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ACCOMMODATION OF LABOUR RIGHTS:
AS GOOD AS IT GETS?

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Abstract

This paper suggests that investigating how internal market architecture affects the accommodation of labour rights helps us better to understand internal market-labour rights conflicts and how they might be resolved. It probes the legislation/primary Treaty freedom dimension of the architecture, by looking at the interplay between legislature and Court of Justice in two overlapping free movement of service fields where labour rights' accommodation is contested: posting of workers and public procurement. The aspirations and reality of the current architecture are explored. Five lessons about internal market architecture are drawn from the case-study. Alternative architectural options, drawing on new governance, are canvassed.

Keywords

internal market architecture, labour rights, posted workers, public procurement, EU legislature, Court of Justice, new governance

The Case-Study: Posting of Workers, Public Procurement and the Interplay between Legislature and Judiciary

Few interested in EU law or labour law can be unaware of the wave of Court of Justice cases in recent years dealing with conflicts between labour rights and internal market freedoms. These conflicts have concerned how internal market rules can affect workers' freedom of association including collective bargaining and strike action.¹ They have also concerned how internal market freedoms affect differences between labour standards, especially pay, in Member States: can higher protection be maintained for workers by preventing relocation to a Member State with lower standards;² can businesses moving with their workforces to provide services in other states with higher labour standards be required to comply with those higher standards?³

This essay suggests that investigating how internal market architecture affects the accommodation of labour rights helps us understand aspects of these conflicts better and is a *sine qua non* in considering their resolution. It focuses on a central feature of internal market architecture: the legislation/primary Treaty freedom dimension, by looking at two different service sub-fields where legislation has been adopted and where labour rights are at issue.⁴ Those sub-fields are posting of workers and public procurement, both central to the recent controversies on accommodating labour rights with internal market freedoms. Posting of workers occurs when an employer based in one Member State sends (posts) its workers to another Member State, called the host-state, to deliver services in the host-state. Under Article 56 TFEU, the Treaty freedom to provide services, workers who move cross-border with their employers to carry out projects are called 'posted workers', emphasising that their base remains that of the state they have come from (the home-state) rather than the state where they are carrying out the project (the host-state). This raises a choice as to which employment standards should be applied to posted workers: those of the home-state, those of the host-state, or some combination of the two. Public procurement concerns the purchasing of goods and services by public authorities within the EU. A key aim of EU public procurement law is to ensure that those public purchasing contracts are open to tenders from all the Member States. When a contract involves the supply of services the Treaty freedom to provide services is engaged. It is clear also that the sub-fields of public procurement and posting of workers can overlap in certain factual contexts. A public tender to build a school in London may result in a Polish business winning the contract, which envisages building the school by posting its Polish workforce to the UK. It is this area of overlap, the interface between public procurement and posting of workers, which is my primary focus. The salient features of the internal market architecture in these two areas consist of the primary Treaty freedom, Article 56 TFEU guaranteeing the freedom of services, and legislation adopted under Articles 53 and 62 TFEU, which provide the legal basis to adopt secondary services legislation. In the case of posting of workers, one significant piece of legislation has been created, the 1996 Posted Workers' Directive (PWD).⁵ In the public procurement field, by contrast, a much more active legislative approach has prevailed with successive waves of public procurement legislation from the 1970s onwards,⁶ the most significant recent manifestation being two directives in 2004, one concerning utilities,⁷ the other a general public

¹ C-438/05 *Viking* [2007] ECR I-10779; C-341/05 *Laval* [2007] ECR I-11767; C-346/06 *Rüffert* [2008] ECR I-1989; C-271/08 *Commission v Germany* (occupational pension procurement), judgment of 15 July 2010.

² *Viking*, *ibid.*

³ *Laval*, *Rüffert* above n 1; C-319/06 *Commission v Luxembourg* [2008] ECR I-4323.

⁴ Because the legislation does not regulate the conflict between freedom of association rights and internal market freedoms, that aspect of the current controversies is not examined in detail in this chapter.

⁵ Directive 96/71/EC, OJ 1997, L 18/1.

⁶ The public procurement directives apply only to certain public procurement contracts, and in particular those whose value equals or exceeds the relevant threshold set out in the directives.

⁷ Directive 2004/17/EC, OJ 2004, L 134/1.

procurement directive (GPPD) on supplies, services and public works.⁸ The Court of Justice plays a central role in interpreting services legislation in light of the primary Treaty freedom.

The essay looks first at the promise of the current architecture by considering why internal market legislation is created. It then looks at its operation in practice in the areas of posting of workers and public procurement by looking at the creation of legislation and the interpretative role of the Court of Justice. Five key lessons about the accommodation of labour rights with this internal market architecture are drawn from this examination. The concluding section draws on the idea of catalysis, as utilised in recent New Governance literature, to consider how the architectural problems this case-study highlights might better be solved.

Investigating the Architecture: Why Bother Creating Internal Market Legislation?

One useful way of investigating the legislation-Treaty freedom dimension of internal market architecture is to pose the question: Why bother creating services legislation? This is best thought about by considering the governance of these service sub-fields in the absence of such legislation. The legal position will be governed by Article 56 TFEU. State rules and practices in relation to posting and public procurement will be examined by the Court to see if they constitute a restriction on freedom to provide services. Where they do, the Court will then examine whether that restriction can be justified by a legitimate objective and whether the test of proportionality is satisfied. Accretions of case-law will provide a more detailed picture of the rules and principles to apply in posting workers and public procurement.

Given the alternative, judicial Treaty elaboration, the desirable legal features which legislation may offer become apparent. It can offer a *structure* for service market participants – we shall see that the public procurement directives, in particular, provide a highly developed structure of stages for public contracting authorities to follow. Secondly, it can offer valuable *detail and certainty* on what can and cannot be lawfully done by public authorities and market participants. For instance, those posting workers, as well as the receiving host-state, will ask themselves: what host-state labour rights can be applied to posted workers? Which collectively agreed standards can be applied to posted workers? Answers to such questions can be set out in legislation. Third, it allows for *adaptation* by constructing special regimes such as transitional, or distinctive, rules for defined sectors. Fourth, legislation provides a vehicle for *consolidation and codification of Court of Justice jurisprudence*: legislation generally purports, at least in part, to consolidate or codify previous Court of Justice jurisprudence. In their analysis of the Services Directive,⁹ Badinger and Maydell note that one of its chief contributions is its codification effort. This is of value because:

Obligations arising out of case-law and thus potentially being fact intense and applicable only to the very special circumstances of the underlying case become explicit and generally applicable as EC secondary legislation.¹⁰

Fifth, and rather differently, legislation allows for *reaction to Court of Justice jurisprudence*. Often something much more elaborate and creative than simple codification is at work in the secondary legislation process. Legislation in fact provides an opportunity to react to Court of Justice jurisprudence as well as attempting to steer future interpretative developments in the area at issue by signalling to the Court of Justice the views of other institutions as expressed in the legislative output. Legislation may constitute an attempt to intensify market integration, building on but going beyond the Court's jurisprudence, as exemplified by the failed attempt to introduce the Country of Origin

⁸ Directive 2004/18/EC, OJ 2004, L 134/114.

⁹ Directive 2006/123/EC, OJ 2006, L 376/36.

¹⁰ H. Badinger and N. Maydell, 'Legal and Economic Issues in Completing the EU Internal Market for Services: An Interdisciplinary Perspective' 47 JCMS (2009) 693-717, 712.

Principle in the Services Directive. Or it may represent an attempt to curb or curtail aspects of Court of Justice jurisprudence considered undesirable by one or more of the other institutions. Both posted workers and public procurement powerfully illustrate this phenomenon.

Finally, all these aims could be achieved through non-legislative means, through, for example, guidance in Commission Communications and indeed, important examples of such activity are the Commission's 2001 Communication on integrating social considerations into public procurement, as well as a Commission Guide on the same issue in 2010.¹¹ Yet legislation has a *democratic imprimatur* (as well, of course, as containing norms which can be legally binding) that these other means lack. This may alter its reception by the Court of Justice.

However, these valuable aims – structure, detail, certainty, adaptation, consolidation/codification, reaction, democratic signalling and bindingness - are at best imperfectly fulfilled. For a start, it is clear that the aims are in themselves at odds with each other: reacting to Court of Justice jurisprudence is necessarily different from consolidating Court of Justice jurisprudence. Secondly, the relationships between Article 56 TFEU and services legislation create an inherently unstable equilibrium. The most important, and well-known, reason for this is that there is a *constitutional* dimension to the Treaty provision's role. Article 56 TFEU is a constitutional trump-card in relation to services legislation. Interpretation of internal market legislation takes place very much in the shadow of the mother-provision. Where there is a divergence between the legislation and Article 56 TFEU, the latter will always prevail. Moreover, any such divergence gives the Court the power to strike down as invalid the relevant legislative provisions. Finally, the actors and processes creating legislation are not the same as the actors and processes structuring the interpretation of Article 56 TFEU and that legislation.

By drawing out some key aspects of the *creation* and *interpretation* of the legislation on posting of workers and public procurement, further dimensions of the internal market architecture become apparent. Such a reconstruction effectively conveys the complexity of the dilemmas inherent in the current architecture.

The Creation of Internal Market Legislation: Actors and Processes

It is obvious but important that a distinctive constellation of institutional actors is given power in making internal market legislation. In particular, the European Parliament plays a key pro-labour protection role in the creation of services legislation. The move to the co-decision legislative procedure for services legislation has emphasized and expanded this role, set to expand further with the ordinary legislative procedure introduced by the Lisbon Treaty from 2010.¹² Additionally, different parts of the Commission have voice at the creation stage of internal market legislation's interface with labour rights but thereafter, the decision to take infringement actions against Member States lies with the internal market directorate. Often strongly divergent views can emerge from the employment and social affairs directorate and the internal market directorate of the Commission on how, or indeed whether, to accommodate labour rights within internal market legislation. Though not explicitly institutionally involved, as already noted, the Court of Justice provides an important input into the content of secondary legislation. Finally, the position of States in the Council may be strongly divergent. In relation to posting of workers, for instance, States' positions tend to be sharply divergent

¹¹ *Interpretative Communication on the Community Law applicable to public procurement and the possibilities for integrating social considerations into public procurement* (COM) 2001 566. See also the Commission Guide, *Buying Social: A Guide to Taking Account of Social Considerations in Public Procurement* (EU, 2010).

¹² It is worth noting that the Posted Workers' Directive and pre-2004 public procurement legislation were adopted under the co-operation procedure but the 2004 public procurement legislation was adopted using the co-decision procedure. Henceforth, free movement of services legislation will be adopted under the ordinary legislative procedure laid out in Article 294 TFEU.

depending on whether the State views itself as primarily an importer or primarily an exporter of posted workers.¹³

We turn to show how the final legislative output in both our examples bears witness to varying institutional views on labour rights as well as each institution's power in the legislative process.

The Posted Workers' Directive and Labour Rights

The drafting of the Posted Workers' Directive was heavily influenced by the Court of Justice's decision in 1990 in *Rush Portuguesa*.¹⁴ In *Rush* the Court famously stated,

Community law does not preclude Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established; nor does Community law prohibit Member States from enforcing those rules by appropriate means.

The importance of this statement resides less in the number of cases it was used to decide than in the strong assumptions it created surrounding the adoption and meaning of the Posted Workers' Directive. By granting a very broad freedom to host-states to impose their labour standards on employers of posted workers, this case put host-states voting in the Council very much in the driving seat in the drafting of the Directive. Hence, the Commission fought in vain to exclude postings of less than three months from the central obligations to apply host-state minimum pay and holidays.¹⁵ Had this succeeded, posted workers would have been subject to home-state standards for postings of less than three months. Instead, what made it into the directive were permissions (not obligations) for host-states to exempt various short-term postings.¹⁶ But given that host-states generally wish to apply their labour standards to posted workers, they are hardly likely to use these permissive provisions.

For these reasons, the PWD on adoption was widely viewed as providing a supranationally coordinated set of *non-exhaustive minimum rules* for host-states and service-providers. The minimum rules in Article 3(1) PWD provide a floor of protection for posted workers, a nucleus of mandatory rules for minimum protection on matters including minimum pay, rest and holidays.

Collective setting of these minimum standards in host-states was a particularly controversial issue during passage of the PWD. Fearing protectionist application of collective agreements, the Commission was keen to restrict collective standard-setting as much as possible in the Directive. Its original proposal only allowed collective agreements which have been declared universally applicable, the closest kind to statutory norms, to set host-state standards. In the course of the legislative process, a push to authorise a broader range of collective agreements to set minimum standards was successful, but at the cost of restricting the occupational coverage of the areas where collective agreements could set minimum standards to the construction sector, where posting of workers is most strongly established. Hence, in the construction sector, as well as collective agreements which are universally applicable, that is binding, Article 3(8) of the Directive allows national and regional agreements which

¹³ Beautifully illustrated by the States' interventions in *Laval*. 15 Member States, as well as Iceland and Norway, participated in *Laal*. For a good example of the split in positions, see AG Mengozzi's Opinion in *Laval*, paras 167 and 169, arguing for a generous (host-state or importer friendly) interpretation of the Directive (Article 3(8)): the Austrian, Danish, Finnish, French, German, Icelandic, Norwegian, and Spanish governments; for a restrictive (home-state or export friendly) interpretation: the Estonian, Latvian, Lithuanian, Polish, and Czech governments.

¹⁴ Case C-113/89, [1990] ECR I-1417. For discussion of this and other strands in the PWD adoption process see S. Evju, 'Revisiting the Posted Workers Directive: Conflicts of Law and Laws in Contrast' CYELS (2010-2011) forthcoming.

¹⁵ See further P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?' (1997) 34 *CMLRev* 571.

¹⁶ Articles 3(3) and 3(5) PWD. Short-term postings (less than one month) can be exempted from host-state obligations, after consulting the social partners; posted workers can be exempted from minimum pay and paid holiday provisions where the work to done by them is not significant.

are applicable in fact or which are agreed between the most representative employers' and labour organisations at national level to set minimum host-state standards.¹⁷

These minimum rules, however set, were viewed as *non-exhaustive* because Article 3(7) PWD provides that this floor 'shall not prevent application of terms and conditions of employment which are more favourable to workers'¹⁸ and Article 3(10) PWD permits application (on a basis of equality of treatment between foreign and national undertakings) of terms and conditions of employment beyond the minimum for 'public policy provisions' as well as those in the same kinds of collective agreements set out in Article 3(8) for the minimum core of host-state standards. That is to say, the PWD appeared, via Article 3(7) and/or 3(10), to give host-states a significant freedom to apply their labour legislation and collective standards to posted workers on their territory.¹⁹ Most certainly, the Treaty freedom stays in place as an important backstop to be used to set some outer limits on justification. Hence, the understanding was that protection for posted workers higher than the minimum, though saved by Articles 3(7) and/or 3(10) PWD, would be tested for compatibility with the Treaty freedom to provide services. Nonetheless, the freedom given to host-states to impose their labour standards on posted workers in the design of the PWD was such that commentators questioned whether it might be struck down by the Court of Justice as incompatible with its legal basis as a measure promoting free movement of services.²⁰

The Public Procurement Directives and Labour Rights

The 2004 General Public Procurement Directive (GPPD) illustrates how institutional conflict strongly affects the structure and social content of internal market legislation. The stage(s) at which social considerations should apply is a central debate in EU public procurement governance. The main stages in modern public procurement exercises concern:

- deciding what is to be contracted for, that is the subject-matter of the contract;
- elaborating the technical specifications of the contract;
- selecting those contractors whose tenders shall be considered;
- awarding the contract to the winning tenderer;
- setting and monitoring compliance with the contract performance conditions applicable to the successful tenderer.²¹

Interestingly, how to deal with the public procurement/posted workers interface, although not entirely absent from the social considerations in public procurement debate, has certainly not been central. Prior to *Laval* and, in particular, *Rüffert*, it had not been addressed by the Court of Justice in its case-

¹⁷ For further analysis of the issues raised by collective standard-setting, see C. Kilpatrick, 'Laval's Regulatory Conundrum: Collective Standard-Setting and the Court's New Approach to Posted Workers' 34 *EL Rev* (2009) 844.

¹⁸ Some authors read Article 3(7) as meaning only that Art 3(1) does not stop a higher *home-state* standard applying eg higher pay, better holiday provision, where one exists. Others, especially the AGs in *Laval* and *Rüffert*, read it as instead, or additionally, allowing higher *host-state* standards to apply: AG Mengozzi in *Laval* [151], [196-9], AG Bot in *Rüffert* [82]-[83]. Though interesting, pre-*Laval* et al this was not central as the key shared understanding was that, *one way or another* (through Art 3(7) and/or Art 3(10) and/or the primary Treaty freedom) higher host-state standards could be applied in a wider range of cases than those envisaged in Art 3(1).

¹⁹ See eg E. Kolehmainen, noting that Article 3(10) is 'a magician's trick: it turns the exhaustive list of terms and conditions of employment into an inexhaustive one' and 'given the large freedom granted by the *Rush Portuguesa* decision to host states to apply their labour rights to posted workers, the inclusion of a 'safety valve' in the form of Article 3(10) was probably necessary to win the acquiescence of the Member States with higher levels of protection', in 'The Directive Concerning Posting of Workers: Synchronization of the Function of National Legal Systems', 20 *Comparative Labor Law and Policy Journal* (1998) 71 at 86, 88.

²⁰ P. Davies, 'The Posted Workers' Directive and the EC Treaty' (2002) 31 *ILJ* 298.

²¹ See the useful Commission publications of 2001 and 2010 above n 11.

law. Nor, before those cases, had it been central to policy and academic discussions about social considerations in public procurement.²² Those discussions have instead focused on whether two other kinds of social considerations can be taken into account in public procurement: first, measures focused on reducing unemployment, including local, regional or national unemployment; second, measures focused on reducing the disadvantage/exclusion of status groups – the disabled above all but also ethnic minorities and, to a lesser extent, women. Social considerations were a divisive issue in adopting the 2004 GPPD. On one side, pushing for greater social content in public procurement, especially at the central award criterion stage, were the Court of Justice (via two key cases *Beentjes*²³ and *Nord-Pas-de-Calais*²⁴) and the European Parliament, newly strengthened in this iteration by the switch to co-decision for services legislation. On the other was the Commission aided and abetted by the Council. The outcome of this institutional struggle is that much of the social content, including the Court's case-law, is pushed into the recitals and out of the main body of the directive. Relatedly, acknowledgment of social considerations is moved from the award criteria stage to the contract performance stage. Nonetheless, the final Directive appears to endorse, or perhaps more accurately assume, significant space for application of labour rights in host states in each of three areas we can identify as crucial to the posted workers-public procurement interface:

1. when public contractors can be expected to comply with generally applicable (host-state) labour obligations;
2. when public contractors can use labour criteria at the award stage to either award a tender or reject a tender (eg undertakings to address unemployment, to comply with labour standards clauses);
3. when public contractors can impose special labour obligations at the contract performance stage (such as local labour preferential hiring clauses or special wage rates).

(1) Compliance with generally applicable labour obligations

The core question is whether tenderers from other Member States, which will post workers as part of execution of their tender, have to comply with generally applicable host-state legislation or would such compliance unjustifiably restrict their freedom to provide services?

This is not addressed in the main body of the GPPD. Although the Directive contains a provision on compliance with generally applicable labour obligations,²⁵ read carefully, it requires little from tenderers. It neither requires tenderers to promise to comply with employment obligations as a condition of being awarded the contract (award stage) nor does it make compliance with labour obligations in the contracting authority's Member-State a contract performance condition (performance stage). It simply allows (not requires) public authorities to inform tenderers where to obtain information about employment obligations and to require tenderers to show they have taken these obligations *into account* when drawing up the tender.

Only the GPPD's recitals contain provisions on compliance with generally applicable labour obligations in public procurement. Recital No 34 refers expressly to the Posted Workers' Directive:

²² For a wide-ranging comparative analysis of public procurement, especially its relationship with addressing status inequality, see C. McCrudden, *Buying Social Justice: Equality, Government Procurement and Social Change* (OUP, 2007).

²³ Case 31/87 *Beentjes v State of the Netherlands* [1988] ECR 4635.

²⁴ C-225/98 *Commission v France* (Nord-Pas-de-Calais) [2000] ECR I-7213.

²⁵ Article 27 2004 GPPD, replicating a provision in the previous 1993 legislative iteration (Directive 1993/37/EEC concerning the co-ordination of procedures for the award of public works contracts OJ 1993 L 199/54).

The laws, regulations and collective agreements, at both national and Community level, which are in force in the areas of employment conditions and safety at work apply during performance of a public contract, provided that such rules, and their application, comply with Community law.

In cross-border situations, where workers from one Member State provide services in another Member State for the purpose of performing a public contract, Directive 96/71/EC concerning the posting of workers in the framework of the provision of services lays down the minimum conditions which must be observed by the host-country in respect of such posted workers.

Why does the main body of the directive not deal with the application of domestic labour standards? McCrudden suggests that it was not included because compliance with such obligations by tenderers is assumed.²⁶ Such a position may indeed seem to be reflected in the first sentence of Recital 34. But in fact matters are not that simple, precisely because of the posted workers' interface and the core free movement of services question it raises. The second sentence of the recital does refer to cross-border situations and the Posted Workers' Directive. But this reference is of limited utility because it only refers to the minimum conditions which must be observed by host-states under the PWD – that is Article 3(1) PWD. It says nothing about compliance with higher than this minimum core of host-state labour standards by out-of-state tenderers. The fullest discussion of this issue is in the Commission's 2001 Interpretative Communication on social procurement. This distinguishes cross-border and 'purely national' situations. In the latter, all domestic labour obligations, in both labour legislation and collective agreements, apply. In cross-border situations, 'requirements justified by overriding interests in the general interest that are in force in the host-country (the catalogue of such rules was put on a Community basis by Directive 96/71/EC) must among others, be complied with by service-providers'. Additionally, 'provisions more favourable to workers may, however, also be applied (and must then also be complied with), provided that they are compatible with Community law'.²⁷

The issue of which general host-state labour obligations can be applied to out-of-state contractors posting workers was not considered central in drafting the 2004 GPPD. No provision in the main directive is devoted to it; the recital refers only to the PWD's minimum standards. The Commission's Communication appears to adopt the position which most assumed prevailed before the new approach ushered in by the Court in *Laval*: minimum host-state standards, as laid down in the PWD, must be complied with by out-of-state public contractors; higher than minimum host-state standards are possible provided they comply with the PWD and Article 56 TFEU.

(2) Award criteria and labour obligations

Award criteria

A central provision of EU public procurement is that normally the contract must be awarded either to the tenderer offering the most economically advantageous tender or, alternatively (and less commonly in practice) the lowest price.²⁸

There is no indication whatsoever that social matters can constitute award criteria in the main body of the GPPD. But this leaves a major puzzle – the meaning of the first two recitals in the 2004 Directive. The first recital states (emphasis added):

²⁶ Above n 22 at 557.

²⁷ Above n 11 at 20. For the Commission's view post-*Laval* and *Rüffert* see below n 62.

²⁸ Article 53 2004 GPPD.

*This Directive is based on Court of Justice case-law, in particular case-law on award criteria, which clarifies the possibilities for the contracting authorities to meet the needs of the public concerned, including in the environmental/social area, provided that such criteria are linked to the subject-matter of the contract, do not confer an unrestricted freedom of choice on the contracting authority and comply with the fundamental principles in Recital 2.*²⁹

What is this Court of Justice case-law and why is no trace of it found in the main body of the Directive? Two key cases *Beentjes* and *Nord-Pas-de-Calais*,³⁰ bolstered by sister-cases on environmental considerations in public procurement,³¹ read alongside the Directive, tell a truly remarkable institutional tale of dogged resistance by the Commission, with Council support, to the more socially-inclined reading made by the Court of Justice of the award stage in public procurement.

Beentjes was a tenderer for a Dutch public contract who challenged his refusal to be awarded a contract because of his inability to employ long-term unemployed persons. The Court found that the Directive was *non-exhaustive* and that, provided *additional criteria* of this kind were advertised in the contract notice, the condition relating to the employment of long-term unemployed persons would be compatible with the Directive provided it complied with all the relevant provisions of Community law, in particular the Treaty freedoms on establishment and services, and did not discriminate directly or indirectly against out-of-State tenderers.

However, the Commission strongly preferred a position in which the two award criteria – lowest price or most economically advantageous tender – were exhaustive. It tried to square this with *Beentjes* by interpreting that case as being about contract performance conditions rather than the contract award stage. This take on *Beentjes* drove Commission infringement proceedings against France for a declaration that, in the award of public works contracts for construction and maintenance of school buildings in the Nord-Pas-de-Calais region, France had failed to respect its free movement of service obligations under the (EC) Treaty. The award criteria used included one linked to a local project to combat unemployment. In *Nord-Pas-de-Calais*, the Court clearly and firmly rejected the Commission's interpretation of *Beentjes* – that the two award criteria in the Directive – lowest price and most economically advantageous tender – were exhaustive and that it concerned contract performance conditions. In relation to the first prong of this argument, it stated that the award criteria provision in the Directive:

[D]oes not preclude all possibility for the contracting authorities to use as a criterion a condition linked to the campaign against unemployment provided that that condition is consistent with all the fundamental principles of Community law, in particular the principle of non-discrimination flowing from the provisions of the Treaty on the right of establishment and the freedom to provide services.³²

²⁹ These fundamental principles on the award of contracts are stated in Recital 2 to be, '...respect of the principles of the Treaty and in particular the principle of free movement of goods, the principle of freedom of establishment and the principle of freedom to provide services and to the principles deriving therefrom, such as the principle of equal treatment, the principle of non-discrimination, the principle of mutual recognition, the principle of proportionality and the principle of transparency.'

³⁰ Above nn 23 and 24.

³¹ C-513/99 *Concordia Bus* [2002] ECR I-7213; C-448/01 *EVN AG & Wienstrom* [2003] ECR I-14527. Note that in these cases the Court restricted the use of such additional award criteria by requiring them to be 'linked' to the subject-matter of the contract. For interesting arguments that this can be addressed in relation to social award criteria by making the subject-matter 'social' (eg building a prison in a way which promotes labour rights and protection) see McCrudden above n 22 at 552-6. For the opposite argument see the forcefully expressed Commission view in eg both the documents cited above at n 11.

³² [50] judgment.

In relation to the second prong of the Commission's argument, that *Beentjes* concerned contract performance conditions and not award criteria, the Court expressly found that that was wrong. In *Beentjes* the condition relating to the employment of long-term unemployed persons, 'had been used as the basis for rejecting a tender and therefore necessarily constituted a criterion for the award of the contract'.³³

What is then truly noteworthy is that even this clear instruction from the Court did not find its way into the 2004 Directive. Instead, as we have seen, that Directive continues the Commission's preferred interpretation in a number of ways. The main new provision on social considerations is Article 26 on contract performance conditions, examined in the next section; and the Article on award criteria does not mention the possibility of additional social criteria. Instead, this is relegated to the recitals, with the second recital emphasising how much this possibility is constrained by internal market principles.³⁴

Abnormally low tenders

The public procurement/posting of workers interface may also be relevant at another stage of the award process: the possibility in the directives for abnormally low tenders to be rejected. As we have seen, the contract must be awarded either to the tenderer offering the most economically advantageous tender or, alternatively the lowest price.³⁵ However, public authorities are allowed to reject abnormally low tenders provided, before doing so, they give the tenderer a right to reply in relation to those parts of the tender thought to be abnormally low. In 2004 the parts of the tender which might be abnormally low were more fully enumerated than in the previous legislative iteration (in 1993) and include 'compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed'.³⁶ This is important for the posting-public procurement interface as it beckons the possibility of rejecting a tender priced according to significantly lower home-state wages and holidays because the tenderer is posting workers to carry out the contract.

(3) Public contractors and special labour obligations at the performance stage

The fall-out of the institutional disagreement over award criteria is Article 26 GPPD. This provides that the contracting authority can lay down special conditions relating to the performance of a contract, provided these are compatible with Community law and are indicated in the contract notice or specifications. Most significantly, these special conditions may 'in particular, concern social and environmental considerations'.

³³ [51] judgment.

³⁴ Outside the Directive, using its important position as a disseminator of information to public authorities and tenderers on the EU law position, the Commission has tried to restrict the reach of the Court's jurisprudence still further. One key example is its continued assertion that the Court of Justice decided in *Nord-Pas-De-Calais* that 'contracting authorities can award a contract on the basis of a condition related to eg combating unemployment...but only where the authorities had to consider two or more equivalent tenders' (2010 Guide above n 11 at 40). Yet the judgment simply cannot be read as restricting social award criteria to tie-break situations.

³⁵ Article 53 2004 GPPD.

³⁶ Article 55(d) GPPD.

An amplifying recital provides examples of the kind of performance conditions contracting authorities may impose, such as favouring on-site vocational training, the employment of people experiencing particular difficulty in achieving integration, recruiting long-term job-seekers, complying in substance with the provisions of the basic ILO Conventions and recruiting more handicapped persons than required under national legislation. Such conditions will be GPPD-compatible provided they are not directly or indirectly discriminatory (against EU service-providers).³⁷

Obligations at this stage – the performance stage - do not focus on the tenderer's record before the award of the contract, nor can they be a basis for rejecting a tenderer. Instead, they are obligations which may be placed on a *successful tenderer*. Prior to 2004 it was clear that the performance phase of public procurement contracts was not regulated by public procurement directives. This provision therefore essentially provides an important clarification of the freedom possessed by public authorities to impose such conditions. However, it also stresses that such freedom must be exercised in compliance with EU law, in particular by not discriminating directly or indirectly against EU service-providers.

The Commission's 2001 Interpretative Communication expands on the content of this obligation not to discriminate directly or indirectly against non-national tenderers. It gives an example of a measure which should be EU-law compatible: a clause stipulating that a successful tenderer must employ a certain number or percentage of long-term unemployed or apprentices, without requiring the unemployed or apprentices to be from a particular region or registered with a national body for the execution of a works contract.³⁸ By implication, therefore, local labour policies would normally be unlawful as, depending on the formulation of the local labour policy, it would be directly or indirectly discriminatory.

What of additional obligations placed on public contractors concerning delivery of a higher level of worker protection than that required generally? Imagine for instance a UK public authority in London requiring not just compliance with the UK statutory minimum wage but with a higher 'living wage' by successful tenderers. The broad thrust of this provision is that such obligations should be allowed. That is to say, the policy underpinning Article 26 of the 2004 GPPD is to allow public authorities to impose social obligations over and above those generally applied. However, as we shall see, this policy sits very uneasily with the Court's decision in *Rüffert*.

(4) Institutional traits

Three significant institutional facts therefore shaped the approach to social considerations in the 2004 GPPD. First, the Court of Justice decided two key cases in the public procurement field, *Beentjes* and *Nord-Pas-de-Calais* which had to be dealt with in the legislative process. Second, the European Parliament, was empowered to push for greater social content by both Court of Justice decisions and its greater institutional role as a result of the move to the co-decision from the co-operation legislative procedure in 2004.³⁹ Third, the Commission, with Council support, was determined to resist the full

³⁷ Recital 33 2004 GPPD.

³⁸ Above n 11 at 16. But see C. Barnard, 'British Jobs for British Workers: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' 38 *Industrial Law Journal* 245 who argues that preferences for local unemployed in performance conditions should be seen as compatible with the Treaty freedom to provide services (Article 56 TFEU).

³⁹ This push reaped its most significant rewards in the area of status equality: unlike its predecessors, the 2004 directive, and an accompanying recital, permits Member States to reserve to sheltered workshops or sheltered employment programmes for the disabled the right to participate in public contract award procedures (Art. 19 GPPD; Recital 28 GPPD). In addition, although the provisions permitting exclusion of contractors deemed undesirable because of eg bankruptcy, professional misconduct do not mention compliance with labour standards, a recital singles out judgments finding non-

implications of the Court's jurisprudence on social considerations and public procurement. Both Council and Commission met the EP's push for more social content in the 2004 Directive by revising and adding recitals, and also by stressing the extent to which social criteria could be dealt with through contract performance conditions rather than award criteria.⁴⁰ Placing social considerations at the performance stage rather than the award stage also expressed the Commission's resistance to the Court's public procurement case-law on award criteria. This explains the distinctive architecture of the 2004 GPPD's social dimension. It underlines the *institutional* significance of recitals as a privileged means of managing inter-institutional conflict and forging compromise in the legislative process.⁴¹ It results in a variegated set of relationships between the social recitals and the main body of the Directive.⁴²

The position then on the three posting-public procurement interface issues, as it emerged from the 2004 legislative process, was as follows. In relation to generally applicable labour legislation and collective agreements, the 2004 GPPD assumes this will be applicable. The 2004 Directive also expressly acknowledges the freedom of public authorities to impose special labour conditions on public contractors while performing contracts. Finally, Court of Justice jurisprudence, though not fully reflected in the directive, has given extremely strong backing to using social award criteria in public procurement. While the general relationship between social considerations and public procurement was controversial, the posting-public procurement interface was not. This, in turn, reflected the dominant understanding of the PWD and the Treaty freedom to provide services, as requiring tenderers to comply with minimum host-state requirements as well as permitting host-state public authorities to require compliance with higher labour standards or special hiring policies for those finding labour market entry difficult, provided this complied with the primary Treaty freedom, which it was assumed would be the case in quite a wide range of cases.⁴³ However, this presumed social content of the two sub-fields, as well as the 'fit' between them, has been shattered by the Court's new approach to the posting of workers, especially in its application to the posted workers/public procurement interface.

Interpretation and the Internal Market Architecture: Examining *Laval*, *Luxembourg* and *Rüffert*

Unsurprisingly, the Court of Justice takes legislative outputs, such as the PWD and the procurement directives seriously. However, as this analysis has demonstrated, legislative outputs reflect the institutional constellation and its engagement with the judicial *acquis* at a given point in time. As time passes, the Court's positions on Article 56 TFEU change. Commission campaigns on public procurement and posting of workers, using in particular its ability to take infringement proceedings, provide invitations to the Court to revisit earlier positions. Preliminary references also provide a means for national conflicts about the appropriateness of national labour rights in procurement and posting of workers to be played out before the Court of Justice. From late 2007 onwards the Court of Justice used invitations provided in both infringement proceedings and preliminary references

(Contd.)

compliance with the Framework Equal Treatment Directive (2000/78) and the Equal Treatment Directive (formerly 76/207, now 2006/54) as providing grounds for professional misconduct (Recital 43 GPPD).

⁴⁰ McCrudden, *Buying Social Justice* above n 22 at 456.

⁴¹ In the preceding directive (1993), there was no mention whatsoever of social considerations in the recitals whereas in 2004 fully six recitals concern wholly or in part social considerations in public procurement. More broadly, recital proliferation is a feature of the 2004 Directive: 51 recitals compared with just 14 in 1993.

⁴² Mirroring (Eg the provisions on sheltered workshops for the disabled); Amplification (eg Article 26 on social contract performance conditions); Replacement (social award criteria).

⁴³ For further analysis of the Court's interpretation of the Treaty freedom to provide services in posted workers' cases pre-*Laval* see C. Kilpatrick, *British Jobs for British Workers? UK Industrial Action and Free Movement of Services* LSE Working Paper 16/2009 available on SSRN.

concerning posting of workers to significantly alter the accepted understanding of the legal position. This new understanding radically rearranges the posting of workers' architecture and has substantial though unclear implications for the public procurement sub-field.

The New Approach to Posted Workers

In *Laval* and thereafter, the Court introduced a new approach to posted workers. Both the outcomes and the method are of interest. In terms of method, what is most interesting is that it did not do this by striking down provisions of the PWD as incompatible with Article 56 TFEU. Instead, the Court found a way to re-read the provisions of the PWD so that the Directive delivered very different outcomes to those assumed prior to *Laval*.

In terms of outcome, the Court has dramatically restricted when host-state labour standards can be applied to posted workers. Beyond a minimum core, posted workers should almost always simply be subject to the labour standards of their home state. This is primarily achieved by making the minimum floor in the Directive a ceiling. Hence, the Court refers to Article 3(1) PWD as 'an exhaustive list'.⁴⁴ As we have seen, prior to *Laval*, it had been generally assumed that under the Directive host-states could apply other and higher standards to posted workers. For some this was because Article 3(7) PWD, in stating that that minimum floor 'shall not prevent application of terms and conditions of employment which are more favourable to workers', authorises application of higher host-state standards.⁴⁵ Under the new approach, the Court had therefore to find a way to reinterpret Article 3(7) so as to preclude its authorising host-states applying other and higher standards to posted workers. It did this by interpreting Article 3(7) PWD to mean it permits more favourable *home*-state rules to apply to posted workers, as well as allowing service-providers in host states to voluntarily provide more favourable terms for posted workers.⁴⁶

With the Article 3(7) route closed, only Article 3(10) remained. In infringement proceedings against Luxembourg⁴⁷ the 'public policy' route in Article 3(10) for applying other and higher host-state standards was all but closed by the Court. Luxembourg, in national legislation implementing the Directive, had designated a set of labour law measures as pertaining to 'mandatory public policy' and therefore as applying to posted workers on its territory. The Court stated that Article 3(10), derogating from the Treaty freedom to provide services, had to be interpreted strictly. 'Strictly' meant, drawing in particular on the Court's case law in relation to deporting undesirable migrants, that 'public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society'.⁴⁸ It is difficult to imagine the host-state labour law rules typically at stake in posted workers' cases falling under such a definition. Certainly, none of the challenged Luxembourg measures met this standard.⁴⁹

⁴⁴ *Commission v Luxembourg* above n 3 [26].

⁴⁵ See above n 18.

⁴⁶ *Laval* [80]–[81]; *Rüffert* [33].

⁴⁷ Above n 3.

⁴⁸ See further C. Barnard, 'The UK and Posted Workers: The Effect of *Commission v Luxembourg* on the Territorial Application of British Labour Law' 38 ILJ (2009) 122.

⁴⁹ Given this stance, it seems highly unlikely that a generous interpretation will be given to the second option in Article 3(10) PWD, which permits host-state standards beyond the minimum floor contained in certain kinds of broadly applicable collective agreements to be applied to posted workers. This provision fits extremely poorly, indeed not at all, with the new approach. It will therefore create renewed textual difficulties in interpreting the Directive.

The New Approach and Public Procurement: the Rüffert Decision

Rüffert sits squarely within the posted workers-public procurement interface. In *Rüffert*, a Polish subcontractor obtained a contract to build a prison in Lower Saxony, a German *Länder*. A condition of the contract, laid down by the Lower Saxony public procurement law, was to abide by a specified collective agreement. The Law stated its purpose clearly:

The Law counteracts distortions of competition which arise in the field of construction and public transport services resulting from the use of cheap labour and alleviates burdens on social security schemes. It provides, to that end, that public contracting authorities may award contracts for building works and public transport services only to undertakings which pay the wage laid down in the collective agreements at the place where the service is provided.

The Polish subcontractor was found to be paying its workforce less than half the minimum wage specified in the collective agreement. Action was taken against the main contractor (and subsequently its liquidator, Mr Rüffert) for its failure to ensure, in accordance with its contract with the public authority, compliance by subcontractors with the wage levels laid down in the applicable collective agreement. Rüffert counterclaimed, on behalf of the contractor, that such requirements for employers of posted workers to comply with host-state collective pay standards breached the Treaty freedom to provide services (Article 56 TFEU).

The German referring court clearly pushed for the view that the Lower Saxony public procurement law should not be allowed to stand:

In the case of foreign workers, the obligation to comply with the collective agreements does not enable them to achieve genuine equality of treatment with German workers but rather prevents workers originating in a Member State other than the Federal Republic of Germany from being employed in Germany because their employer is unable to exploit his cost advantage with regard to the competition.⁵⁰

Through its reference, therefore, the German court involved the Court of Justice in long-running controversies in Germany about the legality of social considerations in public procurement as well as the legality of applying host-state standards to posted workers.⁵¹

Advocate General Bot considered the relevance of the public procurement directives to determining the case's outcome. The 2004 GPPD was not in force for *Rüffert* and its 1993 predecessor contained no express provision on social considerations at the contract performance stage.⁵² Nonetheless, the Advocate General found the 2004 GPPD and the Court's case-law on social award criteria assisted in rejecting the Commission's argument that the Lower Saxony law was unlawful because it created discrimination between workers in the construction industry, depending on whether the primary contractor was private or public. In relation to the discrimination argument, AG Bot considered that the only relevant discrimination issue was not the public/private one but rather concerned non-discrimination on grounds of nationality. In that regard, he considered that so long as posted workers

⁵⁰ [15] judgment.

⁵¹ See further McCrudden, *Buying Social Justice* above n 22, Ch 10 Section II, and Chapter 11 Section III; O. Otting, 'Compulsory social standards for public work contracts as a restriction on the freedom to provide services: *Rüffert*', *Public Procurement Law Review* (2008) 193.

⁵² AG Opinion [60]. There is a good argument to be made that the case actually raised issues about the award criteria stage rather than the contract performance stage as the Lower Saxony law made commitment to the collective agreement a condition of award. Paragraph 3(1) of the Law stated: 'Contracts for building services shall be awarded only to undertakings which, when lodging a tender, undertake in writing to pay their employees, when performing those services, at least the remuneration prescribed by the collective agreement at the place where those services are performed and at the time prescribed by the collective agreement.'

and local workers were paid the same rate, there would be no breach of the principle of non-discrimination on grounds of nationality. In addition, he argued that the public/private argument was also misplaced because EU law specifically endorsed the possibility of integrating social considerations into public contracts. This was clear both from Court of Justice case-law (*Beentjes, Nord-Pas-de-Calais*) and from the new Article 26 on contract performance in the 2004 GPPD. Accordingly, as the contract performance condition at issue in this case – the minimum remuneration provisions laid down in the Lower Saxony Law – did not discriminate on grounds of nationality, provided it was transparent it was consistent with EU law.⁵³ The public procurement *acquis* bolstered the legality of the public authority's position on labour rights.

AG Bot's Opinion also provides a textbook illustration of the pre-*Laval* approach to posting of workers. He used Article 3(7) PWD to say that higher than minimum host-state protection is expressly allowed by the directive. He then determined whether the higher than minimum protection, although compatible with the PWD, might breach the ceiling established by the Treaty freedom to provide services. He found the existence of a restriction and then considered justification. The Lower Saxony rules were justified as they conferred 'a genuine benefit on the workers concerned [higher host-state wages] which significantly augments their social protection'⁵⁴ and also provided appropriate means of combating social dumping by ensuring posted and local workers were paid equally. These objectives could not be achieved by means of rules with a less restrictive effect on the freedom to provide services.

In *Rüffert* the Court disagreed comprehensively with its Advocate General. It confirmed its new approach to posted workers. Additionally it made it clear that what would qualify as an appropriate minimum standard-setter would be very narrowly construed. Hence, the Lower Saxony public procurement law requiring contractors to comply with the minimum pay rates laid down in the applicable collective agreement did not fall within the definition of 'minimum wage' setting for the purposes of the Directive. Because the collective agreement, and not the law, set the minimum wage, the Court would not accept the law as a minimum wage-setting law for the purposes of Article 3(1).⁵⁵ Nor was the collective agreement in question found to be one of those which Article 3(8) PWD permits to set minimum standards in the construction industry. The collective agreement in question was not universally applicable, as the power to make collective agreements universally applicable is not available to *Länder*. Ominously for the division of powers between different levels of public authority, the Court found that where a Member State had the power to make collective agreements universally applicable, as in Germany, no collective standards other than those in universally applicable collective agreements could be applied.⁵⁶

The Court could have stopped there. However, ploughing further (and unnecessarily, given what it had already decided) into public procurement territory, it found that the collective wage-setting was also ruled out because it applied only to *public contracts* within a defined geographical scope (the Land of Lower Saxony), and not to public and private contracts.⁵⁷ The distinction between public and private sector contracting was also used by the Court as a reason for rejecting a worker protection justification for the Lower Saxony Law: if workers on private contracts did not require such protection, why then should workers on public contracts?⁵⁸ Despite these wide-ranging pronouncements on the

⁵³ [130]-[135] AG Opinion.

⁵⁴ [116]: 'compliance with the [Lower Saxony Law] would have given these workers genuine additional protection by ensuring that they received a wage that was significantly higher than the wage they would normally be paid in the State in which their employer is established. This law therefore appears to me to ensure the protection of the posted workers' [118].

⁵⁵ [24] judgment.

⁵⁶ [27] judgment.

⁵⁷ [28]-[29] judgment.

⁵⁸ [38]-[40] judgment.

incompatibility with the Posted Workers' Directive of specific contract conditions being laid down by public contracting authorities, the Court's judgment is marked by a total absence of consideration of the public procurement social *acquis*, the directives and its own progressive jurisprudence.

Despite the absence of references to public procurement in its judgment, *Rüffert* clearly has significant implications for procurement situations involving posting of workers. Consider a public authority putting a building contract out to tender today. *Rüffert* suggests the following. Beyond the minimum standards in Article 3(1) PWD on pay, holidays etc. it will not be able to insist on application with generally applicable labour legislation or collective standards to contractors from other Member States, as an award criterion, as a reason for rejecting a tender as abnormally low, or as a contract performance condition. Nor will it be able to insist on compliance with special labour standards, applicable *only to public contractors* at any stage in the procurement process; if such standards are, as is quite likely, higher or beyond those permitted in the exhaustive list set out in Article 3(1) PWD. The only policy space left for public procurement and labour standards, where posting of workers is concerned, is to exploit the minimum standard-setting options endorsed by the new approach to posted workers. Yet our examination of the GPPD, agreed just a few years before, shows how far out-of-kilter these outcomes are with those assumed to apply to EU public procurement exercises. Is then the posting of workers/public procurement interface now to be considered a major exception to the normal procurement framework and, if so, what exactly justifies that exceptionality?

The implications of *Rüffert* for host-state labour rights in public procurement are clear in outline, although their detailed application and further development may well be highly controversial. Imagine a procurement exercise to build a prison in which a foreign service-provider is chosen because its contract, based on the lower labour standards applicable in its home-state and the minimum host-state core, is better value than those of domestic tenderers, obliged to comply with higher domestic standards on wages, hours and other matters. Can the domestic tenderer argue that the obligation of equal treatment of tenderers, central to EU procurement, has not been respected in the procurement process?⁵⁹ The broader implications of *Rüffert* for social considerations in public procurement also remain unclear. In so far as the new approach to posted workers manifests a tougher line by the Court to giving access to out-of-state providers, *Rüffert* also indicates that a tough stance may be taken on procurement criteria or conditions on unemployment, wherever those criteria or conditions tend to favour tackling local unemployment. However, *Rüffert* can also be read, albeit in my view less persuasively, as the Court taking a less positive view of social considerations in public procurement *tout court*.⁶⁰ What is significant is how this line of cases is available as a resource for those opposed to integrating social considerations into public procurement.

In this regard, the Commission's initial response to *Rüffert*'s public procurement implications merits close attention:

[A]lthough this judgment was rendered in the context of a public procurement contract, it has no implications for the possibilities offered by the Procurement Directives to take account of social considerations in public procurement. It only clarifies that social considerations (in public procurement) regarding posted workers must also comply with EU law, in particular with the Directive on the posting of workers.⁶¹

⁵⁹ For consideration see C. Barnard, 'Using Public Procurement to Enforce Labour Standards' in B. Langille and G. Davidov (eds) *The Idea of Labour Law* (OUP, forthcoming).

⁶⁰ See S. Arrowsmith and P. Kunzlik, 'Editor's Note – the decision in *Rüffert v Land Niedersachsen*' in id (eds) *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (CUP: 2009) noting that the decision 'raises the possibility that, more generally, the Treaty precludes standards of behaviour being imposed on those who obtain government contracts that do not apply to businesses in general...'

⁶¹ Commission Guide 2010 above n 11 at 46.

In so far as this statement indicates that the Commission considers that *Rüffert* should be read as not restricting social considerations in public procurement outside posting of workers scenarios (or more accurately, not any more than the Commission suggests it is restricted already, which is quite a lot), it is to be welcomed. However, in so far as the statement suggests that *Rüffert* has a minimal impact on tenders where posting of workers may be a feature (and an increase in cross-border tendering is an explicit and central Commission aim)⁶² it amounts to either a disingenuous effort to calm stormy Member State waters or a failure fully to consider the implications of the case.

Internal Market Architecture Lessons

Above we suggested that delivery of values such as structure, detail and certainty made internal market legislation a valuable supplement to the internal market freedoms. The operation of the Treaty freedom/legislation relationship was examined in more detail through a posted workers-public procurement case-study. Five lessons can be extracted from the case-study about how the current internal market architecture accommodates labour rights.

Lesson 1. The legislative design in both posting of workers and public procurement aims to deliver values such as structure, detail, certainty by setting out rules and detailing as many aspects as possible of their application. They aim to provide a very full lawful/unlawful map for their addressees (Member States, public authorities, businesses).

This is such a well-established legislative design, for internal market legislation and more generally, that its utilisation can easily pass unnoticed by lawyers. Hence, the PWD instructs host-Member States on their obligation to apply minimum labour standards in a set of legislatively designated areas, and requires these minimum labour standards to be set by law in all sectors except construction, where it also permits certain legislatively defined collective agreements to set them. It has also been shown that the Public Procurement Directives set out an exceptionally detailed regime for participants to follow, with very extensive rules on which contracts are covered by the procurement legislation regime and the stages those contracts falling within the regime are required to follow. Precisely because its use is so widespread, it is important to assess the implications of use of this legislative design, and consider what alternative designs might offer.⁶³ The concluding section returns to this point.

Lesson 2. The virtues promised by internal market legislation (such as structure, certainty, detail) are seriously compromised in periods of inter-institutional disagreement or judicial change. The relationship with the Treaty freedom makes internal market legislation especially vulnerable to judicial overhaul.

The aim to deliver a full legislative map of legality is never fulfilled. Instead legislative settlements inevitably have a provisional or incomplete quality. Take the example of award criteria in public procurement. We have seen that reading the General Public Procurement Directive gives a misleading picture of the law in force as, due to inter-institutional disagreement, it does not faithfully and fully reflect Court of Justice case-law on that issue. Here, then, is a prime example of a directive not

⁶² *Commission Green Paper on the Modernisation of EU public procurement policy. Towards a more efficient European Procurement Market*, Brussels, 27.01.2011 COM (2011) 15 final: ‘one of the foremost objectives of EU public procurement legislation is to enable economic operators to compete effectively for public contracts in other Member States’ (at 27). Although it does not consider *Rüffert* this Green Paper sets in motion a very wide-ranging consultation on amending the 2004 Directives.

⁶³ As Sabell and Simon note the command-and-control orientation is characterised *inter alia* by ‘an effort to anticipate and express all the key directives needed to induce compliance in a single, comprehensive, and hard-to-change decree’: C.F. Sabell and W.H. Simon, ‘Destabilization Rights: How Public Law Litigation Succeeds’ 117 *Harvard Law Review* (2004) 1015 at 1021.

fulfilling the function either of codifying Court of Justice case-law or of providing a ‘one-stop-shop’ for public authorities, tenderers or others, such as trade unions, needing comprehensive information about how social considerations operate in public procurement. It is not, though, an isolated example.

The Treaty freedom’s constitutional relationship to services legislation makes legislative settlements provisional along three distinctive dimensions: temporal, spatial and substantive.

Temporally, the legislation adopted at any given moment in a sub-field such as posting of workers or public procurement will reflect, albeit in mediated fashion, the Court’s understanding at that time of Article 56 TFEU. However, as the Court’s understanding of Article 56 TFEU evolves or just changes, these legislative artefacts can come to seem out-of-kilter or an awkward fit with the Treaty freedom. The new approach to the Posted Workers’ Directive can usefully be viewed in this light.

The spatial dimension is no less important. As the constitutional mother-provision embracing all its services sub-fields a finding in one sub-field can reverberate far beyond it. Hence, when the Court makes a pronouncement on, say, the collectively agreed standards applicable to posted workers in host-states, the possible implications of that pronouncement for the wider sub-field as well as within other sub-fields will be seriously considered by subsequent judicial decision-makers and the broader legal community. We can illustrate this by looking briefly at the latest instalment in labour rights’ encounter with internal market freedoms. In *Commission v Germany* public authorities had entered into collective agreements selecting pension providers for their workforces without opening the selection of pension providers to competitive tender. This was found to breach the EU’s public procurement rules.⁶⁴ Returning to the distinctions made at the beginning of this essay, we can examine how it relates to the existing cases. It does not directly address the posted workers-public procurement interface. It tells us more about the relationship between internal market freedoms and those labour rights concerning freedom of association.⁶⁵ It also tells us more about the Court’s approach to social considerations in public procurement exercises possibly generally, possibly in non-posting cases⁶⁶ or possibly only in the much narrower sub-set of public procurement situations where worker protection (*in casu*, pension provision) is the *subject-matter* of the contract. The broader point this illustrates is that there is a *meta-narrative of services* which can potentially link all these sub-fields into new combinations: each new intervention, such as a judgment, feeds into that developing narrative in contested ways. Moreover, the meta-services narrative is itself linked to a larger narrative, a fundamental freedoms narrative, in which legal arguments for coherence and consistency across the free movement of persons and goods resonate.

From a substantive perspective, it is highly relevant that the relationship between labour rights and internal market provisions, in the Treaty and in internal market legislation, is often controversial. For internal market purists, labour rules should not normally affect the operation of the market freedoms; for domestic purists, national labour settlements should be given complete insulation from the internal market freedoms. Both have vocal and powerful constituencies, both outside and within the EU institutions. This affects the operation of the legislative process and its outputs. Hence, we have seen the Commission’s persistent commitment to an ‘internal market purist’ stance in relation to public procurement and posting of workers, as a legislative actor, as a law enforcer in infringement proceedings against Member States, and as a disseminator of guides to EU law in both fields. The controversial nature of the internal market-labour rights interface also makes it likely that the Court’s position on how labour rights should be accommodated with the Treaty freedoms will be less stable, and more high-profile, than in relation to other issues. This case-study has shown that the Court has flip-flopped between positions close to internal market purism and reassuring interested constituencies, such as the Member States, trade unions, even the ‘peoples of Europe’, that it will

⁶⁴ Above n 1.

⁶⁵ On this aspect, see P. Syrpis’ case-note in 40 (2011) ILJ forthcoming.

⁶⁶ On these two possibilities, see C. Barnard, *Using Public Procurement* above n 60.

ensure labour rights are not threatened, and can even be bolstered, by the internal market. The Court's new approach to posted workers, including in postings as part of a public procurement exercise, lies firmly at the internal market purist end of the spectrum, while the *Rush* case on posted workers and its case-law on social award criteria in public procurement are at the labour rights' insulation and promotion end.

Lesson 3. The Court respects the form of services legislation, if not always its substance.

Pre-*Laval* Paul Davies suggested that the Posted Workers' Directive was incompatible with its legal basis as it restricts rather than promotes the free movement of services.⁶⁷ Why then did the Court not use its constitutional trump-card in the *Laval* line of cases to strike down all or part of the PWD? The answer seems, at least in part, to lie in the Court's institutional awareness of the roles legislation plays in the Treaty freedom's interpretation. Not only does legislation perform useful practical functions (albeit imperfectly), as already noted, it comes with an important democratic pedigree which the Court is keen to respect, or at least be seen to respect.

Lesson 4. Legislation may not mean what it says (or what most thought it said). The open-texture of language and the obscure wording and complex architecture resulting from legislative compromises facilitates the introduction of new meanings.

This legislative feature facilitates the Court in maintaining the form of internal market legislation while altering its substance. It would be difficult to get a better example of this than the Court's new approach to the Posted Workers' Directive. Though the meaning of Article 3(7) of the Directive was assumed by the Advocates General in both *Laval* and *Rüffert* to mean that the minimum core in Article 3(1) 'shall not prevent application of terms and conditions of employment which are more favourable to workers' in the *host-state*, clearly the words can bear the opposite, *home-state* focused, meaning placed on them by the Court in *Laval* and *Rüffert*.⁶⁸ Similarly, Article 3(10) PWD had been assumed to offer a broad, albeit not unlimited, scope for host-states to impose higher labour standards on grounds of 'public policy'. In *Commission v Luxembourg*, the Court effectively buried that assumption, but in a way which drew on the meaning of public policy developed in the not entirely unrelated context of free movement of (undesirable) persons in the EU. The complex set of relationships between the multiple recitals in the General Public Procurement Directive and the main body of the Directive⁶⁹ also provide ample textual opportunities for the Court of Justice to shape the substance of the Directive in its chosen direction while, more or less convincingly, respecting the legislative bargain struck.

Lesson 5. The Court: valuable agent of creative destruction or unacceptable judicial activist?

Reflecting on this case-study, is it best to view the Court as a valuable agent of creative destruction in the construction of EU internal market norms?⁷⁰ Creative destruction, as used by the economist Joseph Schumpeter,⁷¹ refers to the process of transformation in which an established economic structure is destroyed by the emergence of a new, improved structure. Transposed to law and courts' interpretation of market rules, it could be used to mean the necessary judicial breaking-up of previously established, but no longer fitting, legislative bargains to fit the new internal market environment. The shocks produced by the Court's case-law will provoke consequent institutional adaptation. This is part of the life-blood of the internal market process, preventing stasis and failure to adapt to new circumstances, such as market changes and enlargement.

⁶⁷ Above n 20.

⁶⁸ See also above n 18.

⁶⁹ Above n 41.

⁷⁰ Thanks to Hans Micklitz for this suggestion.

⁷¹ *Capitalism, Socialism and Democracy* (1942).

Clearly, the role of courts, especially in constitutional interpretation mode, as motors of legal change and adaptation is an important descriptive feature of this case-study. Yet the creative destruction metaphor seems misplaced in two ways. First, the legal structure of the internal market cannot easily be analogised with the ‘creative destruction’ unleashed by new production processes, such as the fate of candlestick-makers with the advent of the electric light bulb. This is because the latter are unquestionably and straightforwardly better ways of providing light in a way that cannot be said of the Court of Justice’s views of the internal market. The best ways to accommodate labour rights with the internal market, even for the time being, are essentially contested; there is literally nowhere to turn for the right answer. Additionally, the Court’s views of how the internal market should accommodate labour rights are not consistent or clear. Second, as a result of this mismatched analogy, the creative destruction metaphor can justify both the role of the Court and the outcomes of its decision-making as all being ineluctable creative destruction. The Court’s actions may be creative and destructive, indeed have been shown so to be in this essay, but not ineluctably. Those actions are therefore avoidable and unnecessary, if they are shown to be undesirable.

Does this then mean that the Court has got no good justification for case-law which fundamentally rewrites legislative bargains? Is it best seen as an irredeemably flawed institutional interlocutor, and unacceptably judicial activist, when it acts as it has done in the posted workers-public procurement interface? Should it respect much more carefully legislative bargains struck? Yet we need to avoid sanctifying legislative bargains too. This case-study shows how sub-optimal legislative outputs and the legislative process can be, especially at EU level: slow or absent responses to changing circumstances, entrenched positions, the construction as addressees rather than as producers of norms of key actors (here, centrally, collective bargaining partners, tenderers and public authorities) and unclear and contradictory legislative bargains are central and well-known problems. While there may not be right answers, there can be better answers and better paths to finding new solutions as to how to accommodate labour rights with internal market freedoms. The Court plays a central role in stimulating this search. That is to say, the Court is neither automatically justified in its creative destruction of legislative bargains, as the creative destruction justification would suggest, nor is it automatically unjustified from unsettling bargains which were never satisfactory or have become so because of changing circumstances, as an over-reification of legislative bargains would suggest. In the concluding section, we critically review the existing architecture and suggest the metaphor of catalysis as a more helpful, though demanding, means of reorienting normatively the judicial and legislative branches in their relations with one another and towards the task of governing the internal market-labour rights interface.

Towards Catalysis: Or, Is The Current Architecture Really as Good as It Gets?

Moves are currently afoot for new legislation in both internal market areas analysed in this study: posting of workers and public procurement.⁷² PWD revision is a product of the controversy created by the Court’s new approach to posted workers. Of course, it is possible that these legislative processes will produce responses to the Court’s new case-law which will provide a more broadly accepted settlement than the Court’s case-law has produced and clarify the implications of the new posting of workers’ case-law for social considerations in public procurement exercises.

Staying first within the current legislative design (as noted above, one focused on providing a lawful/unlawful map for addressees of the legislation), here are some examples of issues reform needs to address. The legislature should address a critical central issue not addressed by the Court in its case-law – for how long can a worker be subject largely to home-state standards under the new approach? Clearly, if posted workers are subject to only a minimum core of host-state standards for relatively short periods spent in the host-state, this makes the new approach much less controversial, both

⁷² Above n 62 for public procurement; below n 75 for posting of workers.

normatively and practically, than if the posting regime is allowed to continue for much longer periods of time. Issues concerning when collective standards can set host-state standards, including the central issue of how (the many different) collective bargaining regimes can set a minimum standard, will also need to be fully addressed to prevent the current destructive uncertainty resulting from the Court's new approach case-law.⁷³ When host-states can apply labour standards to posted workers under the 'public policy' heading needs to be addressed. As this analysis has shown, the interface between posting of workers and public procurement also needs fully to be considered in both legislative revision processes. For instance, are domestic tenderers and foreign service-providers equally treated when one tenders on the basis of the full gamut of domestic labour standards and the other tenders on the basis of a minimum core of those standards?

The legislature may produce responses, mediated by the Court's new approach case-law, and the high-profile backlash by trade unions and workers against that case-law.⁷⁴ Amongst the institutional actors, there is a familiar line-up of positions. Hence, the Commission has shown its reluctance to make modifications to the Court's more internally market purist new approach;⁷⁵ the European Parliament its desire to make such modification.⁷⁶ If legislation is agreed, it is accordingly highly unlikely it will clearly address even the examples set out above, due to conflict and compromise on these controversial issues. The necessarily imperfect legislative output will then set in motion a new cycle of response to that legislation by the Court in its role as an interpreter or judge of the validity of that legislation. The legislative output will, probably from the outset, not line up with the Court's case-law and further case-law developments may (though certainly not as a matter of course) prompt a new legislative output. That is the architecture and the architectural outputs governing the internal market-labour rights interface which this chapter has explored in detail. The question is: is this really as good as it gets? Are there not ways of improving governance of the internal market-labour rights interface?

A useful starting-point is Joanne Scott and Susan Sturm's use of the evocative idea of *courts as catalysts* in situations of normative uncertainty and complexity. Hence,

the function of judicially articulated legal norms is not to establish precise definitions or boundaries of acceptable conduct which, if violated, warrant sanction (or to abdicate any role at all). Instead, the judicial function is to prompt - and create occasions for - normatively motivated inquiry and remediation by relevant non-judicial actors in response to signals of problematic conditions or practices.⁷⁷

A catalyst is a vital agent of change which is profoundly connected to that which it alters. Catalysis provides a more promising metaphor than creative destruction or activism to conceptualise the EU judicial and legislature's relationship with each other and other actors in the governance of internal market's interface with labour rights because it captures the need for *change* managed by *interdependent* actors and institutions. The most significant element in the quote above is the creation by the judiciary of opportunities for relevant non-judicial actors to consider and respond to problematic conditions and practices. The mission in this case-study is to find arrangements

⁷³ See C. Kilpatrick, *Laval's Regulatory Conundrum* above n 17.

⁷⁴ See C. Kilpatrick, *British Jobs for British Workers?* above n 43 for some examples.

⁷⁵ Instead the Commission is proposing improved enforcement of and compliance with the PWD, as interpreted by the Court in *Laval et al*: see Commission Communication, *Towards a Single Market Act. For a highly competitive social market economy. 50 proposals for improving our work, business and exchanges with one another* COM (2010) 623, 27 October 2010, 'Proposal No 30: In 2011, the Commission will adopt a legislative proposal aimed at improving the implementation of the Posting of Workers Directive, which is likely to include or be supplemented by a clarification of the exercise of fundamental social rights within the context of the economic freedoms of the single market.' This proposal draws on a report by former Commissioner Mario Monti of 9 May 2010, *A New Strategy for the Single Market*, 9 June 2010, 107pp.

⁷⁶ See also the diametrically-opposed views of the European Social Partners, *Report on Joint Work of the European Social Partners on the ECJ rulings in the Viking, Laval, Ruffert and Luxembourg cases*, 19 March 2010.

⁷⁷ J. Scott and S. Sturm, 'Courts as Catalysts: Rethinking the Judicial Role in New Governance' *Columbia Journal of European Law* (2007) 565.

appropriately accommodating labour rights (including in public procurement) while respecting the requirements and constraints of an internal market in services (including cross-border tendering). Looked at in this light, the central governance flaw in the current arrangements is the failure to design the legislation, and its interpretation in light of the Treaty by the Court, so as to include all relevant non-judicial actors in finding ways to carry out that mission. The legislation, and the Court's interpretation of it and the Treaty freedom to provide services treats employers, unions and public authorities as addressees of legal commands rather than as the authors of norms which could fulfil the mission of making arrangements which accommodate the internal market and labour rights. Imagine instead a governance design that provided a framework and incentives for such bottom-up accommodation of labour rights and market freedoms to happen. The governance values identified earlier in this chapter as aims of internal market legislation: structure and detail, certainty for participants, the democratic value of norms, adaptation in time and space, dialogue with the judicial branch and so on remain central goals. Actors would have to demonstrate, via procedure and substance, that they have appropriately accommodated labour rights and cross-border interests in an 'internal market labour rights agreement'. Inter-institutional relations, and inter-actor relations, would be concerned with catalytic conversion to achieve this mission.

Take *Rüffert*, the case where the new approach to posted workers was applied to public procurement. It was found that a wage laid down in a collective agreement could not be applied to posted workers as a performance condition in a tender. What if the public authority and the collective bargaining partners could make their procurement arrangements free movement of services-proof, so far as posting of workers as part of the tender are concerned, by showing they had taken into account the cross-border implications in their collective bargaining arrangements, through, for example, dialogue with the representatives of the workers being posted and/or substantive adjustments to the labour standards depending on factors such as the length of the posting, comparing the labour standards prevailing in the country of origin and the host-state and whether the business is genuinely involved in posting of workers? In posting situations without a public procurement dimension, host-state unions could make arrangements with home-state unions and employers, especially in the construction industry, on how to set standards for posting which reconcile cross-border interests with labour protection. EU-level employer and union organisations, again perhaps especially at industry level, could disseminate information to local actors about other posting agreements, could provide monitoring and a forum for dispute resolution.

Clearly, this is just a brief sketch to illustrate the possibility of an alternative governance arrangement where cross-border interests are reconciled with labour rights from the ground up rather than from the top-down. How would such a different starting-point alter the roles of the EU legislature and judiciary? The legislature can play a key role in setting out the kinds of internal market labour rights agreements likely to reconcile appropriately labour rights and free movement of services. It can provide examples of who should be involved and the issues that should be covered in an agreement. Another potential role for the legislature is to provide incentives to enter into such arrangements. One way of doing this is by setting a default arrangement to apply in the absence of agreement. This is a tried-and-tested legislative technique in EU law, with the European Works' Council Directive providing a central example.⁷⁸ The default arrangement in this case must provide incentives for host-state workers/unions and home-state employers/unions to make agreements on the labour standards to apply to posted workers in the host state. A moment's thought shows that the current architecture has never provided a stable and appropriate default arrangement. Near-blanket protection of host-state labour rights (eg the *Rush* decision) provides no host-state incentive to make alternative arrangements taking into account home-state factors. The Court's new approach to posted workers provides little incentive for service-providers to enter into alternative arrangements taking into account host-state factors. A default arrangement needs to provide incentives for all concerned to find an alternative.

⁷⁸ Directive 94/45/EC.

This could be done, for example, by making home-state standards applicable (an incentive for those in the host-state to find an alternative arrangement) but for a short period of time (an incentive for those in the home-state to find an alternative arrangement). As for the Court of Justice, its primary task would be to find means of reviewing these agreements, drawing upon the criteria in the directive and the agreements reached, so as to encourage procedural and substantive engagement on the ground with the mission of accommodating labour rights and internal market freedoms.

Of course, many will question the viability of such a governance arrangement. How will it guarantee the internal market? How will participants know whether their arrangements are Court-proof? Where is the detail, where is the certainty? These are important questions to ask, and explore much more fully, but not just of this new architectural proposal. This essay has clearly demonstrated the difficulties the current internal market architecture has in delivering satisfactory answers to these questions too. In so doing, it aims to open to more serious debate the range of governance options considered as viable contenders. If it can be shown that new legislative designs and judicial orientations can deliver better governance than the current architecture of the perennially controversial internal market-labour rights interface then surely they deserve serious consideration, even if they require a substantial reorientation by actors and institutions. It is also worth considering in that assessment additional values to those identified above as desirable aims in the current architecture. Do we want accommodations of the internal market and labour rights that cultivate values such as participation, capacity-building of a nascent transnational civil society, learning, and innovation? Moreover, it is not just values associated with 'new governance' that should be included in a more comprehensive assessment of which architecture delivers good governance of the internal market's interaction with labour rights. Successful delivery of traditional and central values must also be a yardstick against which to measure different governance proposals: effective application on the ground of labour standards to posted workers, respect for and promotion of workers' freedom of association and fostering a sustainable broadly-based acceptance of cross-border movement of workers and businesses in Europe. This essay has endeavoured to demonstrate the importance of a rigorous, detailed and open-minded assessment of the current architecture and alternative architectural proposals for accommodating labour rights with the internal market.

