# EUROPEAN PARLIAMENT

## MINI-HEARING

## "Posting of workers: do the EU rules work? A Nordic Perspective"

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**BRUSSELS**
**European Parliament**
**Committee on Employment and Social Affairs**

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## Executive Summary

The Posting of Workers Directive 96/71/EC was introduced in the mid 90´s and can be seen as a codification of some of the ECJ case law on how to balance partly conflicting interests or how to draw the borderline between free movement on services on one hand and the avoidance of so called social dumping and the protection of posted workers on the other.

This presentation deals with the present situation of posting in the Nordic countries (mainly Denmark, Finland and Sweden) and argues that the Nordic rules do work, although there are certain tensions when adapting the rules on posting to the Nordic Model of collective bargaining.

The presentation discusses the special features of the different Nordic countries and presents some new developments especially from Sweden.

The presentation also deals with the recent Commission Communication: "Guidance on the posting of workers in the framework of the provision of services".[1]

The report argues that the Commission Guidance report does not adequately deal with the problems related to posting; on one hand the need for surveillance and control seems to be underestimated, on the other hand the possibilities for surveillance by the labour market partners and especially the trade unions seem not to be much appreciated

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[1] COM (2006)

## 1. Introduction

In the new enlarged European Union the question of free movement of services and workers and the legal framework of posting of workers have for many reasons drawn much attention. The fact is that most Member States introduced transitional restrictions on the movement of workers from the new Members States to the old ones. The different wage levels in some of the new Member States compared with those in the old ones make it attractive to recruit workers from the new Member States and provide temporary work services by them in the old ones. This can be done both by international temporary agency multinationals but also by local companies. In the border regions there has been much activities in this respect: There are hundreds of Finnish companies that have established themselves in Estonia since 1 May 2004 in order to make business in this field. The large scale of commuting temporary agency workers between Estonia and Finland also lead to the abolition of the restrictions on the free movement of workers this year.

The Posting of Workers Directive 96/71/EC was introduced in the mid 90´s and can be seen as a codification of some of the ECJ case law on how to balance conflicting interests or how to draw the borderline between free movement on services on one hand and the avoidance of social dumping and the protection of posted workers on the other.

During the debates on the EU Constitution, the Service Directive and free movement of services, the restrictions on free movement of workers issues relating to posting of workers have been in the forefront. The Swedish Vaxholm case that is referred to the ECJ from the Swedish Labour Court also addresses some issues on interpretation of the Directive. We therefore deal with important issues that has got much public attention and it is of importance that the European Parliament is basing all its statements in this field on in depth knowledge.

## 2. The labour law model in the Nordic countries

### *2.1 General background*

In the EU Member States there is a prevailing presumption that a certain level of minimum labour standards must be maintained by all employers in a given industry or profession, regardless of whether or not they have concluded collective agreements. The methods used to achieve this vary, however. The vast majority of the Member States have some form of statutory minimum wage. It may be legislation on a minimum wage or systems for extending collective agreements and making them generally applicable (in other words giving them *erga omnes* effect) or a combination of both. So is also the case in Norway and Finland. In both countries there exists a mechanism - although differently designed - for the extension of collective agreements whereby the collective agreement is given an *erga omnes* effect. Such a collective agreement is rendered applicable to all employees within its ambit.

Sweden is different, as is Denmark. They have neither mechanisms for making collective agreements generally applicable, nor legislation on minimum wage.

Instead, another method is used, which might be called the *autonomous collective agreements model*.

In this model it is in fact the exclusive responsibility of the trade unions to safeguard a general level of wages and employment conditions. They do this by trying to force domestic or foreign employers who do not belong to any employers' organisation to conclude '*application agreements'*, i.e. collective agreements in which the employer undertakes to apply the collective agreement covering the branch of activity in question.

If the non-organised employer refuses to sign a collective agreement, the normal procedure is that the trade union declares a boycott against this employer. The meaning of the boycott is that the members of the trade union shall refuse to work for the outside employer. However, this is seldom sufficient, as the trade union may not have any members at the workplace and the employer, particularly if it is a foreign employer that posts workers temporarily in the country, may not want to employ any trade union members to carry out work there. In this situation, the boycott is combined with sympathy (secondary) actions which make the primary boycott more effective. These actions may be taken by the trade union itself, or by other trade unions. The sympathy actions usually aim at stopping deliveries to and from the outside employer.

In this context another specificity of the Swedish system is worth mentioning. Even if the trade union manages (if necessary after having recourse to industrial action) to conclude an application agreement with the outside employer, terms and conditions of employment are not finally settled. For example, very few Swedish sectoral collective agreements today contain wage rates. Usually, they merely lay down a minimum wage intended for very young workers with no or very little work experience, while the wages for all other workers are to be negotiated between individual employers and trade unions at the local level. In the building sector, work is normally carried out at a piece rate, which is negotiated individually for each construction site. All these local level negotiations take place under a peace obligation. Thus, a Swedish standard sectoral collective agreement lays down a framework for negotiations at local level, which makes the system flexible and creates opportunities to take local peculiarities into account.

It goes without saying that an extensive right to take industrial action against employers who are outside the collective bargaining system is of key importance for the functioning of the autonomous collective agreements model. The legitimacy of this model is now being challenged in the *Vaxholm* case, with reference to the EC Treaty provision of the free movement of services. On the one hand it raises important principal issues of European labour law, on the other it concerns some very special Swedish features related to the implementation of the Directive 96/71/EC concerning the posting of workers in the framework of the provision of services (the Posted Workers Directive). The Swedish Labour Court has asked for a preliminary ruling from the ECJ on whether Swedish rules on the right to industrial action are in conflict with EU-law (C-341/05).

*2.2 Sweden*

According to section 23 of the Co-Determination Act, a collective agreement is an agreement between an employers' association or employer and a trade union on terms and conditions of employment or other aspects of employer/employee relations. A collective agreement must be concluded in writing. A collective agreement is binding not only upon the signatory parties but also within the area of employment they cover upon those parties' members, including individual employers and employees. An employer who is bound by a collective agreement is normally also obliged to apply the agreement in relation to non-union members.

During the validity of a collective agreement, industrial action cannot be taken by the signatory parties or their members. However, there are some exemptions to this rule provided in the Co-Determination Act. The most important exemption is the right to take secondary action in support of a lawful primary dispute. There is no principle of proportionality laid down in Swedish legislation with regard to industrial actions.

*2.3 Denmark*

In Denmark there is no statutory definition of a collective agreement. According the definitions used in the legal literature, which are based on case law, a collective agreement is an agreement on salary and other conditions of employment between a trade union and an employers' organisation or an employer.

A collective agreement may be concluded both orally or in writing. An employer is obliged to apply a collective agreement in relation to non-union members also. A collective agreement is binding upon the members of the signatory parties.

According to Section 2 (1) of the basic agreement between the Danish Confederation of Trade Unions and the Danish Employers' Confederation, the peaceful course of work must not be disrupted while a collective agreement remains in force by, e.g., industrial actions. The most important exception from this peace obligation is the right to take secondary actions. Under many collective agreements there is an expressed agreement, or presumption that such secondary action may be initiated despite the otherwise applicable peace obligation. Besides the basic agreement, there are also the Standard Rules for Handling Industrial Disputes. According to Section 22 of the Labour Court Act, these Standard Rules shall apply in all cases where the parties to a collective agreement have not explicitly agreed on some other "adequate" procedure for dealing with any disputes arising while the agreement is in force. A similar principle is also laid down in case nr 108 from the Permanent Court of Arbitration.[2]

The circumstances under which secondary actions may be taken have been further elaborated in case law. A basic prerequisite for the lawfulness of secondary actions is that the secondary action must be taken in support of a lawful primary dispute. According to case law, there is a presumption that the combined pressure exerted on those against whom action is directed may not exceed what is deemed to be

[2] The Permanent Court of Arbitration is now named the Labour Court.

reasonable and that the action must have a reasonable, occupation-related purpose.[3] Also according to this case law, a trade union may normally not initiate an industrial action within an area of employment that is already covered by a collective agreement entered into by another trade union, if both the trade unions are members of the Danish Confederation of Trade Unions. Whether a trade union may initiate an industrial action where the employer is already bound by another collective agreement therefore must be decided on a case-by-case basis.

According to case law from the Labour Court, a trade union may take industrial actions against a foreign undertaking, which posts workers to Denmark with low wages, and force the foreign undertaking to enter into a collective agreement. This applies even if the foreign undertaking is bound by collective agreements where it is established. The Labour Court has in the cases AD 98/632 and 98/702 ruled that an industrial action aimed at forcing a foreign undertaking to enter into a collective agreement may be taken if there is a trade-union interest of a certain strength and topicality. In both these cases, the Labour Court found that this prerequisite was fulfilled. The Labour Court also found that it was unimportant that the area of work on which the collective agreement would comprise already was covered by a collective agreement with another competing trade union. Even if an employer is already bound by a collective agreement, an employer may be obliged to pay wages in accordance with a second collective agreement. The employer must apply the collective agreement that is deemed to be the most favourable collective agreement for the workers.

### *2.4 Finland*

According to the Collective Agreements Act (1946), a collective agreement is defined as any agreement concluded by one or more employers or registered associations of employers and one or more registered trade union, concerning the conditions to be complied with in contracts of employment or in employment more generally. A collective agreement must be concluded in writing. A collective agreement is binding upon the signatory parties, registered associations that are subordinated directly or through one or more intermediaries to the signatory parties and employers and employees who, during the period of the agreement were members of an association and were bound by the agreement. This shall not apply to any association, employer or employee that is bound by an earlier collective agreement containing other conditions.

The parties who are bound by a collective agreement are not entitled to take industrial actions, which are aimed at any single provision in the collective agreement or against the agreement as a whole (Section 8 of the Collective Agreements Act). This is normally referred to as the passive -peace obligation. The parties who are bound by a collective agreement are also required to ensure that the associations, employers and employees subordinated to them and who are covered by the agreement refrain from any hostile actions and that they do not contravene the provisions of the collective agreement in any other manner. This peace obligation is normally referred to as the active-peace obligation. An industrial action that is not aimed at the collective

[3] AD 89.058 and AD 10.092

agreement is allowed. An industrial action is regarded as aimed at the collective agreement if the intention is to make the other party willing to amend the collective agreement or if the aim is to obtain a benefit that is not stipulated in the collective agreement. However, a trade union may take a secondary action due to the fact that such action is not directed against one's own collective agreement. A trade union may therefore lend support to an action taken by another party in an industrial dispute. A prerequisite is that the primary dispute is lawful.

If the foreign undertaking is not bound by a collective agreement with a national labour organisation, a Finnish trade union may take industrial actions against the foreign undertaking in order to obtain a collective agreement. The peace obligation is only applicable if an industrial action is aimed at an already existing collective agreement between the trade union and the undertaking. In areas of the labour market that are not covered by a generally applicable collective agreement, a trade union may therefore choose to take industrial actions. The applicability of a Finnish collective agreement might however be limited if the foreign undertaking is already bound by a collective agreement with a foreign trade union. According to Section 4 of the Collective Agreements Act, an earlier collective agreement has precedence over a collective agreement that has been concluded at a later stage.

An employer shall observe at least the provisions of a national collective agreement considered representative in the relevant sector (generally applicable collective agreement) on the terms and working conditions of the employment relationship that concerns the work the employee performs or the nearest comparable work (Chapter 2, Section 7 of the Employment Contracts Act). Any term of employment contract that is in conflict with an equivalent term in the generally applicable collective agreement is void. An employer that is bound by a collective agreement with a national trade union may derogate from a national collective agreement that is considered representative. Whether a collective agreement is considered to be generally applicable is dependent on several criteria that have been defined in law and case law. For it to be regarded as generally applicable, a collective agreement must have national coverage, be in a defined sector of activity and be deemed representative. The prerequisite that a collective agreement must be in a defined sector of activity means an area or sector of employment as demarcated in accordance with current bargaining practice. The main rule is that an area is determined according to the employer's main field of activity. A collective agreement has national coverage if it is concluded between employers' and trade-union federations. Local or company agreements are not regarded as having national coverage. In order for a collective agreement to fulfil the criterion "can be deemed representative" the collective agreement must be the largest and most representative one in the relevant sector of employment.

According to the Act on Confirmation of the General Applicability of Collective Agreements, a commission confirms whether a collective agreement fulfils the criteria for generally applicability. The commission must take action when a collective agreement and other essential information have been put forward to the ministry in charge of occupational safety and health matters. The Commission's decision may be appealed by the parties of the collective agreement, as well as the employer organisations and trade unions who have acceded to it later on and any employer or employee whose legal standing in an employment relationship depends on the general applicability of the collective agreement.

*2.5 Similarities and differences*

The collective labour laws in Sweden, Denmark and Finland bear many similarities. One essential feature is that of working-life conditions primarily being regulated by collective agreements entered into by strong employer organisations and trade unions. In these countries, there is no legislation on a national minimum wage. Instead, collective agreements normally stipulate the minimum rate of pay that an employer must pay in all circumstances for a certain work or to an employee of a certain category. In all of the three countries, a collective agreement is binding upon the signatory parties and upon those parties' members within the area of employment that they cover. A collective agreement is also binding upon individual employers and employees. The trade unions have been allowed quite a lot of latitude in taking industrial actions for the concluding of collective agreements. However, the primary rule is that the parties to a collective agreement are not entitled to take industrial actions during the validity of the collective agreement. The right to take secondary actions is extensive in the three countries. The trade unions have as a result of the significance of collective agreements, to some extent, been given the responsibility to uphold minimum standards on the labour markets in the four countries. There are, however, differences between Sweden, Denmark and Finland.

In Finland there exists a mechanism for the extension of collective agreements whereby the collective agreement acquires *erga omnes* effect. No such mechanism exists in Sweden or Denmark. In Finland there exists a government body which may under certain circumstances confirm/declare that a collective agreement is generally applicable. It is therefore easy to apply this agreement also to a posted worker. In Sweden and Denmark, there is no mechanism for declaring collective agreements generally applicable. Instead, the only alternative for trade unions is to conclude collective agreements with employers. The state can actually be said to have delegated the power to prevent social dumping to the social partners in accordance with the prevailing social model. This is in my opinion also a sustainable and valid method for the implementation of the Posting of Workers Directive 96/71/EC. It fulfils all requirements of EC law and it is also fully in accordance with recital 12 of the Directive.[4] Such an implementation implies that the trade unions (and social partners) must treat foreign and national companies in an equal way.

## 3. The problems with posting

In 1996 the Posting of Workers Directive 96/71/EC was adopted. The Directive shall apply to undertakings established in a Member State which posts workers to the territory of another Member State in different situations (see Article 1)

The form of posting which has been mostly debated in Scandinavia is when an undertaking posts workers to the territory of a Member State on their account and

[4] Recital 12: "Whereas Community law does not preclude Member States from applying their legislation, or collective agreements entered into by employer and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member state; whereas Community law does not forbid the Member States to guarantee the observance of those rules by the appropriate means."

under their direction under a contract between the undertaking and the party for whom the services are intended. A prerequisite for the applicability of the Posting of Workers directive is that there is an employment relationship between the undertaking and the posted worker. The definition of a worker is the one that is applied in the law of the host state. The Posting of Workers Directive is not applicable to merchant navy undertakings as regards seagoing personnel.

The Posting Directive deals with the conditions of employment for employees temporarily performing work in a particular country. According to the Rome Convention, the law of this country will normally not be applicable to such an employment contract. Nevertheless, the idea of the directive is that some of the rules governing employment in the host state shall apply also to work that is temporarily performed there. Already before the Directive it was clear, following the case-law of the ECJ, that community law does not preclude Member States from extending some of their labour law legislation or collective agreements (at least those agreements having *erga omnes* effect) to any person who is temporarily employed within their territory. According to this case-law, the Member States are *allowed* to extend their legislation or collective agreements. What is new with the directive is that member states are *obliged* to ensure that certain basic standards – sometimes referred to as 'the hard core' – of its own labour law system apply to employees temporarily performing work within their territory.

The standards that the member states are obliged to extend to the posted workers are pointed out in article 3. It follows from that article that the standards must follow and be laid down in certain sources of law (namely law, regulation, administrative provisions and – concerning the building industry – collective agreements with *erga omnes* effect) and concern certain issues (maximum work periods and minimum rest periods, minimum paid annual holidays, the minimum rates of pay including overtime rates, the conditions of hiring-out of workers, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, equal treatment between men and women as well as other provisions of non-discrimination). The extension of laws of host-states to posted workers shall not prevent application of terms and conditions of employment that are more favourable to workers (Article 3.7).

Furthermore, the directive makes it optional for the Member states to extend the terms on conditions of employment laid down in collective agreements which
a) have *erga omnes* effect (even outside the building industry);
b) are generally applicable to all similar undertakings in a certain sector and
c) have been concluded by the most representative employers' and labour organisations at the national level.

Arguably, the collective agreements referred to under b) are the kind of collective agreements concluded in Denmark and Sweden, while the agreements under c) refers to Italian collective agreements. No Member State has used the possibilities that are set out in article 3.8 of the Posting of Workers Directive.

According to Article 3.10, the Directive shall not preclude applications by Member States, when in compliance with the Treaty, to national undertakings and to the undertakings of other States, on a basis of equality of treatment, of terms and

conditions of employment on matters other than "hard core" provisions enumerated in article 3.1 in the case of public policy provisions. However, what should be regarded as public policy provision according to Article 3.10 is contested.[5]

In accordance with national legislation and/or practice, the Member States are, in addition, obliged to designate one or more liaison offices or one or more competent national bodies (Article 4). The aim of the establishment of liaison offices in the Member States is to improve the opportunities for the different undertakings to receive information of the minimum terms and conditions that an undertaking must observe.

The clear starting point for the Directive is that it is neutral in relationship to existing different social models in the Member States and that it does in no way affect the law of the Member states concerning collective action to defend the interests of trades and professions (recital 22).

The present problems with posting in Denmark and Sweden is that a service provider intending to post worker might find himself in a situation were he has to negotiate with trade unions in order to reach a collective agreement on terms and conditions on which to perform work. From the point of view of the service provider this might in practice imply some difficulties:

- costs might be difficult to assess on beforehand;
- negotiations might be time consuming, especially in a situation of conflict.

On the other hand these problems are exactly the same that a national Swedish or Danish service provider might face on national level if he is not a member of an employer organisation or a party to a collective agreement. In that sense we do not face a situation of discrimination.

In Sweden the labour market system has during 2005 developed a solution of this problem that can be offered to companies providing services in Sweden on a temporary basis. The Central labour market parties have made agreements concerning temporary membership for service providing employers in Swedish employer organisations. According to the agreement the labour market partners in the sectors involved will fully respect the principles of fair competition and non discrimination and provide adapted terms and conditions in the collective agreement for these parties. During the negotiations on such terms and conditions the trade unions are bound by a full obligation to avoid any industrial action. Any conflicts within this system can be handled by the labour market partners by negotiations.

These agreements represent an important development and adaptation to the provision on free movement of services within the internal market. It will probably provide a model for "light" agreements that can be reached with Swedish trade unions. The Swedish trade unions will have to accept collective agreements on rather similar conditions also with companies that do not join the employer organisations, otherwise they might endanger the principle of equality.

[5] See, for instance, Hepple, *Labour Law and Global Trade*, Hart 2005 167 p..

This evolving structure also gives a possibility to deal with the question of how to get adequate information of Swedish and Danish wage levels. If there is an adapted negotiated standard solution for foreign companies, information about that standard should be available. The responsibility for the development of such a system lies with the State in the last instance, but the social partners can surely have a constructive role in how to design it.

## 4. Some issues of surveillance and control

The proposed Service Directive showed that the Commission did not fully recognise the risks for misuse of labour and creation of a grey economy in the shadow of the provision on free movement of services. This issue is closely connected to the Nordic model of industrial relations since one of its important features is that supervision of minimum standard of labour conditions to a large extent is effective and exercised by the trade unions or the social partners in cooperation.

It seems that the Commission has learnt very little from the debate on the Service Directive and the deletion of Articles 24 and 25 in the proposed Directive. I therefore wish to present some comments on the recent *Commission Communication (2006) 159: Guidance on the posting of workers in the framework of the provision of services.*

### *4.1 Improved Information and surveillance systems*

One can clearly welcome the initiative of the Commission to improve the systems for information on terms and conditions applicable in different Member States and sectors. Also here the cooperation between state authorities and labour market partners must be emphasized.

Also when it comes to control any new measures adopted should take into account that the most effective control can – when preconditions for such a control exists - be exercised by the labour market partners and trade unions. Transnational cooperation between labour inspectorates is of importance, but the role of the social partners should also be recognised and enhanced.

### *4.2 The requirement to have a representative established on the territory of the host Member State*

To avoid legal problems linked to a representative *established* in the host country the Commission finds as sufficient a system in which one of the posted workers could be appointed as a foreman, to act 'as a link between the foreign company and the labour inspectorate' (p. 4 of the Communication). That should be sufficient, according to the Commission, for the purposes of control and other aspects in the employment relationships of the posted workers. Such a proposal would generally undermine the control of the Posting Directive in the Member States. Next to this, it would destroy the proper functioning of the Nordic, especially the Danish-Swedish labour market system that is crucially based on collective agreements.

The Commission first refers to a requirement to have a representative established in the host Member State by relying on case C-279/00 Commission v. Italy, para. 18. The Commission creates the impression that it would be the very spot where the Court would have outlawed such a requirement as 'the very negation of the free provision of services'. In reality that passage outlawed the requirement to have a registered office or a branch office in the host country. This judgment does not even mention a (physical) representative, but deals with other aspects in the control and safeguards regarding temporary employment agencies. Furthermore, the Court accepted in case C-369/96 Arblade (paragraph 76, second sentence) the possibility that the authorities of the host Member States may show a sufficient interest in requiring the appointment of a representative to keep the social documents. In Arblade the Court outlawed only the specific Belgian requirement that a representative domiciled in Belgium have to keep the social documents five years after the posting.

The Commission further mixes issues by referring to a representative *domiciled* in a given (normally host) country, an issue similar to that in case C-478/01. Firstly, this judgment concerns patent agents the regulation of which is by definition far from realities in the social field, e.g. in the construction and cleaning industries. Secondly, the question of the domicile of an agent is a different thing than an obligation to point out the responsible representative that can receive documents on behalf of the service provider and represent it in authorities and courts or labour market negotiations. There is a clear need to have a representative in the Nordic labour market system that is essentially based on collective agreements at least in an initial stage. In posting of workers the terms and conditions in employment is still mainly based on collective agreements concluded between the employer concerned and the national trade union.

The Posting Directive recognises the Swedish-Danish model of using collective agreements to regulate the labour market and protect the rights of workers under the Directive. It is also without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions. The right to conduct business *without* a competent representative seriously undermines this Nordic Model. The representative of the employer is the person with whom the trade unions in Sweden and Denmark wish to (and who is the only one entitled to) conclude a binding collective agreement. Hence, it is not just for information, demands and correspondence or to act as 'a link between the foreign company and the labour inspectorate.'

It is equally clear that the trade unions in these countries would wish to avoid any unnecessary industrial action to guarantee the application of the rules in the Posting Directive. A foreign worker, probably unfamiliar with the Swedish or Danish law and collective bargaining systems, often not proficient in English, perhaps not knowing workmates from several different countries, would be in the impossible situation of having to negotiate and conclude an agreement with the unions. Yet it is entirely possible that the employer would order him/her to sign such an agreement, and only later consider whether to regard it as valid or not. Such a system would simply serve to multiply malpractice and give rise to serious conflicts.

This is not just a purely theoretical scenario. The explanatory memorandum[6] states that Nordic countries may apply collective agreements to workers posted in their territories as long as they are *de facto* of universal application. The problem, especially in Denmark and Sweden, is that there are no mechanisms by which the State controls the application of these agreements. The social partners do it themselves. This means there must be someone for the employees and unions to negotiate with, and there must be some means for surveillance of the agreement. It should be noted that this is enshrined i.a. in the European Union Charter of Fundamental Rights, Article 28 (Article II-88 of the Constitutional Treaty) on the "Right of collective bargaining and action", as well as e.g. in ILO Conventions that are ratified by all Member States and represent the common constitutional traditions within EU.

A prohibition of the requirement to have a representative present in the Member State might raise questions on the legality of industrial action demanding negotiations with service providers.

The Swedish-Danish model, in particular, requires the practical possibility of a real representative. Such an obligation is, moreover, perfectly natural in other Member States as well. It does not require a full time person on the spot, only that there is a responsible person appointed to undertake the responsibilities of the service provider as the employer. In the present European union it is fully possible for a person condemned by court to a prohibition to conduct any business by reasons of grave misconduct to establish himself in another Member State and to conduct business as a service provider by use of posted workers in the Member State where the prohibition is in force. Such kind of experience led the Finnish government to introduce legislation last year - after careful scrutiny of the EC law aspect - prescribing a requirement of a representative.[7]

### 4.3 *The requirement to obtain an authorization from the competent authorities of the host Member State or to be registered with them, or any other equivalent requirement*

Under this heading the Commission essentially draws the conclusion that any systematic prior control, including by way of compulsory and systematic prior authorization or registration, would be disproportionate.

The only case expressly referred to by the Commission – to back up the conclusion - is case C-43/93 Vander Elst. Also this case must be explored in its proper context which was the obligation to get work permits for third country nationals legally residing in a Member State and posted to another Member State. A further essential feature was that the Moroccan workers residing in Belgium were lawfully employed there. While the Court outlawed the requirement to obtain a work permit for these Moroccan workers posted from Belgium into France, it relied also on the finding that the Belgian system – which includes wide use of social funds and other means of control - excluded any substantial risk of the workers being exploited and competition being distorted.

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[6] Council Document 2004/0001 COD, 5.7.2004.

[7] See the Finnish Act on Posting of Workers 4a § (enacted 22.12.2005/1198).

However, essential is that it is not possible to draw further conclusions from not to read in judgment Vander Elst than the ban of work permits for third country nationals, who reside legally inside the Community and possess a valid work contract. The Court has repeated the essence of judgment Vander Elst in cases C-445/03 Commission v. Luxembourg and C-244/04 Commission v. Germany. In the former the Court outlawed the prerequisite of a prior working relationship of six months and in the latter that of one year, respectively, for posting these third country nationals into another Member State.

The way in which the Commission refers to authorisation or registration of temporary agencies ('many Member States insist that temporary employment agents must be properly authorised') justifies even to resume that the Commission would question the national authorisation or registration schemes of temporary employment agencies also by virtue of judgment Vander Elst. This would certainly not be appropriate, given especially that there is a judgment (case 279/1980 Webb) that concerns exactly this issue.

In Webb the Court recognised the highly sensitive nature of the temporary employment business (see paragraphs 18 and 19; the latter referred also to the interests of the workforce affected). It also recognised the right of the host Member State to require a licence even in a situation where the service provider had a licence in the home state, provided however that the host Member State takes into account the guarantees produced in the home country. [8] Judgment Webb has not lost its actuality, let it be that the agency business has grown, accompanied also by a great number of serious undertakings. Thus, in 1999 the Council of Ministers approved a resolution that highlighted - based on judgment Webb - the need to control fraudulent practices in cross-border manpower traffic. [9] Licensing was accepted and the Resolution included also a Code of Conduct for administrative co-operation.

In fact the emergence of the new internal market with a huge cap in wages and other costs between the old 15 and the new ten Member States has significantly increased the risk of dumping conditions applied to workers posted from the new Member States.

Noteworthy is also that in case C-493/99 Commission v. Germany the Court in principle accepted restrictions on the hiring-out of manpower in the construction industry in Germany. Hiring-out of manpower was accepted in construction sector only between organised employers. However, the Court outlawed the practical

[8] Paragraph 21 and the second ruling reads: 'Article [49] does not preclude a Member State which requires agencies for the provision of manpower to hold a licence from requiring a provider of services established in another Member State and pursuing such activities on the territory of the first Member State to comply with that condition even if he holds a licence issued by the state in which he is established, provided however, that in the first place when considering applications for licences and in granting them the Member State in which the service is provided makes no distinction based on the nationality of the provider of the services or his place of establishment, and in the second place that it takes into account the evidence and guarantees already produced by the provider of the services for the pursuit of his activities in the Member State in which he is established.'

[9] See the resolution 'Fight Against Social Security Fraud And Undeclared Work', the Social Council of 9 March 1999/6491/99 SOC 80.

application of the restriction which required a company to be established in Germany (the host Member State) and to be bound by a collective agreement, either as a member of the employer organisation or by signing a company level collective agreement in the construction sector, in order to be able to send or use temporary workers.

In sum, the relevant case-law does not support the Commission's conclusion that 'any rules', including compulsory and systematic prior authorisation or registration, would be disproportionate. Authorisation or registration of temporary agencies is allowed as a non-distinctive measure by the host state if the evidence and guarantees produced in the home state are taken into account. [10] Besides, authorisation and registration are in the best interest of the serious agencies.

*4.4 The requirement to make a declaration*

Under this heading the Commission first explains the cases C-445/03 and C-244/04 and accepts the systems of prior declaration. Nevertheless, it draws as the conclusion that the prior declarations could lead – via checks and registering - to a forbidden authorisation.

It is to be highlighted once again that authorisation of temporary agencies is not a forbidden measure according to the Court and that such a system is in use in several Member States.

4.5 *The requirement to keep and store social documents in the territory of the host country and/or under conditions which apply in its territory*

Under this heading the Commission says nothing about the documents showing the amount of pay which besides must fulfil the requirement of showing the amount of pay per hours worked. It is clear that any meaningful control requires these document being available in the inspection, if not on site, anyway in the host country so that they can be obtained without any extra delay for the control purposes. Having available the documents showing the wages paid is by no means a guarantee that the workers really receive the stipulated amounts of money (or that they are not imposed to pay back a part of it) but it is anyway a necessary step in that direction.

To back up its position the Commission relies especially on one part of paragraph 61 of judgment Arblade. In so doing it passes over in particular the fourth ruling of the Court that summarised the obligations related to the keeping of the social and labour documents, as follows:

4. Articles [49] and [50] of the Treaty do not preclude the imposition by a Member State on an undertaking established in another Member State, and temporarily carrying out work in the first State, of an obligation to keep social and labour

[10] Accordingly, in case 279/00 Commission v. Italy the Court did not outlaw a requirement to establish a financial guarantee, if it takes into account a corresponding guarantee given in another Member State.

documents available, throughout the period of activity within the territory of the first Member State, on site or in an accessible and clearly identified place within the territory of that State, where such a measure is necessary in order to enable it effectively to monitor compliance with legislation of that State which is justified by the need to safeguard the social protection of workers.

Serious companies do not try to avoid showing their pay documents. Besides, in normal cases the modern techniques can make them available without any delay. Therefore, the question arises whose interests the Commission serves when it tries to evade the obligation to verify as effectively and quickly as possible the wages paid.