.

<sup>16</sup>J Trachtman, ‘Embedding Mutual Recognition at the WTO’ 14 (5) (2007) *Journal of European Public Policy* 780–99.

<sup>17</sup>A Volpato, ‘Mutual Recognition, Pre-emption and Decentralisation in the Common Agricultural Policy’ 13 (3) (2020) *Review of European Administrative Law* 135–57.

<sup>18</sup>W van Ballegooij, *The Nature of Mutual Recognition in European Law* (Intersentia 2015); L Klimek, *Mutual Recognition of Judicial Decisions in European Criminal Law* (Springer International Publishing 2016).

<sup>19</sup>C Janssen, *The Principle of Mutual Recognition in EU Law* (Oxford University Press 2013).

<sup>20</sup>Van Ballegooij (n 18).

<sup>21</sup>K Alter and S Meunier-Aitsahalia, ‘Judicial Politics in the European Community: European Integration and the Pathbreaking *Cassis de Dijon* Decision’ 26 (4) (1994) *Comparative Political Studies* 535–61.



exercise of public authority and political power across the multi-level system.<sup>22</sup> Her research situates mutual recognition within a broader institutional and political context that shares resonances with Scharpf's asymmetry thesis, which emphasises the Union's higher capacity to integrate negatively rather than positively.<sup>23</sup> Nicolaïdis positions mutual recognition's rise against the backdrop of an increasingly globalised world wherein states structure their interactions via common institutions. Increased interactions, via these institutions, give rise to increased opportunities for distrust to manifest. This distrust can relate to consumer protection standards for foodstuffs or trust in one another's judicial system. Regardless of the source, the tension must be managed to facilitate cooperation, and mutual recognition facilitates this. Such dynamics are visible in Europe via recurrent political conflicts in relation to regulatory authority in the internal market, asylum policy, or labour mobility.<sup>24</sup> Börzel links mutual recognition's expansion to the actions of the Union legislature, which operates as part of broader systems of hybrid governance (such as the Open Method of Coordination).<sup>25</sup> Unlike in the national context, where public and private actors negotiate legal changes within the setting of a single state hierarchy, the EU relies primarily on a negotiation system dominated by public actors. Member States negotiate with one another directly via the Council, and indirectly via other institutions such as the Parliament, while private actors play a more limited role in negotiations at the European level formally. These negotiations, in Börzel's view, occur in the shadow of hierarchy cast by supranational institutions such as the Commission and the Court of Justice. While the Member States retain formal decision-making power – via the Council – they are aware that once they take such a decision, enforcement is managed by European-level institutions directly. Within this context, Börzel sees mutual recognition as a strategic method that emerges to advance integration while limiting the reach of supranational enforcement mechanisms and the associated hierarchy concerns. Mutual recognition is deployed in sensitive areas of integration (such as judicial and criminal cooperation) to enable deeper cooperation and advance European integration while preserving domestic autonomy, in particular by allowing Member States to determine their own rules.<sup>26</sup> To summarise, political science accounts are, therefore, theoretically framed and reflect upon the broader implications of mutual recognition for European integration as a process, while legal scholarship focuses in particular on exploring the underlying rules and institutional mechanisms that support mutual recognition from a doctrinal perspective. This is not to say that political scientists do not explore the legal mechanisms which establish mutual recognition mechanisms nor that legal scholars entirely neglect to reflect upon the implications of the use of mutual recognition for European integration.<sup>27</sup> Rather, my point here is to highlight how each field tends to emphasise the examination of factors specific to its own discipline. Mutual recognition from a distinctly judicial perspective is rooted in the 'Treaties' free movement provisions, most clearly the prohibition on quantitative restrictions and measures of equivalent effect in Article 34 TFEU. Through case law such as *Cassis*, this rule interacts with principles like proportionality, necessity and non-discrimination, as well as the duty to compare and the ban on dual burdens. The duty to compare obliges national authorities to assess whether a foreign measure is equivalent to the domestic measure before restricting access to the domestic market. Together, these rules and

<sup>22</sup>S Schmidt, 'Mutual Recognition as a New Mode of Governance' 14 (5) (2007) *Journal of European Public Policy* 667–81.

<sup>23</sup>F Scharpf, *Governing in Europe: Effective and Democratic?* (Oxford University Press 1999).

<sup>24</sup>K Nicolaïdis, 'Trusting the Poles? Constructing Europe through Mutual Recognition' 14 (5) (2007) *Journal of European Public Policy* 696.

<sup>25</sup>See, generally, K Armstrong and C Kilpatrick, 'Law, Governance, or New Governance? The Changing Open Method of Coordination' 13 (3) (2007) *Columbia Journal of European Law* 649–678.

<sup>26</sup>T Börzel, 'European Governance: Negotiation and Competition in the Shadow of Hierarchy' 48 (2) (2010) *Journal of Common Market Studies* 191–219.

<sup>27</sup>For example, Christian Joerges, a legal scholar, frequently combined both legal and political science scholarship in his work, also in relation to mutual recognition. See C Joerges, 'Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration' 2 (2) (1996) *European Law Journal* 125–8.

principles interact to create a situation where restrictions may only be justified by overriding reasons of public interest, requiring national authorities to recognise the regulatory choices of other Member States. A restriction is any measure which might limit, hinder, or otherwise impair one of the fundamental freedoms in the single market context. Such restrictions are generally considered impermissible unless they can be justified. For example, a national rule that prevents people from selling disposable e-cigarettes produced in one Member State within its own territory. On this basis, mutual recognition should not be seen as a single unified principle but as the outcome of applying a series of rules and principles – in particular, the principles of non-discrimination and proportionality, and rules such as the prohibition of unjustified restrictions on fundamental freedoms – to particular factual constellations.<sup>28</sup> This understanding of mutual recognition is outcome-oriented, meaning it focuses on the results and impacts of mutual recognition for national rules, rather than the doctrinal mechanisms via which mutual recognition operates. This outcome-oriented conceptualisation of mutual recognition is also reflected in the work of Janssens. She defines mutual recognition as requiring:

*... that, notwithstanding differences between the various national rules that apply throughout the EU, objects, activities or decisions that are lawful in accordance with a Member State's legal framework must be accepted as equivalent to objects, activities or decisions carried out by one's own state, and must be allowed to take effect in one's own sphere of legal influence (either by granting them access to the national territory, or by taking them into account in any subsequent decisions, or by executing them), unless one of the available grounds for non-recognition applies.<sup>29</sup>*

Her definition, therefore, frames mutual recognition as an output-oriented notion. It represents a requirement for Member States to permit objects, activities, or decisions, lawful in one Member State, to create legal effects in the receiving Member State's territory unless a justification for non-recognition applies. Janssens's framework can be understood as bridging legal and political science accounts of mutual recognition, as it captures both (a) the doctrinal mechanism that enables recognition and (b) the broader effects for European integration. In legal scholarship, mutual recognition is understood through the application of legal rules and principles. Mutual recognition emerges – both in its judicial and legislative forms – from, for example, the application of the four freedoms, non-discrimination, proportionality, and the prohibition of unjustified restrictions on the fundamental freedoms, to a constellation of facts to generate a *de facto* legal obligation in the receiving Member State to recognise an object, activity, or decision from the sending Member State as legally valid and equivalent within its own jurisdiction. In the political science literature, mutual recognition is understood as a broader governance strategy that allows heterogeneous national systems to cooperate despite these differences so as to generate deeper integration. These studies emphasise its role in managing diversity by focusing on how mutual recognition shapes Member State interactions, enabling coordination and cooperation. Political science, therefore, focuses on how mutual recognition manages political complexity, while legal scholarship understands it as a (rebuttable) legal obligation.<sup>30</sup> On that basis, I adopt Janssens' outcome-oriented definition as the conceptual framework used to identify mutual recognition in this article.

<sup>28</sup>R Riordan, 'Legal Principle or Legal Consequence? Mutual Recognition as a Judicially Originating Mode of European Governance' 27 (2026) German Law Journal, forthcoming.

<sup>29</sup>Janssens (n 19) 5.

<sup>30</sup>See further (n 28) for a more detailed explanation.

### 3. Posted workers saga

#### A. *Rush Portuguesa*

The Court's ruling in *Rush Portuguesa* concerned a Portuguese company which had entered into a subcontracting arrangement with a French company for the construction of a high-speed rail line.<sup>31</sup> *Rush Portuguesa* specialised in the construction of public infrastructure projects. It sent, or 'posted', its Portuguese employees to France to carry out the construction. French law specified that only the *Office national d'immigration* was permitted to recruit third-country nationals to work within France.<sup>32</sup> It maintained that Portuguese nationals were not entitled to the exercise of the free movement of workers until the end of the transitional period specified in the Act of Accession.<sup>33</sup> It further argued that *Rush* could not rely on the freedom to provide services, as such employees were governed by the free movement of workers. Consequently, the office issued a decision against *Rush*.<sup>34</sup> *Rush* argued this was contrary to Community law, per Articles 59 and 60 of the Treaty.<sup>35</sup> The French Administrative Court, hearing the case, asked the Court of Justice, inter alia, if (A) Community law allowed Member States to preclude the company from providing services with its Portuguese workforce and (B) if *Rush* could be required to secure permits for its workforce.<sup>36</sup> The Court of Justice considered that the Act of Accession's transitional period governing the free movement of workers did not apply to *Rush* as the workers were not moving from Portugal to access the labour market of France. Rather, in its view, their employment relationship remained linked to their Portuguese employer, who had sent them temporarily to provide a service.<sup>37</sup> At no time did the workers gain access to the French labour market.<sup>38</sup> It, however, noted that Community law did not preclude Member States from extending their legislation and collective agreements to such workers.<sup>39</sup>

The Court's ruling was controversial as it was perceived as undermining the political agreement the Act of Accession represented. Specifically, while Portugal would join the Community, there would be a moratorium on its nationals' entitlement to work in other Member States. Carter notes that the decision represents the establishment of the legal concept of a 'posted worker' for the first time in EU law.<sup>40</sup> Garben describes the Court's decision as its 'original sin', arguing it was not reached via a deliberate and intentional interpretation of the Treaty provisions. Rather, she is of the view that the Court's decision was motivated by a 'concern to limit the effect of the transitional period' to 'enhance the application of EU law in the face of this transitional period'.<sup>41</sup> She highlights that the Court's conception of a worker in *Rush* was not in line with its earlier case law, which identified a worker as being 'any national of a Member State who actually and genuinely performs work in another Member State'.<sup>42</sup> There is undoubtedly a dissonance here. Garben points toward Regulation No. 1612/68 to support her position. That Regulation stated, in its preamble, that the right to free movement of workers must be enjoyed, without discrimination, by

<sup>31</sup>Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* ECLI:EU:C:1990:142 para 2.

<sup>32</sup>*Ibid.*

<sup>33</sup>*Ibid.*, para 4; Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, OJ L302/23 (Hereafter the 'Act of Accession').

<sup>34</sup>*Ibid.*, para 3.

<sup>35</sup>*Ibid.*, para 4; (n 33) Arts 2, 215, 216 and 221 of the Act of Accession.

<sup>36</sup>*Ibid.*, para 5.

<sup>37</sup>*Ibid.*, paras 12–15.

<sup>38</sup>*Ibid.*, para 15.

<sup>39</sup>*Ibid.*, para 18.

<sup>40</sup>D Carter, 'Equal pay for equal work in the same place? Assessing the revision of the posted workers directive' 14 (2018) Croatian Yearbook of European Law and Policy 34–6.

<sup>41</sup>S Garben, 'Posted Workers Are Persons Too! Posting and the Constitutional Democratic Question of Fair Mobility in the European Union' in N Nic Shuibhne (ed), *Revisiting the Fundamentals of the Free Movement of Persons in EU Law* (Oxford University Press 2023) 47.

<sup>42</sup>*Ibid.*, 48.



permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services.<sup>43</sup> This point was also raised by the Advocate General in their opinion.<sup>44</sup>

Yet, as the Court of Justice noted, the Act of Accession made it clear that the relevant provisions of Regulation No. 1612/68 were not to apply to Portugal until 1 of January 1993, ie, after ruling in *Rush*.<sup>45</sup> Therefore, the Court could not, in reaching its decision, rely on that regulation as an interpretative tool to understand EU primary law. Moreover, the provisions referred to by both Garben and the Advocate General are in the preamble of the Regulation and hence are not operative. Instead, the preamble to the Regulation may only be used as an aid for the interpretation of the provisions of the Regulation, where there is uncertainty regarding their meaning. Their use as broader interpretative tools to understand the Treaty, therefore, seems problematic.<sup>46</sup> Garben's position, therefore, overlooks that the Court's decision in *Rush* was arguably a result of the political decisions of political institutions. Those political choices became law via the Act of Accession. Accession agreements have the same status as primary law, hence taking precedence over secondary law.<sup>47</sup> It is not illegitimate to say the Court was required to defer to the political choices of the Union's political institutions, given that these choices became legal norms when they were embedded within the Union's legal system through the Act of Accession. Those legal rules reflect deliberate policy decisions made by political actors. In contrast to the view that *Rush* undermined social protection standards, Marshall argued in 1991 that the Court's ruling 'protects the labour markets of the old Member States while encouraging cost-effective construction projects which benefit both parties to a public works contract . . . [I]t takes the EEC one step closer to fulfilling its goal of economic integration and expansion'.<sup>48</sup> Davies, reflecting on the Court's decision ten years after its issuance, observed that perhaps the Court made a basic judicial error: it answered a question that was not necessary for it to reach its decision. By stating that Community law did not prevent Member States from extending their legislation or collective agreements to any person employed within their territory, it reassured host states that they could strengthen their laws to cover this new category of worker. In response, an alarmed Commission, concerned about the impact on cross-border trade, later proposed the Posted Workers Directive.<sup>49</sup>

### B. The legislative response

In response to the Court's decision in *Rush*, the Commission tabled a proposal in 1991 for a Directive to regulate this area of law.<sup>50</sup> The purpose of the dossier was to coordinate the terms and conditions of employment for workers engaged in work within the framework of the freedom to

<sup>43</sup>Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, OJ L257/2. Note that this regulation was subsequently repealed by Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, OJ L141/1.

<sup>44</sup>Case C-113/89 *Rush Portuguesa* (n 31) paras 13–14.

<sup>45</sup>*Ibid*, paras 9–19, and in particular paras 12–14; Article 216(1) of the Act of Accession of Spain and Portugal (n 33).

<sup>46</sup>L Humphreys, C Santos, L di Caro, G Boella, L van der Torre and L Robaldo, 'Mapping Recitals to Normative Provision in EU Legislation to Assist Legal Interpretation' in A Rotolo (ed), *Legal Knowledge and Information Systems* (IOS Press BV 2015) 41–50; T Klimas and J Vaičiukaitė, 'The Law of Recitals in European Community Legislation' 15 (1) (2008) ILSA Journal of International & Comparative Law 93; Furthermore recitals have no independent operative legal effect. See Case C-308/97 *Giuseppe Manfredi v Regione Puglia* ECLI:EU:C:1998:566 para 29–30.

<sup>47</sup>Joined Cases C-357/19, C-379/19, C-547/19, C-811/19 and C-840/19 *Euro Box Promotion and Others* ECLI:EU:C:2021:1034, para 156; Joined Cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19 *Asociația 'Forumul Judecătorilor din România' and Others v Inspecția Judiciară and Others* ECLI:EU:C:2021:393, para 149.

<sup>48</sup>K Marshall, 'European Economic Community – Free Movement of Workers – European Court of Justice Determines That in a Case of Temporary Movement of Workers Member States in Whose Territory the Work Is to Be Carried out May Not Impose Conditions Related to the Recruitment of Man-Power or Procurement of Work Permits' 21 (3) (1991) Georgia Journal of International and Comparative Law 573.

<sup>49</sup>P Davies, 'The Posted Workers Directive and the EC Treaty' 31 (3) (2002) Industrial Law Journal 300.

<sup>50</sup>Proposal for a Council Directive concerning the posting of workers in the framework of the provision of services (COM(91) 230 FINAL), 01.08.1991. (Hereafter European Commission, 'Proposal for a Directive on Posted Workers' (1991)).

provide services.<sup>51</sup> The Commission stressed that increasingly mobile cross-border workers within the Community would lead to disputes as to the applicable national labour rules.<sup>52</sup> In its view, an overreliance on conflict of law mechanisms to resolve such issues would increase the likelihood of recourse to litigation. Such litigation would likely result in barriers to the freedom to provide services due to uneven enforcement and conflicting jurisprudence between national courts.<sup>53</sup> Based on these factors, the Commission outlined the aims, scope and content of its proposal as seeking to remove the obstacles and legal uncertainties that would impede the freedom to provide services via the creation of a framework that would establish clear rules.<sup>54</sup> In particular, the ‘coordination’ of mandatory rules to be complied with in the host State to ensure worker protection.<sup>55</sup> The Commission, in its proposal, therefore, placed a stronger emphasis on the economic and market regulatory logic of the proposal compared to social concerns. In addition, it emphasised the coordination of rules between jurisdictions to establish legal certainty as to whose rules apply when workers are posted between Member States.

The European Economic and Social Committee, in its opinion on the proposal, expressed concern regarding the aim of the Directive.<sup>56</sup> It argued there was a tension between its goal of addressing both the freedom to provide services and securing the protection of workers. The Directive’s legal basis in the Treaty was viewed as not reflecting these dual goals.<sup>57</sup> Parliament issued its first report on the proposal in 1992.<sup>58</sup> It noted the significant impact of the Court’s case law as a source of framing for the proposal.<sup>59</sup> *Rush Portuguesa* was explored in detail, the report stating the ruling ‘acted as a springboard for the present proposal’.<sup>60</sup> It described the dossier as aiming to increase the ‘... freedom [to provide services] by removing some of the legal obstacles and uncertainties ...’.<sup>61</sup> Parliament asks, based on *Rush*, if there are ‘... some restrictions [on the freedom to provide services] that can be retained? ...’ and can Member States ‘... insist that those posted be treated identically to their nationals doing the same work? ...’.<sup>62</sup> This indicates Parliament was contemplating the scope of the Court’s non-discrimination jurisprudence, and if it could restrict the freedom to provide services without discriminating between nationals from different Member States. A primary motivation, therefore, appears to be the regulation of the freedom to provide services and what type of restrictions may be retained by Member States. Parliament surmises that a host state may apply its legislation and collective agreements to posted

<sup>51</sup>European Commission, ‘Proposal for a Directive on Posted Workers’ (1991) (n 50) at 2; Yet it is interesting to note, as has been widely commented, that the Directive’s legal basis was in the internal market provisions of the Treaty, not the social provisions.

<sup>52</sup>*Ibid.*; The Commission therefore moved away from its initial social argument at the opening of the proposal towards a competition and market-based argument as the grounds justifying its legislative proposal.

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*, 13.

<sup>55</sup>*Ibid.*

<sup>56</sup>European Economic and Social Committee, ‘Opinion of the proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ (OJ C49/41) 24.02.92; The European Economic and Social Committee, under the Maastricht Treaty, assisted the Parliament and Council in their activities via an advisory role. Both institutions were required, under specific provisions of the Maastricht Treaty, to consult with, or obtain the opinion of, the Economic and Social Committee prior to taking certain actions or decisions. See Art G(B)(6) in particular, and Art G(C) Art 8e and G(D) 10 of the Treaty of Maastricht (1992). Its composition was specified in Art 194 as consisting of 207 members appointed, by the Council acting unanimously, for four-year terms.

<sup>57</sup>*Ibid.* para 2.1.2. The legal basis specified was Arts 57(2) and 66 of the Treaty. In particular, as Art 57(2) governs self-employed individuals and it was therefore argued it was not an appropriate legal basis.

<sup>58</sup>European Parliament, ‘Report of the Committee on Social Affairs, Employment and the Working Environment on the Commission proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ (A1-0161/92, 22 April 1992). (Hereafter 1<sup>st</sup> Report of the European Parliament).

<sup>59</sup>*Ibid.*, 15.

<sup>60</sup>*Ibid.*

<sup>61</sup>*Ibid.*

<sup>62</sup>*Ibid.*

workers. However, they may not, ‘... in the name of equality of treatment, apply all their national legislation where this leads to discrimination’.<sup>63</sup>

Parliament does explore the social dimension of the dossier, albeit briefly, highlighting the importance of the proposal by emphasising three consequences should it not become law. *First*, there would be increased movement of ‘cheap labour temporarily posted from south to north. This would be a distortion of competition ... because competitive advantage would not be derived from superior productivity or the superior quality of the product but from fundamental differences in social and economic development’.<sup>64</sup> This is less a concern about the protection of posted workers and more of a concern about protecting higher-earning workers from posted workers. It also establishes a very specific understanding of ‘fair competition’ based on quality and not price, which clearly emphasises a political value judgement on what forms of competition are considered ‘fair’. It also presupposes a more expensive service to be a better-quality service. *Second*, it highlights that it could become more common for workers to do the same work in the same place but be subject to excessive differences based on nationality, which would ‘... be against fundamental social principles’. *Third*, it notes that situations could emerge where posted workers were not protected by any law due to cascading subcontracting arrangements.<sup>65</sup> These points show that where the labour and social dimensions of the proposal emerge, the concern appears to be about protecting high-earning workers from the impact of cheaper labour.

Parliament tabled over thirty amendments in its first report, many of which reflect the above points.<sup>66</sup> For example, amendment 4 sought to introduce a recital 16(a), which specified, ‘Whereas, however, the mandatory rules for minimum protection in the home country must be observed where these provide for better terms and conditions for workers than those in the host country’.<sup>67</sup> This provision can be considered in conjunction with amendment 23, which sought to introduce a new Article 3, paragraph 1(a) specifying that where the rules or collective agreements of the home State provided ‘*better terms and conditions for workers than those of the host country*, Member States shall ensure that the terms and conditions which apply in the home country are observed for workers posted to the territory of the host country’. [Emphasis added].<sup>68</sup> In plain English, these amendments seem to have had the intention to benefit workers moving from jurisdictions with higher labour standards to those with lower standards, and not vice versa. Amendment 23 was accepted in 1996.<sup>69</sup> By contrast, Amendment 28, which proposed a new Article 3(d), which would have stated that the act ‘shall be without prejudice to the right of Member States to apply or lay down laws, regulations or administrative provisions which are more advantageous to the workers covered in this Directive’ was not adopted.<sup>70</sup> That amendment appears to have been intended to permit host states to go above the provisions of the Directive and apply higher standards than those under generally applicable domestic law. However, the amendment was rejected.<sup>71</sup> Parliament issued its final opinion on the dossier on 4

<sup>63</sup>1st Report of the European Parliament (n 58) 18.

<sup>64</sup>*Ibid.*, 18.

<sup>65</sup>*Ibid.*, 19.

<sup>66</sup>*Ibid.*, 4–13.

<sup>67</sup>*Ibid.*, 5.

<sup>68</sup>*Ibid.*, 9.

<sup>69</sup>Council of the European Union, ‘Outcome of Proceedings of the Working Party on Social Questions on 12 and 14 March’ 1996’ (5683/96, 18 March 1996) 8.

<sup>70</sup>*Ibid.*, 12.

<sup>71</sup>Specifically, Art 3’s provisions. The amendment was relabelled as amendment 29. See European Parliament, ‘Second Report of the Committee on Social Affairs, Employment and the Working Environment on the Commission proposal for a Council Directive concerning the posting of workers in the framework of the provision of services’ (COM(91) 0230), 27.01.93, at 12. (Hereafter 2<sup>nd</sup> Report of the European Parliament 1993); On the rejection, see Council, ‘Outcome of Proceedings’ (5683/96) (n 69) at 8.

September 1996,<sup>72</sup> it was forwarded for a second reading in September and successfully passed the Parliament vote, leaving only the Council to assent to its adoption.<sup>73</sup> In sum, Parliament's amendments indicate an intention to only allow higher labour standards to prevail between jurisdictions.

The Working Party on Social Questions (WPSQs) was the body within the Council responsible for the dossier. WPSQ observed that the Treaty did not prevent Member States from applying their legislation and collective agreements to persons employed temporarily on their territory.<sup>74</sup> It concluded that a 'nucleus' of mandatory rules for the 'minimum' protection of workers needed to be coordinated.<sup>75</sup> Several Member States wanted the proposal to specify that it was not prejudicial to the home state's application of more favourable working conditions, with the Commission indicating its openness to this. In particular, Belgium, Germany, Spain, Italy and France stated that the proposed 'negative wording would imply that working conditions in the host country were always more favourable than in the country of origin: this was certainly not always the case'.<sup>76</sup> A subsequent note from 15 July 1992<sup>77</sup> is highly relevant; marked 'N.B',<sup>78</sup> it stated, concerning Article 3(1), that 'maintaining the law applicable to the employment relationship where it was more favourable than the law applicable in the Member State in which the work was carried out should not be excluded'.<sup>79</sup> This provision would later be amended and become Article 3(7) of the 1996 framework. The apparent political intention revealed by the negotiation documents is to allow a home state with higher labour standards, whose workers are posted to a host state with comparatively lower standards, to continue to apply their employment rules to the workers posted. By extension, it enables the extra-territorial application of the labour standards of the higher standard state within the jurisdiction of the lower standard state.

In June 1993, the Council received a communiqué from the Commission.<sup>80</sup> An important note is included concerning Article 3's scope and legal operation, the Commission specifying that a new 'Paragraph 3 has been inserted to reflect the opinion of Parliament and is designed to guarantee the application of the more favourable working conditions provided for by the law applicable, usually the law of the home country'.<sup>81</sup> This new paragraph 3 states, 'Paragraph 1 shall not prevent the application of the terms and conditions of employment provided for by the law applicable, which are more favourable to workers'.<sup>82</sup> An amended version of the text was circulated by the WPSQs four months later, in November; however, no delegations submitted additional comments on this new provision.<sup>83</sup> These drafting documents introduce some ambiguity as regards the intentions of the legislators. Did they not intend that host states could also go beyond the

<sup>72</sup>European Parliament, 'Recommendation for Second Reading on the common position of the Council on the amended proposal of the European Parliament and Council Directive on the posting of workers carried out in the framework of the provision of services' (A4-0265/96, 4 September 1996).

<sup>73</sup>*Ibid.*, 3.

<sup>74</sup>Council of the European Communities, 'Summary of Proceedings of the Working Party on social Questions on 1 October 1991' (4165/92, 21 January 1992) 4.

<sup>75</sup>*Ibid.*, 8.

<sup>76</sup>*Ibid.*, 13. Specifically, Belgium, Germany, Spain, Italy, and France. They stated that; 'the negative wording would imply that working conditions in the host country were always more favourable than in the country of origin: *this was certainly not always the case*'. [Emphasis added].

<sup>77</sup>Council of the European Communities, 'Summary of Proceedings of the Working Party on Social Questions on 15 July 1992' (8146/92, 28 July 1992).

<sup>78</sup>*Ibid.*, 13. 'N.B'. meaning 'nota bene' or 'note well' in English.

<sup>79</sup>*Ibid.*, 13.

<sup>80</sup>Council of the European Communities, 'Letter from the Commission of the European Communities to the President of the Council of the European Communities, Subject: Amended proposal for a Council Directive concerning the posting of workers in the framework of the provision of services' (7484/93, 21 June 1993).

<sup>81</sup>*Ibid.*, 3, of the explanatory memorandum supplied by the Commission.

<sup>82</sup>*Ibid.*, 16.

<sup>83</sup>Council of the European Communities, 'Summary of Proceedings of the Working Party on Social Questions on 5 November 1993' (9712/93, 8 November 1993) 18–19.

minimum terms and conditions of employment laid down in the dossier, so that its provisions were a floor rather than a ceiling? It is not explicitly stated that this is the intention, so clarity here is hard to find. However, a later note circulated by the Presidency of the Council in 1995, seeking the delegation's views on a number of issues, appears to add some clarity. Based on the agreement reached in December 1994, Article 3 would indeed be 'kept open' (ie, was to be a non-exhaustive list, a floor rather than a ceiling). However, the proposed text tied this understanding to what was then Article 3(6), which governed the public policy exceptions to Article 3(1).<sup>84</sup> Article 3(1) was, therefore, intended to be a floor provision via its interaction with Article 3(6). Article 3(1), read alone, therefore constitutes a ceiling above which standards could not rise and not a floor below which standards could not fall. Article 3(6) would become Article 3(10) in the final text of the Directive. This interpretation was confirmed in January 1996 when the Council Presidency noted that under the current text of the dossier, Member States could apply terms and conditions on matters beyond Article 3(1)'s provisions in the case of public policy via Article 3(6).<sup>85</sup> This provides considerably less flexibility to host states to establish higher standards for posted workers protection compared with Article 3(7), which negotiation documents indicate was intended to allow home states to continue to apply their rules if of a higher standard. Article 3(7), therefore, disproportionality benefits wealthier states' regulatory systems vs less well-off jurisdictions, given that it embeds an asymmetrical preference for the application of rules of a higher level of protection, which are more likely to be Northern/Western European Member States. A decision of the European Parliament dated the 28th of October 1996, notes the institution's approval of the Council's position.<sup>86</sup> This interpretation runs contrary to that reached by many scholars in the field. Kilpatrick, for example, understands Article 3(1) to establish a 'floor of protection for posted workers, a nucleus of mandatory rules for minimum protection', which is non-exhaustive as Article 3(7) provides that the floor does 'not prevent the application of terms and conditions of employment which are more favourable to workers'.<sup>87</sup> This is the opposite of the conclusions reached via the analysis herein.<sup>88</sup> The legislative negotiations illustrate an attempt to embed an asymmetrical mutual recognition mechanism. This asymmetry was intentionally constructed by the legislature through the deliberate introduction into the 1996 framework of rules that differentiate between home and host state control. Particularly via the interaction between Articles 3(1) and 3(7), the latter provision privileges certain labour regulatory models over others if they are 'more favourable' to workers. The 1996 act institutionalised a bias favouring the application of higher labour standards and wage rates over lower ones, thereby privileging the regulatory systems of older, Northern and Western Member states over newer, Eastern and/or Southern states, as such regulatory divergences often align along these lines. In this sense, if moving from east to west, Western rules will apply, and if moving from west to east, Western rules will also likely apply. This conceptual framing allows the Directive to be understood not merely as a site of legal compromise

<sup>84</sup>Council of the European Union, 'Presidency Note to the Working Party on Social Questions meeting on 31 January 1995' (4522/95, 27 January 1995) 3.

<sup>85</sup>Council of the European Union, 'Memorandum from the Presidency 29 January 1996' (4085/96, 29 January 1996).

<sup>86</sup>Decision on the common position of the Council with a view to adopting the Directive of the European Parliament and of the Council on the posting of workers in the framework of the provisions of services' (OJ C320/73, 28 October 1996).

<sup>87</sup>C Kilpatrick, 'The ECJ and Labour Law: A 2008 Retrospective' 38 (2) (2009) *Industrial Law Journal* 197.

<sup>88</sup>This interpretation of Article 3(1) – as establishing a 'floor' rather than a ceiling – is the predominate view taken in the literature. See, for example; RS De Castro, 'EU Law on Posting of Workers and the Attempt to Revitalize Equal Treatment' 12 (2) (2019) *Italian Labour Law e-Journal* 151; V Hatzopoulous, 'Actively Talking to Each Other: the Court and Political Institutions' in M Dawson, B de Witte and E Muir (eds), *Judicial Activism at the European Court of Justice* (2013 Edward Elgar) 121–2; P Van Nuffel and S Afanasjeva, 'The Posting of Workers Directive Revised: Enhancing the Protection of Workers in the Cross-border Provision of Services' 3 (3) (2013) *European Papers* 1411; V Bogoeski, 'The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labor in Europe' 2 (1) (2021) *Global Perspectives* 3; A Lubow and S K Schmidt, 'A hidden champion? The European Court of Justice as an Agenda-Setter in the Case of Posted Workers' 99 (2021) *Public Administration* 328.



but as a mechanism that embeds the uneven consolidation of regulatory authority for rule recognition across the single market.

I argued based on the above analysis that the Posted Workers Directive established a mutual recognition mechanism in line with Janssen's framework. Article 3(1) contains prior conditions for the establishment of mutual recognition; this list is exhaustive, and it specifies the rules that a host state may apply to posted workers, which must be recognised by the home state. While Article 3(1) does not harmonise the content of rules, such as the substantive content of the term 'minimum rates of pay' under Article 3(1)(c), it does establish that the national rule as to what is equivalent to a minimum rate of pay must be constituted in compliance with the Directive's requirements. Specifically, minimum rates of pay must be established in compliance with Article 3(1) first and second indents, meaning set down by law or administrative provision, or via universally applicable collective agreements. Once established in compliance with the Directive, they can be considered rules on the terms and conditions of employment for the Directive. Hence, minimum rates of pay can then be mutually recognised between jurisdictions. The Directive, therefore, coordinates the 'type' of rules, such as the terms and conditions of employment, that Member States must recognise. It does not, however, attempt to determine the content of those rules recognised. There are two exceptions to the general rule of Article 3(1) that can be identified from the negotiation documents. The first is implemented via Article 3(7). The provision governs Article 3(1) in that it confers regulatory authority under the Directive upon the state whose rules are 'more favourable' to workers. Whose rules are 'more favourable' is framed by the terms and conditions of employment specified by Article 3(1). National rules of the host or home state, falling within the scope of Article 3(1), are only applicable where they are equal to the standard that is of higher protection to the worker being posted; they are 'more favourable'. This interpretation was taken by Davies in 1997 following the passage of the proposal into law. He noted that the 'home State employer does not escape the regulation of its State of establishment, except to the extent that the host State's provisions are more favourable to the employee' via Article 3(7).<sup>89</sup> The second exception to the rule that can be identified from the negotiations is contained in Article 3(10) of the final act, this provision making the list non-exhaustive. It specifies that the host state may apply higher standards than those contained in Article 3(1) on grounds of public policy when applied on a basis of equality of treatment, meaning non-discrimination.

Therefore, under the 1996 Directive, Member States were under an obligation to ensure companies operating within their jurisdiction (as defined by Article 1), providing cross border workers within the context of the freedom to provide services (per Article 2), apply the rules of Member States that fall within the coordinated matters (via Article 3(1)(a)–(g)) and are established under national law in compliance with the Directive (per Article 3(1), first and second indents). Not only does the Directive impose a positive obligation upon the Member State to which workers are posted (as defined by Article 2) to ensure companies falling with the Directive (per Article 1) guarantee the terms and conditions of employment (set out by Article 3(1)(a)–(g)), but furthermore this positive obligation implies a negative obligation upon the country of origin to recognise the host state's regulatory control, unless this presumed right of regulatory control is superseded by Article 3(7). Hence, establishing a mutual recognition mechanism. This was the same interpretation of the provision taken by the Court of Justice in its subsequent case law in both *Laval* and later *Rüffert*.<sup>90</sup> This amounts to a mutual recognition mechanism under Janssen's framework, given that Member States must determine whose labour rules apply in cross-border situations. At the same time, the framework provides a preference for the application of 'more favourable' rules under Article 3(7), meaning that regulatory jurisdiction oscillates depending on

<sup>89</sup>P Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems' 34 (1997) Common Market Law Review 585 and fn 40 specifically.

<sup>90</sup>Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* ECLI:EU:C:2007:809 para 81; Case C-346/06 *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189 paras 30–5. The Court specifically refers to its reasoning in *Laval*.



the Member States in question – unless a justification for divergence from this general framework can be invoked under Article 3(10). In effect, the Directive establishes a requirement for Member States to permit labour rules lawful in one Member State to produce external legal effects in another Member State's territory: an output-oriented understanding of mutual recognition in line with Janssen's framework.

Daubler, writing in 1998, noted that the 'hard core' of labour law rules established via Article 3 was a 'quite impressive' catalogue of provisions.<sup>91</sup> Yet Daubler also observed a series of issues presented by the dossier, particularly for workers moving from lower-wage jurisdictions to higher-wage ones. Such employees are usually poorly informed on a range of issues, from knowing their rights, understanding how to pursue judicial action, and fearing being perceived as 'disloyal' for asking to receive wages higher than those in their employment contracts based on the standards or pay rates within the host state.<sup>92</sup> In sum, they are at a disadvantage. Evju notes that the Directive, via Article 3(1), took a conflict of laws approach to the management of cross-border issues of posting, but is of the view that the Directive's overarching objective is to promote the cross-border provision of services.<sup>93</sup> Davies, reflecting on the passage of the dossier into law, argued that the choice of legal basis suggested the adoption of an act with the aim of facilitating the cross-border provision of services rather than being a social instrument designed to protect workers. He suggested that the Directive does indeed advance the interest of home state employers, but that the primary beneficiaries under the Directive are the regulatory systems of the host state.<sup>94</sup> The negotiations on the dossier reveal that indeed the social and labour protection concerns appear to be secondary to the central concerns of ensuring the freedom to provide services. Regulating the freedom to provide services, in the context of posted workers, allowed the Union to address all other issues.

### C. The Laval Quartet

The *Laval Quartet* refers to a series of rulings of the Court of Justice which proved so controversial that they perhaps do not require the following review. The first ruling was *Viking*. Viking was a Finnish ship operator which sought to 'reflag' its ship in Estonia.<sup>95</sup> By doing so, it could operate under Estonian labour law and pay lower wages to its employees.<sup>96</sup> Its staff were, via a national trade union, members of the International Transporters Workers' Federation. The Federation had a policy of opposing reflagging, where the motivation was to lower labour costs.<sup>97</sup> Consequently, the national union planned industrial action. Viking claimed such action would infringe its right to establishment under Article 43 of the Treaty.<sup>98</sup> A preliminary reference was made, and the Court of Justice determined that, though ultimately for the national court to decide,<sup>99</sup> such actions could make it less attractive to exercise the right of establishment.<sup>100</sup> The Court simultaneously noted that the right to strike forms an integral part of the general principles of Union law. Yet, that right must be balanced against the rights of others and may, therefore, be subject to restrictions.<sup>101</sup>

<sup>91</sup>W Daubler, 'Posted Workers and Freedom to Supply Services' 27 (3) (1998) *Industrial Law Journal* 264.

<sup>92</sup>*Ibid.*, 268.

<sup>93</sup>S Evju, 'Revisiting the Posted Workers Directive: Conflict of Laws and Laws in Contrast' 12 (2010) *Cambridge Yearbook of European Legal Studies* 169.

<sup>94</sup>Davies (n 89) at 573.

<sup>95</sup>Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* EU:C:2007:772.

<sup>96</sup>*Ibid.*, para 6–9. Part of the reason for the company's decision was caused by the fact that it was operating at a loss as a result of competition from Estonian vessels who operated on the same route with lower wages to pay.

<sup>97</sup>*Ibid.*, para 8.

<sup>98</sup>*Ibid.*, para 23; Article 43 EC Treaty is now codified under Article 49 TFEU.

<sup>99</sup>*Ibid.*, para 83.

<sup>100</sup>Case C-438/05 *Viking* (n 95) para 55.

<sup>101</sup>*Ibid.*, para 44.

While the right to strike is, therefore, a right under Union law, its objective of protecting workers would no longer be tenable if those jobs were ‘not jeopardised or under serious threat’.<sup>102</sup> Ultimately, the consequences of the decision in *Viking* were never conclusively resolved beyond the preliminary reference request, as the case was settled out of court.<sup>103</sup>

*Laval* was decided a week after *Viking*.<sup>104</sup> Whereas *Viking* related to the right of establishment, the *Laval* case pivoted around the freedom to provide services.<sup>105</sup> In *Laval*, a Latvian company secured a construction contract in Sweden. Under Directive 96/71/EC on the posting of workers, Laval was required to pay its workers the minimum rates of pay applicable under Swedish law per Article 3(1). A Swedish trade union sought to have Laval sign its collective agreement, the terms of which were more favourable to the posted workers from Latvia than the rules the company was legally required to comply with under Article 3(1). Furthermore, the nature of the agreement prevented Laval from determining the wages to be paid in advance.<sup>106</sup> Laval refused to sign, and the trade union called industrial action, resulting in Laval being unable to conduct business in Sweden.<sup>107</sup> Laval claimed the industrial action infringed its right to freely provide services.<sup>108</sup> The Court of Justice, following a preliminary reference, ruled that compliance with Article 49<sup>109</sup> applied not only to rules which are public but also to measures designed to regulate, collectively, the provision of services.<sup>110</sup> It noted that in light of its decision in *Viking*, the right to take collective action for the protection of workers may constitute an overriding reason in the public interest, such as to justify restrictions on the freedom to provide services.<sup>111</sup> However, such actions may not be justified where negotiations on pay are characterised by a lack of sufficiently precise and accessible provisions that make it excessively difficult in practice for undertakings to determine their obligations concerning minimum pay rules applicable under Article 3(1).<sup>112</sup> The Court found the collective agreement could not be described as universally applicable for Article 3(1), second indent, read in conjunction with Article 3(8), because it was not the case that the collective agreement must be observed by all undertakings within Sweden. Nor was it observed by the whole industry.<sup>113</sup> Furthermore, as Sweden had no system for declaring collective agreements to be of universal application, it had to apply for such recognition.<sup>114</sup> Sweden utilised a decentralised approach to collective bargaining that determined wages on a case-by-case basis.<sup>115</sup> The collective agreement, therefore, did not form part of the notion of minimum rates of pay under Swedish law. As such, there were no legal grounds through which Sweden or the union could impose the collective agreement on Laval.

<sup>102</sup>Case C-438/05 *Viking* (n 95) para 81.

<sup>103</sup>A Bucker and W Warneck (eds), ‘Viking – Laval – Rüffert: Consequences and policy perspectives’ (2010) European Trade Union Institute Report 111, 119.

<sup>104</sup>*Laval* (n 90).

<sup>105</sup>*Ibid.*, paras 86–111.

<sup>106</sup>*Ibid.*, para 29. Specifically, it would not agree to allowing *Laval* to set wages in advance on a monthly basis.

<sup>107</sup>*Ibid.*, para 34.

<sup>108</sup>*Ibid.*, para 40.

<sup>109</sup>Now Art 56 TFEU

<sup>110</sup>*Laval* (n 90) para 98. The abolition of barriers to the freedom of movement of services being compromised if this was not the case; Case C-36/74 B.N.O. *Walrave and L.J.N. Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* ECLI:EU:C:1974:140, para 17 and 18; Case C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* ECLI: EU:C:1995:463 para 83–84; Case C-309/99 *J. C. J. Wouters, J. W. Savelbergh and Price Waterhouse Belastingadviseurs BV v Algemene Raad van de Nederlandse Orde van Advocaten, intervenier: Raad van de Balies van de Europese Gemeenschap* ECLI:EU:C:2002:98 para 120.

<sup>111</sup>*Laval* (n 90) para 103.

<sup>112</sup>*Ibid.*, para 101.

<sup>113</sup>*Ibid.*, para 7.

<sup>114</sup>*Ibid.*, paras 64–7.

<sup>115</sup>*Ibid.*, para 69.

*Laval* has been widely criticised, in particular for elevating economic freedoms above social rights.<sup>116</sup> Evju argues that the Court's interpretation of the 1996 Directive, considered against its drafting background, is problematic given the Court's decisions impinge upon important features of collective labour law and industrial relations dynamics.<sup>117</sup> The review of the drafting background conducted herein does not support Evju's position. He notes that the Court's restrictive approach to the kinds of terms and conditions of employment included within the scope of Article 3(1) of the Directive effectively disallows collective bargaining models typical in Scandinavian states. However, this view overlooks the express wording of Article 3(1), which emphasises that the Directive would include only universally applicable rules within its scope. For the Court to allow non-universally applicable agreements to come within its scope would have been *contra legem* unless they could be included via Article 3(8). Evju further argues that the Court's case law sidelines the role of trade unions.<sup>118</sup> Yet Deignan notes that while some might frame the Court's approach to Swedish labour law as 'harsh', if the Court had allowed Swedish law to stand uncorrected, it would have denied European law of its effectiveness and uniform application.<sup>119</sup> Relatedly, Refslund emphasises the conflict of legislative norms between the vertical and horizontal systems. The Nordic approach of self-regulation of labour markets is underpinned by voluntary agreements, secured via collective bargaining with limited state interference, and a more limited role for national law.<sup>120</sup>

Louis, in 2018, examined the impact of the European Trade Union Confederation's (ETUC) judicial activities in the area of posted workers. The ETUC established a task force for coordinating with national legal teams to develop a coherent response, and additionally, established a working group to determine 'how to win these cases'.<sup>121</sup> This resulted in the creation of a litigation network with the aim of defending trade union rights following *Viking* and *Laval*. In particular, to limit, or even reverse, the implications of those decisions.<sup>122</sup> The network's approach was centred around the use of international social law to influence the perceived primacy given to economic freedoms within the EU legal order.<sup>123</sup>

In 2022, Louis explored the legal and political impact of the rulings from a social constructivist perspective, illustrating how trade unions and labour academics interpreted the rulings as detrimental to social Europe. Yet, he argues that these conclusions are not, *stricto sensu*, legal consequences of the rulings themselves, rather the judgments were construed as a defeat of social Europe because they were read as such by these actors.<sup>124</sup> Building on this, Louis examines the impact of the Court's decisions by considering its interaction with other institutions. By doing so,

<sup>116</sup>EUR-Lex listed 129 notes relating to the decision. <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62005CJ0438>> accessed 30 November 2025.

<sup>117</sup>S Evju (n 93) 151–82.

<sup>118</sup>*Ibid.*, 181–2.

<sup>119</sup>J Deignan, 'The CJEU and Fundamental Social Rights: A Bridge Too Far or Completing the Internal Market' 10 (2011) *Hibernian Law Journal* 116.

<sup>120</sup>B Refslund, 'Adjusting the Danish industrial relations system after *Laval*: recalibration rather than erosion' 21 (2) (2015) *European Review of Labour and Research* 247–9. Refslund observes that the Danish industrial relations system could – and did – adjust to the effects of the *Laval* ruling. This was achieved via a legislative change which regulated collective strike actions by incorporating three criteria from the Court of Justice's decisions to determine whether strike actions could be permitted. Wage claims would have to be shown to be (1) the same as in relation to Danish companies, (2) laid down in a collective agreement signed by the most representative parties within the labour market, and (3) sufficiently clear. This provision allows Danish trade unions to take industrial action against foreign firms to secure collective agreement-level wages for posted workers and was used to secure approximately ten new collective agreements between 2012–2014.

<sup>121</sup>J Louis, 'The Judicialization of European Trade Union Confederation action: From the *Viking* and *Laval* Cases to Defending Fundamental Social Rights' (2022) *European Trade Union Institute Working Paper* 2022.13, 7–8.

<sup>122</sup>*Ibid.*, 10.

<sup>123</sup>*Ibid.*, 11. In particular standards set by the Council of Europe and the International Labour Organisation, which were seen as more favourable to social rights than EU law.

<sup>124</sup>J Louis, 'Constructing the *Viking* and *Laval* cases as a Major Defeat for Social Europe: A Contextual and Processual Analysis' 2 (2023) *European Law Open* 724–6.

his approach adopts a ‘law in context’ view of the rulings, emphasising the role of the protagonists in the subsequent interpretation and impact of case law on social and political reality.<sup>125</sup> He notes that *Viking* and *Laval* initially emerged from relatively normal conflicts in the private sector between trade unions and employers. At first, there was a lack of concern regarding the relationship between economic freedoms and social rights under EU law. Discussions initially centred around the interpretation of Swedish law in conformity with the 1996 Directive.<sup>126</sup> This changed with the involvement of the ETUC, which, he argues, led to the subsequent establishment of a task force, which mobilised what he terms ‘judicial lobby’ activities. The task force’s teams produced documents presenting *Laval* and *Viking* as cases where the notion of social Europe was on the menu.<sup>127</sup> Louis observes a consensus developed among labour law scholars – before the decisions had been issued – that the cases were of crucial importance to the future of a social Europe.<sup>128</sup> In this regard, Louis notes that while the initial reactions to the rulings by trade unions were ‘cautiously positive’, this transformed into harsh criticism. Initially, the recognition of the right to take collective action was welcomed; later, this evolved into a perception of cementing the importance of market freedoms over social rights.<sup>129</sup> Once issued, the decisions were viewed as a major defeat, although the Court for the first time found collective actions to represent a fundamental right under European law (without any explicit acknowledgement of such a right in primary law at the time).

Ericsson’s work explores *Laval* by considering the many and various readings, and possible misreadings, of the ruling. She emphasises that the law is a matter of interpretation, your interpretation of the law flows from your own vantage point in the broader political landscape. She noted that the narrative that the Court undervalued collective bargaining regimes was prominent in the literature, highlighting a number of examples.<sup>130</sup> Rosas described the judgment as consistent with the notion of social Europe because it protects all workers by limiting the scope for Member States to use labour standard-setting regimes to shield their domestic labour markets.<sup>131</sup> Nic Shuibhne maintains that the Court missed an opportunity to mould a more nuanced approach to freedom of movement issues, in particular given its strict application of the justification and proportionality test.<sup>132</sup> Relatedly, Davies argues that the Court’s use of the proportionality assessment was inappropriate, as it assessed the interaction of the trade union’s right to strike with the employer’s right to the freedom to provide services without a sufficient understanding of the industrial relations context in which the industrial action was actually occurring.<sup>133</sup> Ericsson furthermore examines the arguments made by Barnard, Novitz and Dorssemont, who contend that the Court’s rulings demonstrated both its economic bias and deregulatory approach to integration.<sup>134</sup> Others, such as Deakin, are critical of the mere fact that the Court engaged with the

<sup>125</sup>Louis (n 124) 724–52; For this alternative reading of *Van Gend en Loos* and *Costa v ENEL* see D Gallo, ‘Rethinking Direct Effect and Its Evolution: A Proposal’ 1 (3) (2022) *European Law Open* 576–605.

<sup>126</sup>*Ibid.*, 727–9.

<sup>127</sup>*Ibid.*, 729–32.

<sup>128</sup>*Ibid.*, 736–7.

<sup>129</sup>Louis (n 124) 738–40.

<sup>130</sup>A Ericsson, ‘The Many (Mis)readings of the *Laval* Case’ 19 (2) (2016) *Europarättslig tidskrift* 113 – 126, esp. 115.

<sup>131</sup>*Ibid.*, 113–14; A Rosas, ‘Les Travailleurs Détachés dans l’Espace Social Européen – la Jurisprudence Récente’ in *De Rome à Lisbonne: les juridictions de l’Union européenne à la croisée des chemins: mélanges en l’honneur de Paolo Mengozzi* (Bruylant 2013) 393–4.

<sup>132</sup>N Nic Shuibhne, ‘Settling Dust? Reflections on the Judgments in *Viking* and *Laval*’ 21 (5) (2010) *European Business Law Review* 682.

<sup>133</sup>ACL Davies, ‘One Step Forward, Two Steps Back? The *Viking* and *Laval* Cases in the ECJ’ 37 (2) (2008) *Industrial Law Journal* 145–8.

<sup>134</sup>Ericsson (n 130) 116–17; C Barnard, ‘*Viking* and *Laval*: An Introduction’ 10 (2008) *Cambridge Yearbook of European Legal Studies* 469–70; T Novitz, ‘A Human Rights Analysis of the *Viking* and *Laval* Judgments’ 10 (2008) *Cambridge Yearbook of European Legal Studies* 542; F Dorssemont, ‘The Right to Take Collective Action v. Fundamental Freedoms in the Aftermath of *Laval* and *Viking*’ in Marc De Vos, *European Union Internal Market and Labour Law: Friends or Foes?* (Intersentia 2009) 87.

question of judicial balancing at all, believing that the application of the proportionality test by the Court was inappropriate, echoing the views of Davies, Robin-Olivier and Evju.<sup>135</sup>

Against these critiques, Carter notes that competition in terms of labour costs and wages is a normal part of a market economy. In that sense, posted workers are, in his view, no more a source of unfair competition or social dumping than is the case within national markets. For him, social dumping can only be understood from the perspective of those who are negatively affected by the trend.<sup>136</sup> Carter also notes that a variety of factors, such as negative integration dynamics and mutual recognition, can create structural biases which result in a process of deregulation. Mutual recognition often means that a host state's rules are incompatible with internal market law, with few possibilities to derogate. This affects economies differently. Scharpf highlighted that liberal market economies are less affected by *Laval* and related rulings compared to coordinated market economies. Drawing on the framework of Hall and Soskice, Scharpf characterises liberal market economies as systems in which the state plays a minimal role in the economy and labour market intervention. Instead, the state focuses on creating the conditions for functional markets to prosper via fair competition and the provision of means-tested social assistance. In coordinated market economies, the state plays a more direct role in the economy via, for example, higher levels of labour market regulation, collective bargaining systems and the provision of universal social security systems. As a result, the Court's jurisprudence is likely to impact coordinated market economies more directly.<sup>137</sup> Cremers notes that, concerning the impact of posted workers on domestic wages and on social dumping dynamics, the identification of the macro-economic impact of such activities is, in reality, challenging. At the time of publication of that paper, Cremers observed that few Member States maintained systematic records of workers posted to their jurisdiction.<sup>138</sup>

In *Rüffert*, the Court built on its *Viking* and *Laval* jurisprudence, finding the 1996 Directive – interpreted in light of Article 56 TFEU – prevented Germany from requiring companies, subcontracted by public procurement contractors, to comply with specific domestic provisions on remuneration.<sup>139</sup> This was because Member States could not require a company to go beyond the minimum terms and conditions of employment applicable by law.<sup>140</sup> The Court concluded that the collective agreement in question was not of universal scope, and therefore did not apply via Article 3(8) as Germany had a system for declaring such agreements to be of universal application and had not done so.<sup>141</sup> As such, the collective agreement could not be enforced. In *Commission v Luxembourg*, it was argued by the Luxembourgish government that a domestic legal requirement for wages generally to be linked to the cost of living complied with Article 3(1)(C). This was rejected by the Court as that provision related to *minimum rates of pay* only and not wages

<sup>135</sup>Ericsson (n 130) 117; S Deakin, 'Regulatory Competition after Laval' 10 (2008) Cambridge Yearbook of European Legal Studies 605–7; S Robin-Olivier and E Pataut, 'Europe sociale ou Europe économique (à propos des affaires Viking et Laval)' in A Lyon-Caen et Q Urban, *Le Droit du Travail à l'épreuve de la globalisation* (Daloz 2008) 116.

<sup>136</sup>D Carter, 'Equal Pay for Equal Work in the Same Place? Assessing the Revision of the Posted Workers Directive' 14 (2018) Croatian Yearbook of European Law and Policy 47–8.

<sup>137</sup>*Ibid.*, 51–2; PA Hall and D Soskice (eds) *Varieties of Capitalism. The Institutional Foundations of Comparative Advantage* (Oxford University Press 2001); F Scharpf, 'The Asymmetry of European Integration, or why the EU cannot be a "Social Market Economy"' 8 (2010) Socio-Economic Review 233–4. Scharpf uses Hall and Soskice's framework in his paper; however, he notes that these are broadly framed 'ideal types' of these economic models, providing simplified descriptions of complex, country-specific economic configurations that do not capture all features of the national institutional constellations. For example, the UK follows a liberal market economic model but also provides universal healthcare through the National Health Service (NHS).

<sup>138</sup>J Cremers, 'In Search of Cheap Labour in Europe: Working and Living Conditions of Posted Workers' 6 (2011) CLR Studies 182.

<sup>139</sup>Case C-346/06 *Dirk Rüffert v Land Niedersachsen* ECLI:EU:C:2008:189 paras 34–5.

<sup>140</sup>*Ibid.*, para 33.

<sup>141</sup>*Ibid.*, paras 25–6.



generally.<sup>142</sup> Luxembourg claimed that the rule aimed to maintain good labour relations and therefore constituted a public policy exception per Article 3(10).<sup>143</sup> The Court noted that Article 3(10) did establish grounds for derogation.<sup>144</sup> However, such derogations must be interpreted strictly, so that their scope cannot be determined unilaterally by each Member State.<sup>145</sup> The public policy exception may only be relied upon as a derogation if there is a ‘genuine and sufficiently serious threat to a fundamental interest of society’.<sup>146</sup> For a Member State to avail of Article 3(10), appropriate evidence or analysis as to the expediency and proportionality of the restriction on the freedom affected must be supplied, along with ‘precise evidence enabling its arguments to be substantiated’.<sup>147</sup> The Luxembourgish government only cited general objectives of protecting workers’ purchasing power and maintaining positive labour relations.<sup>148</sup> Luxembourg, therefore, could not rely on the public policy exception.<sup>149</sup>

The decisions of *Ruffert* and *Commission v Luxembourg* can be linked back to *Laval*. The Court interpreted the 1996 Directive as meaning that when a host state applies terms and conditions of employment that are more favourable than those established by its national law or by universally applicable agreements, this would create situations in which posting workers from Member States with lower labour protection standards would become less attractive or more difficult. This, therefore, constituted a restriction under the Court’s case law, via its interpretation of Article 3(1) as representing an exhaustive list of rules which can be applied to workers. This reading appears to be in line with the general intention of the EU legislature as seen from the legislative negotiations on the 1996 framework. An interpretation which was further embedded in *Rüffert* and *Commission v Luxembourg* by the Court.<sup>150</sup> In Deignan’s view, the by-product of the Court’s interpretation of the 1996 framework in *Laval* and *Viking* is a system akin to that envisaged by what was known as the ‘Bolkestein’ Directive (ie, the proposed measure which later evolved into the Services Directive) and its strict country-of-origin principle or mutual recognition mechanism.<sup>151</sup> In summary, the *Laval Quartet* generated a ‘tsunami’ of academic commentary, most of which viewed the Court’s approach negatively.<sup>152</sup>

#### D. The recast Directive

Despite the centrality of the *Laval Quartet* rulings to the Commission proposal for a Recast Posted Workers Directive, references to these cases are notably absent from the written records of the institutions’ negotiation positions on the dossier. By contrast, later rulings such as *Elektrobudowa* are referred to frequently during negotiations. In *Elektrobudowa*, the Court of Justice somewhat

<sup>142</sup>Case C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* ECLI:EU:C:2008:350, paras 45–7.

<sup>143</sup>*Ibid.*, para 48.

<sup>144</sup>*Ibid.*, para 49.

<sup>145</sup>*Ibid.*, para 50.

<sup>146</sup>*Ibid.*, para 50; The Court of Justice cited Case C-54/99 *Église de scientologie* ECLI:EU:C:2000:124 para 17.

<sup>147</sup>*Ibid.*, para 51.

<sup>148</sup>*Ibid.*, para 52.

<sup>149</sup>*Ibid.*, para 55.

<sup>150</sup>Deignan (n 119) at 104–5.

<sup>151</sup>*Ibid.*, 106.

<sup>152</sup>See the special issue of the Cambridge Yearbook of European Legal Studies, Volume 10, published in 2008 which included six papers by C Barnard, M Rönningmar, A Dashwood, T Novitz, S Sciarra and S Deakin; M Blauberger, ‘With Luxembourg in Mind ... the Remaking of National Policies in the Face of ECJ Jurisprudence’ 19 (1) (2012) *Journal of European Public Policy* 109–26, and also M Blauberger, ‘National Responses to European Court Jurisprudence’ 37 (3) (2014) *West European Politics* 111; S Schmidt, *The European Court of Justice and the Policy Process: The Shadow of Case-law* (Oxford University Press 2018) 215–16; J Malmberg and T Sigeman, ‘Industrial Actions and EU Economic Freedoms: The Autonomous Collective Bargaining Model Curtailed by the European Court of Justice’ 45 (5) (2008) *Common Market Law Review* 1115–45; JE Dølvik and J Visser, ‘Free Movement, Equal Treatment and Workers’ Rights: can the European Union Solve its Trilemma of Fundamental Principles?’ 40 (6) (2009) *Industrial Relations Journal* 503.

clarified the scope and meaning of the term ‘minimum rates of pay’ under Article 3(1)(C). It outlined, for example, that host states may require posting companies to include holiday allowances, daily flat-rate allowances, and compensation for travel time within the notion of minimum rates of pay. Additionally, where a collective agreement sets different rates of pay for workers based on the categorisation of employees into pay groups, they are valid once universally applicable and transparent.<sup>153</sup> The Commission tabled the proposal for the Recast Directive in 2016.<sup>154</sup> Its purpose was the ‘targeted revision of the Posting of Workers Directive to address unfair practices and promote the principle that the same work at the same place should be remunerated in the same manner’.<sup>155</sup> The Commission outlined that the act would specifically address issues not addressed via the 1996 act.<sup>156</sup> The attached Staff Working document cites a significant report commissioned by Parliament examining the *Laval Quartet*.<sup>157</sup> That report outlines the main achievement of the 1996 act as establishing obligations for host states to ensure posted workers have a basic level of minimum labour protection applied.<sup>158</sup> The report characterises the 1996 Act as a ‘minimum labour law’,<sup>159</sup> a claim not supported by the overview of the negotiations concluded herein. The report presented the consequence of the Court’s rulings in *Viking*, *Laval*, *Rüffert* and *Commission v Luxembourg* as clarifying that: (1) collective actions, which include industrial actions, may amount to a restriction of economic freedoms under the Treaties;<sup>160</sup> (2) collective actions are a fundamental right under Union law, but must be balanced against free movement rights;<sup>161</sup> (3) the 1996 Directive had been interpreted by the Court of Justice as a ceiling rather than a floor and as exhaustive coordination of national measures.<sup>162</sup> The Commission’s proposed revision of the 1996 framework sought to remove the reference to ‘minimum rates of pay’ and instead refer to the notion of ‘remuneration’.<sup>163</sup> The move from the term ‘minimum rates of pay’ toward ‘remuneration’ is an attempt to address the Court’s interpretation of what was included in the notion of minimum rates of pay per Article 3(1). The Commission, while observing the Court’s case law, contributed to the progressive clarification of the law, and also noted that case law is unpredictable, necessitating legislative intervention.<sup>164</sup> By moving toward the term remuneration, the Commission appears to have intentionally sought to widen the scope of Article 3(1) to include a broader array of rules within the notion of wages or minimum rates of pay.

The European Economic and Social Committee argued for the need to address the ‘false interpretation of the Directive as a maximum standard’ which had arisen following the *Laval*

<sup>153</sup>Case C-396/13 *Sähköalojen ammattiliitto ry v Elektrobudowa Spółka Akcyjna* ECLI:EU:C:2015:86.

<sup>154</sup>European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services’ (COM(2016) 128 final) 08.03.2016). (Hereafter Commission, ‘Proposal amending Directive 96/71/EC (COM (2016) 128 final)’).

<sup>155</sup>*Ibid.*, 2.

<sup>156</sup>*Ibid.*, 3.

<sup>157</sup>European Commission, ‘Commission Staff Working Document Impact Assessment Accompanying the document ‘Proposal for a Directive of the European Parliament and the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services’ (8 March 2016) 18. (Hereafter Commission, ‘Staff Working Document 2016’); European Parliament, ‘Directorate General for Internal Policies, The Impact of the ECJ judgments on Viking, Laval, Rüffert, and Luxembourg on the practice of collective bargaining and the effectiveness of social action’ (Brussels, May 2010). (Hereafter European Parliament, ‘The Impact of the ECJ Judgments on Viking, Laval, Rüffert, and Luxembourg’).

<sup>158</sup>*Ibid.*, 3.

<sup>159</sup>*Ibid.*, 4.

<sup>160</sup>*Viking* (n 95) paras 68–74, 75–80; *Laval* (n 90) para’s 99–101.

<sup>161</sup>*Viking* (n 95) paras 2, 43–4; Case *Laval* (n 90) paras 3, 90–1.

<sup>162</sup>*Commission v Luxembourg* (n 142) para’s 26–31.

<sup>163</sup>Commission, ‘Staff Working Document 2016’ (n 157) 21–8.

<sup>164</sup>*Ibid.*

*Quartet* and ‘re-establish it as a minimum standard’.<sup>165</sup> This move appears to be a clear repudiation of the Court’s interpretation of the Directive. The Committee believed collective agreements should be understood as benchmarks for remuneration.<sup>166</sup> The inclusion of the concept of remuneration was viewed as a codification of the Court’s *Elektrobudowa* decision, which was seen as clarifying and widening the meaning of ‘minimum rates of pay’. In *Elektrobudowa* the Court of Justice expanded the interpretation of Article 3(1)(C)’s reference to the notion of minimum rates of pay by equating it with the notion of a ‘minimum wage’. It thereby interpreted the meaning of Article 3(1) through Article 3(7), second paragraph, which contained a reference to the notion of a ‘minimum wage’. That provision specifies that allowances paid to posted workers could be considered to form part of the notion of a minimum wage under Article 3(7), unless paid in reimbursement of expenditure actually incurred in relation to the posting. However, this broader notion of minimum wage can be relied upon, according to the Court, ‘only in so far as that definition, as it results from the relevant national law or collective agreements or from the interpretation thereof by the national courts, does not have the effect of impeding the freedom to provide services’.<sup>167</sup> The Court’s broadening of the scope of Article 3(1)(C), via its reading of Article 3(7), was picked up by the legislature via the proposed shift towards the concept of remuneration. The term remuneration was also viewed favourably by the Committee of the Regions as it would strike a balance between ensuring cross-border service provision while also protecting workers and preventing unfair competition.<sup>168</sup> A report issued by the European Parliament’s Employment and Social Affairs Committee on the issue of social dumping from 2016 provides important context.<sup>169</sup> It makes several references to case law, noting in particular that in *Laval*, the right to take collective action, including industrial action, was found to form part of Union law, but such actions must be proportionate and not unjustly restrict the freedom to provide services.<sup>170</sup> It notes that, in relation to the ruling in *Elektrobudowa*, the 1996 framework pursues a dual aim: (i) ensuring fair competition, and (ii) ensuring a nucleus of mandatory rules for the minimum protection of workers, supporting my previous conclusions.<sup>171</sup>

Parliament’s Committee on the Internal Market and Consumer Protection proposed thirty-nine amendments. Amendment 19, altering Recital 12 of the Commission’s original proposal, implicitly adopts the Court’s language, observing that it is within the Member States’ competence to set rules on remuneration, but that these rules must be justified by reference to the protection of workers and not disproportionately restrict service provision.<sup>172</sup> Amendment 15 sought to alter the same provision so as to specify that wage setting is a matter for the Member States and their social partners, and care should be taken not to undermine national approaches.<sup>173</sup> Amendment 15, which did not implicitly endorse the Court’s doctrinal reasoning as proposed by amendment 19, was

<sup>165</sup>European Economic and Social Committee, ‘Opinion on the ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of the European Parliament and of the Council concerning the posting of workers in the framework of the provision of services’ (3 March 2016) para 5.7. (Hereafter the Opinion of the Economic and Social Committee (2016)).

<sup>166</sup>*Ibid.*, para 1.5. It states that ‘The EESC considers collective agreements to be the benchmark for levels of remuneration’.

<sup>167</sup>*Ibid.*, para 4.1.4, and specifically fn 15; *Elektrobudowa* (n 153) paras 32–4.

<sup>168</sup>Committee of the Regions, ‘Opinion of the Committee of the Regions – The Revision of the Posting of Workers Directive’ (2017/C 185/10, 9 June 2016) para 11 and 14. (Hereafter the Opinion of the Committee of the Regions (2016)). The Committee of the Regions is an advisory body established under the Treaties tasked with representing Europe’s regional and local authorities.

<sup>169</sup>European Parliament, ‘Report of the Committee on Employment and Social Affairs on social dumping in the European Union’ (A8-0255/2016, 18 August 2016). (Hereafter Report of the Committee on Employment and Social Affairs (2016)).

<sup>170</sup>*Ibid.*, 7.

<sup>171</sup>*Ibid.*, 8.

<sup>172</sup>Report of the Committee on Employment and Social Affairs (2016)) (n 169) 42–62.

<sup>173</sup>European Parliament, ‘Committee on Employment and Social Affairs, Report on the proposal for a Directive of the European Parliament and of the Council amending Directive 96/71/EC of The European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services’ (A8-0319/2017, 19 October 2017). (Hereafter Report of the European Parliament on the proposal for a directive (2017)) 12.

successfully incorporated into the Recast Directive via Recital 17. Amendment 21 proposed the introduction of a new Recital 12(b) specifying that, in line with the Court's findings, collective agreements '...cannot per se constitute a public policy exception within the meaning of Article 3(10) ...' of the original Directive, with *Commission v Luxembourg* cited as precedent for this; however, the amendment was ultimately rejected.<sup>174</sup> Following this, informal contacts between Parliament, the Council, and the Commission resulted in an agreement on a compromise text in a vote held on 29 May 2018.<sup>175</sup> The text was then forwarded to the Council for approval on 22 June.<sup>176</sup>

In the Council, the dossier was assigned to the Employment, Social Policy, Health and Consumer Affairs Committee in 2016.<sup>177</sup> From the outset, the dossier was subject to tensions, the Social Questions Working Party (SQWP) observing that several delegations opposed negotiations, arguing the Commission's work on the dossier was insufficient.<sup>178</sup> Concerns were raised regarding the introduction of remuneration to the revised act.<sup>179</sup> The Commission observed that it was a broad concept that would not require an explicit definition.<sup>180</sup> The Polish Senate underlined that general interest restrictions should not go beyond what is necessary and that distinctions between posted and local workers relating to wage differences are not, *stricto sensu*, discriminatory.<sup>181</sup> Similarly, Latvia argued that the principle of equal pay for equal work needed to reflect that posted workers are not in the same position as local workers.<sup>182</sup> Estonia argued that such differences were a legitimate element of single-market competition.<sup>183</sup> Croatia argued that the proposal contravened freedom of movement principles.<sup>184</sup> There was, therefore, a clear pushback from Eastern Member States against the incorporation of the term remuneration.

The key theme tying these points together is the question of the degree of national autonomy in wage setting (via the concept of remuneration) that should be afforded to Member States. The Presidency and the Commission were convinced that the incorporation of remuneration into

<sup>174</sup>Report of the European Parliament on the proposal for a directive (n 173) (2017) 51; *Commission v Luxembourg* (n 142).

<sup>175</sup>Council of the European Union, 'Communication from the General Secretariat to the Permanent Representatives Committee concerning the Proposal for Directive of the European Parliament and of the Council on the amending of Directive 96/71/EC (Outcome of the Parliament's first reading)' (9467/18, 1 June 2018). The original file from the Parliament indicating its assent could not be identified, hence it was proved via this document. (Hereafter Council, 'Communication from the General Secretariat' (9467/18)).

<sup>176</sup>Council of the European Union, '3625<sup>th</sup> Meeting of the Council of the European Union (Employment, Social Policy, Health and Consumer Affairs), Voting Result for Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (First reading) (Adoption of a legislative act)' (10422/18, 22 June 2018). (Hereafter Council, '3625<sup>th</sup> Meeting – Voting Results' (10422/18)).

<sup>177</sup>*Ibid.*

<sup>178</sup>Council of the European Union, 'Social Questions Working Party Outcome of Proceedings on Directive of the European Parliament and of the Council amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services' (7894/16, 22 April 2016) 1.

<sup>179</sup>*Ibid.*, 7.

<sup>180</sup>*Ibid.*, 8–9.

<sup>181</sup>Council of the European Union, 'Communication from the Polish Senate to the Presidency of the Council concerning the Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC' (8001/16, 15 April 2016); The Lithuanian Parliament argued the same, see Council of the European Union, 'Communication from the Lithuanian Parliament to the President of the Council concerning the Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC' (8762/16, 10 May 2016) 4.

<sup>182</sup>Council of the European Union, 'Communication from the Latvian Parliament to the President of the Council concerning the Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC' (8759/16, 11 May 2016) 9. (Hereafter 'Communication from the Latvian Parliament (8759/16)').

<sup>183</sup>Council of the European Union, 'Communication from the Estonian Parliament to the President of the Council concerning the Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC' (8798/16, 11 May 2016) 2. (Hereafter 'Communication from the Estonian Parliament (8798/16)').

<sup>184</sup>Council of the European Union, 'Communication from the Croatian Parliament to the President of the Council concerning the Proposal for Directive of the European Parliament and of the Council amending Directive 96/71/EC' (8761/16, 10 May 2016) 7.

Article 3(1) would not affect national competences.<sup>185</sup> A report issued by the Permanent Representatives Committee of the Council on the proposed Directive notes that one of the main issues raised during negotiations was whether the proposal adequately guaranteed the exercise of fundamental rights, in particular the freedom to strike, negotiate, conclude, and enforce collective agreements. This observation clearly points toward the impact of *Viking* and *Laval*.<sup>186</sup> In late October, the General Secretariat released an amended text, with Recitals 7a–8 incorporating the Court of Justice’s jurisprudence,<sup>187</sup> and paragraph 7 of Article 3 replaced by provision (ca), which reflects the ruling in *Elektrobudowa*. Specifically, the revised provision outlines that allowances specific to posting form part of the concept of remuneration unless those allowances are intended to reimburse expenditure related costs incurred related to the posting. This amendment successfully made its way into the final act.<sup>188</sup> Recital 12a states that the ‘concept of “remuneration” should include, but should not be limited to, all the elements of minimum rates of pay developed by the Court of Justice . . .’.<sup>189</sup> This approach is perhaps unsurprising. Pecinovsky, for example, considers the evolution of the Court of Justice’s *Laval Quartet* jurisprudence in the post-2009 era.<sup>190</sup> Examining the Court’s rulings in *Elektrobudowa* and *RegioPost*, he argues that the Court took a more ‘socially friendly’ approach in its case law. In *Elektrobudowa*, for example, the Court of Justice noted that while Article 3(1) of the 1996 Directive allows host states to prescribe minimum wages, it leaves the components of this notion undefined; thus, the concept of minimum wages should be interpreted in accordance with host state law unless the national definition would impede the freedom to provide services.<sup>191</sup> Relatedly, in June 2017, changes to Article 3(10) were proposed to specify that the Directive would not prevent Member States from applying ‘terms and conditions of employment on matters other than those referred to in the first subparagraph of paragraph 1 in the case of public policy exceptions’ once done in a non-discriminatory way. Significantly, in 2018, the Council noted Article 3(8) had been amended to read, ‘[i]n the absence of, or in addition to, a system for declaring collective agreements or arbitration awards to be of universal application within the meaning of the first subparagraph, Member States may, if they so decide, base themselves on’ ... [emphasis added].<sup>192</sup> This changes the functioning of the 1996 framework considerably, representing a significant legislative amendment in response to the *Laval* ruling. It allows Member States to apply rules which fall outside the scope of the original Directive, as they did not form part of universally applicable domestic rules on minimum rates of pay. On 22 June, the Council approved the text by 22 votes. (Croatia, Latvia, Lithuania, and the United Kingdom abstaining, Poland and Hungary voting no).<sup>193</sup>

<sup>185</sup>Council of the European Union, ‘Communication from the Permanent Representatives Committee to the Council concerning the Proposal for Directive of the European Parliament and of the Council on the enforcement of Directive 96/71/EC (Progress Report)’ (9949/16, 10 June 2016).

<sup>186</sup>Council of the European Union, Progress Report (n 185) 7.

<sup>187</sup>Council of the European Union, ‘Communication from the General Secretariat to the Delegations concerning the Proposal for Directive of the European Parliament and of the Council on the amending of Directive 96/71/EC (General Approach)’ (13612/17, 24 October 2016) 3–4.

<sup>188</sup>*Ibid.*, 14; *Elektrobudowa* (n 153). In that ruling the Court of Justice specified that allowances formed part of the minimum wage, for the purposes of Article 3 of the 1996 Directive, where they are paid as part of the a national collective labour agreement or minimum pay regulations in a Member State, and are not paid as in ‘reimbursement of expenditure actually incurred on account of the posting . . .’. See specifically that ruling para 47.

<sup>189</sup>Council, ‘Communication from the General Secretariat to the Delegations’ (13612/17) (n 187) 6.

<sup>190</sup>P Pecinovsky, ‘Evolutions in the Social Case Law of the Court of Justice’ 7 (2) (2016) European Labour Law Journal 294–309.

<sup>191</sup>*Ibid.*, 303.

<sup>192</sup>Council of the European Union, Communication from the General Secretariat to the Permanent Representatives Committee concerning the Draft Directive of the European Parliament and of the Council on the amending of Directive 96/71/EC (first reading) (Adoption of the legislative act/Statements) (9383/18, 15 June 2018) 33.

<sup>193</sup>Council, ‘3625<sup>th</sup> Meeting – Voting Results’ (10422/18) (n 176) 2. The states who approved the text are, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden.



This overview of negotiations demonstrates that the Recast Directive reinforces the asymmetry of the 1996 framework, favouring higher-wage Member States by broadening mutual recognition via the shift toward remuneration in Article 3(1)(C). Eastern Member States repeatedly contest this, reflecting the persistent east–west divide noted by Kyriazi. She examined the political dynamics behind the revision of the 1996 framework and asked what the drivers are of this shift towards the ‘social’.<sup>194</sup> Her work draws on media coverage and elite interviews to reconstruct the policy process. She concludes that transnational organisation at the vertical level, and relatedly to this, between horizontal levels, was an important part of the policy-building process that ultimately concluded with the Recast Directive becoming law. In particular, intergovernmental negotiation tactics between Western/old and Eastern/new European Member States governments triggered dynamic feedback loops where coalitions for and against the proposal developed along these geographical and historical lines.<sup>195</sup> She shows how conflict over revising the dossier versus maintaining the existing framework is structured predominantly along territorial lines, between East and West, or between high-wage and low-wage economies.<sup>196</sup> Bogoeski, however, views the Recast Directive as the result of a countermovement, led by the European trade union movement, against the Court of Justice’s case law. This reflects the findings of Louis. The revision of the Court’s interpretation of the 1996 framework can be seen, in Bogoeski’s view, as a form of symbolic rescue of the European Union’s liberal market economic approach and a rejection of market access as the Union’s understanding of social justice.<sup>197</sup> Bogoeski argues that the Court’s interpretation of the law creates a fictitious commodification of work that artificially seeks to subject labour to the rationality of the market. This, by extension, undermines the underlying inter-dependent and organic dynamics of ‘the social whole’, by dressing these arrangements in the cloak of contractual interactions which effectively ignore the underlying social relations.<sup>198</sup>

From a longitudinal perspective, Zahn argues that the posted workers Directives are examples of failed attempts to Europeanise applicable national labour rules. Both Directives attempt to promote cross-border service provision, while also seeking to ensure fair competition and respect for workers’ rights within the internal market.<sup>199</sup> She notes that the Commission’s proposal for the Recast Directive was a step in the right direction, in particular as the inclusion of the term ‘remuneration’ allows ‘the inclusion of a variety of different elements as part of a pay package and give social partners some discretion in bargaining over pay and its constituent parts’.<sup>200</sup> However, in the sectoral pay context, the framework continues to only recognise collective agreements of a universally applicable nature. The result is that countries such as Sweden, where such agreements are not widely used, will continue to face issues related to wage equality.<sup>201</sup> Rizzi has observed the longitudinal effects of *Viking* and *Laval* as a provocation for further positive integration in this area. A consequence of the Court’s rulings is a highlighting of underlying issues within the Union’s legal and constitutional system regarding the balance between fundamental rights and economic freedoms. This prompted both national and supranational responses to address these asymmetries at both the horizontal and vertical levels. Horizontal level responses, including Member State adaptation of domestic labour rules in response to case law, leading to the emergence of more coherent social policies at the European level. Equally, case law triggered distinctively European

<sup>194</sup>A Kyriazi, ‘Making and Breaking Coalitions for a more “Social Europe”: The Path Towards the Revision of the Posted Workers Directive’ 29 (3) (2023) *European Journal of Industrial Relations* 225.

<sup>195</sup>*Ibid.*, 225.

<sup>196</sup>*Ibid.*, 223–36.

<sup>197</sup>V Bogoeski, ‘The Revision of the Posted Workers Directive as a Polanyian Response to Commodification of Labour in Europe’ 2 (1) (2021) *Global Perspectives* 7.

<sup>198</sup>*Ibid.*, 4.

<sup>199</sup>R Zahn, ‘Revision of the Posted Workers Directive: A Europeanisation Perspective’ 19 (2017) *Cambridge Yearbook of European Legal Studies* 209.

<sup>200</sup>*Ibid.*

<sup>201</sup>*Ibid.*, 206.

responses via the institutions as shown herein.<sup>202</sup> Taken together, the empirical analysis demonstrates that the Recast Directive preserves the structural asymmetries of rule application via Article 3(1)'s mutual recognition mechanism. It reflects a more socially friendly turn in that the inclusion of the notion of remuneration under Article 3(1)(C) allows a wider array of domestic rules to be applied to posted workers. Yet the framework continues to favour the application of labour rules from higher protection jurisdictions. Moreover, it continues to rely on procedural mechanisms which facilitate the mutual recognition of certain 'types' of rules between Member States without resolving the deeper divergences in national labour systems regarding the substantive content of labour rules that led to so much of the tension in the context of the cross-border posting of workers.

#### 4. Analysis

The 1996 Directive is often framed as setting minimum standards for employment conditions for posted workers. Strictly speaking, this is untrue; rather than setting minimum standards, it establishes a list of rules (Article 3(1)(a)-(g)) which must be recognised between Member States when workers provide their labour in the context of the cross-border services provision. It is the Member States who establish minimum labour and social standards applicable within their territories. The 1996 framework only removes regulatory barriers to the provision of labour in the context of the freedom to provide services: deregulation via mutual recognition. In both the post-*Rush* and post-*Laval Quartet* eras, the implications of case law created pressure for political institutions to respond. In many Member States – such as France, Germany, Finland and Sweden – concern is centred around the idea of unfair competition and social dumping, which would result in a race to the bottom. By contrast, newer Member States – such as Poland, Latvia, Estonia and Croatia – appear to have viewed the case law positively and resisted its revision. To them, cross-border competition seems to be framed as a central component of the Union's single market. When these two perspectives met, conflict emerged across largely geopolitical lines within the multi-level space, as noted by Kyriazi. Lindstrom similarly highlights in her work the split that *Viking* and *Laval* created between the 'old' and 'new' Member States, arguing that the rulings represent a split between members along these socio-political divides.<sup>203</sup> Kyriazi and Lindstrom's conclusions in this regard are supported by the analysis herein. Demands for political institutions to respond, reconsider and renegotiate existing free movement and social policy rules resulted ultimately in the 1996 and 2018 Directives. This whole saga was not unforeseeable, Scharpf stated in 2002 that; 'the only thing that stands between the Scandinavian welfare state and the market is not a vote in the Council of Ministers or in the European Parliament, but merely the initiation of ... legal action by potential private competitors before a national court that is then referred to the European Court of Justice for a preliminary hearing'.<sup>204</sup>

If we accept – and many are likely to disagree with the analysis herein – that the objective of the 1996 Directive was to (1) regulate instances where workers provide their labour in the context of freedom to provide services and (2) manage the linked social dumping issues highlighted by Member States, the question becomes who the posted workers framework aimed to protect. The Directives protect all cross-border workers in that they ensure minimum levels of protection

<sup>202</sup>C Uğur Rizzi, 'The impact of the Court of Justice of the European Union on the development of the European Union Social Policy' 13 (2020) *International Journal of Social Inquiry* 804–5.

<sup>203</sup>N Lidstrom, 'Service Liberalization in the Enlarged EU: A Race to the Bottom or the Emergence of Transnational Political Conflict?' 48(5) (2010) *Journal of Common Market Studies* 1307–27.

<sup>204</sup>F Scharpf, 'The European Social Model: Coping with the Challenges of Diversity' 40 (4) (2002) *Journal of Common Market Studies* 657.

vis-à-vis pay (later ‘remuneration’) and working conditions. Yet, the origins of both instruments clearly grew from political concerns of the Member States related to social dumping and, based on the conclusions drawn above, appear to be strongly connected to a motivation to protect higher-earning workers from the competition posed by lower-earning workers. Article 3(7)’s interaction with Article 3(1), as the examination of the *travaux préparatoires* conducted herein demonstrates, guaranteed that workers from Member States with better working conditions could have the rules of that Member State applied both (A) within the home state to incoming workers, and (B) in the host state when they move from high to low wage jurisdictions. Workers from home states with lower rates of pay and labour standards cannot benefit from the application of Article 3(7), as their home state’s rules are not ‘more favourable’. Hence, their employer must pay these workers a higher wage specified by the host jurisdiction. In this sense, the conclusions of this study lend weight to the work of Jukovec, who, in exploring the notion of ‘Social Europe’, argues that the stance taken on the *Laval* and *Viking* rulings depends upon the vantage point of the viewer in the broader social, political and economic landscape of the Union. Jukovec is critical of those who attempt to disconnect social rights from economic freedoms. In his view, this literature overlooks the idea that the *Laval* ruling is equally about the social rights of the Latvian workers against an interpretation of the freedom of movement provisions of the Treaty as an economic provision that would favour the Swedish trade unions.<sup>205</sup> The Union’s political institutions argued that posted workers should at a minimum be paid the same rate of pay as local workers in line with the principle of ‘equal pay for equal work’ during the negotiations on the Recast Directive. However, we should ask if the issue is that simple, and if the deployment of this mantra is as sincere as it is presented. As Latvia argued in the Council negotiations, posted workers are not necessarily in the same position as local workers, wage differences reflecting different cost-of-living requirements, for instance.<sup>206</sup>

That said, the use of mutual recognition in the Posted Workers context in many ways comes down to the constraining effects it has on Member States and their autonomy to determine what rules apply in their jurisdictions and to their workers. Higher-standard, wealthier Member States continued to express social dumping concerns under the 1996 framework, as posted workers were only required to receive the minimum rates of pay established in their domestic laws. Such pay levels often fall below the actual wages of many workers who earn above the legal minimum, limiting domestic flexibility in addressing social dumping. Yet, the Member States accepted these constraints on their domestic autonomy to secure the broader objective of ensuring the freedom of movement of services. Lower-standard Member States were also constrained. They could no longer apply their labour rules to workers providing services in higher-wage jurisdictions, reducing their competitive economic advantage. While many of the newer Member States were not involved in drafting the 1996 framework, they participated in the 2018 revision and thus faced similar choices regarding the restriction of national autonomy during those negotiations, particularly with regard to the introduction of the broader concept of remuneration into Article 3(1)(c). The Posted Workers frameworks embed an asymmetrical form of mutual recognition: the regulatory mechanism that privileges certain labour systems, typically those of older, higher-wage Member States, over others. Yet these constraints represent deliberate and politically meaningful choices, as a review of the negotiations clearly shows. These choices are enacted and facilitated through shared vertical institutions, presenting both opportunities and trade-offs for Member States that are inherent in European cooperation.

<sup>205</sup>D Jukovec, ‘Whose Social Europe? The Laval/Viking judgments and the prosperity gap’. Talk presented at the ‘Developing Europe: Regional Policy and Free Markets in European Legal Discourse’ Conference, Harvard Law School (16 of April 2010). (Accessible via [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1800922](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800922). Last Accessed 29 November 2025).

<sup>206</sup>‘Communication from the Latvian Parliament (8759/16)’ (n 182) 9.

## 5. Conclusions

This paper has sought to illustrate the challenges of being ‘United in Diversity’. In a Union that is characterised by political, economic, social and cultural heterogeneity, mutual recognition allows us to work together by skirting around the meta-politics. That is to say, mutual recognition allows the Member States to bypass deeper political and ideological questions, such as what assumptions, values, social model, or goals underpin the pursuit of deeper integration from a substantive perspective. Rather, mutual recognition emphasises the pursuit of functional integration. It achieves this by instead focusing on the development of mechanisms and structures which can enable coordination and facilitate cooperation between the public actors, administrative bodies, and the regulatory systems of the Member States. It facilitates such cooperation and coordination by advancing a formula wherein the ‘types’ of rules recognised between Member States are regularised at the Union level (allowing unity) with the specific ‘content’ of those rules subject to determination by the national level (facilitating diversity).

In the Posted Workers Directive, this is done through leaving the substantive content of the terms of Article 3(1) to the Member States for determination, such as the meaning of ‘minimum rates of pay’ and later ‘remuneration’. Only the types of rules recognised are specified in Article 3(1). Yet, as the negotiations on both dossiers and the related case law demonstrate, this approach does not address the underlying political tensions that may, and often do, emerge when legal systems interact and conflict as the different social, economic, cultural and political perspectives of the Member States come into contact via recognition between legal systems. In the context of posted workers, we see this via the interaction of different methods of wage setting across the horizontal level, or the different notions of what is included within the scope of the term minimum rates of pay. Where these different rules and norms came into contact via the 1996 framework, it created not just legal consequences but broader political and societal tension that resulted in disunity. Enlargement – as noted by Schmidt and Nicolaïdis in the context of the implementation of mutual recognition in the services Directive – exacerbated these conflicts, and increasingly these conflicts emerged along geo-political lines.<sup>207</sup> The research herein clearly mirrors and supports this finding. The Posted Workers frameworks clearly embedded an asymmetrical preference for the mutual recognition of higher-labour-standard jurisdictions over lower-standard jurisdictions, since the former jurisdictions fall into the category of ‘more favourable’ to workers under Article 3(7), which modulates the application of Article 3(1) across jurisdictions. However, this framework reflects a deliberate political choice enacted through shared European institutions. That choice can be contested or questioned, but it remains a legitimate and deliberate political choice.

Returning to the broader question regarding the lessons of the Posted Workers saga for European integration more broadly, the case study highlights the challenges of being ‘United in Diversity’. As I pointed out at the outset of this paper, mutual recognition is omnipresent in Europe; it is central to how we govern, a cornerstone of integration. Everything from goods to services, criminal cooperation and risk regulation, private cooperation to the enforcement of judicial orders, is supported, in some way, by mutual recognition. This reliance on mutual recognition has been driven largely via its implementation in secondary law by political institutions. But as this case study demonstrates, there are limits to our ability to recognise the types of rules between jurisdictions without setting down a basic agreement as to the substantive content of such rules. Mutual recognition cannot indefinitely act as a substitute for political agreement on legal substance. Where our political institutions do not engage in meaningful discussions as to the substantive meaning of the ‘types’ of rules we agree to recognise between

<sup>207</sup>S Schmidt and K Nicolaïdis, ‘Mutual Recognition on Trial: the Long Road to Services Liberalization’ 14 (5) (2007) *Journal of European Public Policy* 717–34.

jurisdictions, they will run into limits, particularly where such rules overlap with important social, economic, cultural, or constitutional questions. The challenge for the Union, therefore, is not just to facilitate diversity via procedural rules and broader governance mechanisms such as mutual recognition. We require meaningful engagement with what rules, what values, and indeed what social model the Union should pursue.

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