



FACULTY OF LAW
Lund University

Daniel-René Weigert

The applicability of domestic laws in
cross-border employment situations
and current developments in
employment-related anti-
discrimination-law.

JAEM01 Master Thesis

European Business Law
15 higher education credits

Supervisor: Xavier Groussot

Term: Spring 2013

Table of Contents

1	SUMMARY	2
2	ABBREVIATIONS	3
3	SCOPE OF THE ANALYSIS	4
3.1	General	4
3.2	Possible cross-border situations	4
4	SOURCES OF LABOUR LAW	6
5	INTERESTS OF NATIONAL AND EUROPEAN LEGISLATION	8
6	APPLICABLE LAWS	10
6.1	Private law: Rome I	10
a)	<i>Introduction</i>	10
b)	<i>Agreement</i>	10
c)	<i>Favourability-clause</i>	11
d)	<i>Lex loci laboris</i>	11
e)	<i>Employing branch</i>	11
f)	<i>ECJ C-383/95 (Rutten, 1997), ECJ C-29/10, Koelzsch, 2011)</i>	12
g)	<i>ECJ C-384/10 (Voogsgaerd, 2012)</i>	12
h)	<i>General clause</i>	13
i)	<i>Art. 9</i>	13
j)	<i>Indispositive laws</i>	13
k)	<i>Wide scope of Art. 8</i>	14
6.2	Directive on services in the internal market 2006/123	14
6.3	The relationship between EU labour law and domestic labour law	14
6.4	Jurisdiction	15
6.5	Interim result	16
7	POSTING OF WORKERS	17
7.1	Legal protection of the home country	17
7.2	Introduction to the PWD	17
7.3	Indispensible national laws	18
7.4	Other problems and concretions of the PWD	19
a)	<i>No minimum protection</i>	19
b)	<i>Lack of definitions</i>	19
c)	<i>Collective Agreements</i>	20

d)	<i>"Nordic Model"</i>	20
e)	<i>Fundamental freedoms</i>	20
8	HISTORY OF JURISDICTION WITH REGARDS TO THE POSTING OF WORKERS	21
8.1	Freedom to provide services	21
8.2	Horizontal direct effect	22
8.3	Jurisdiction	22
a)	<i>ECJ C-113/89 (Rush Portuguesa, 1990); ECJ C-43/93 (Vander Elst, 1994)</i>	22
b)	<i>ECJ C-369/96 (Guiot, 1999)</i>	22
c)	<i>ECJ C-369/96, (Arblade, 1999)</i>	23
d)	<i>ECJ C-165/98 (Mazzoleni/Guillaume, 2001)</i>	23
e)	<i>ECJ C-49/98 (Finalarte, 2001)</i>	23
f)	<i>ECJ C-164/99, (Portugaia Construções, 2002)</i>	24
g)	<i>ECJ C-341/05 (Laval, 2008)</i>	24
h)	<i>ECJ C-346/06 (Rüffert, 2008)</i>	27
i)	<i>C-319/06 (Commission v. Luxemburg, 2008)</i>	27
9	FREEDOM OT ESTABLISHMENT	29
9.1	ECJ C-438/05 (Viking Line, 2007)	29
a)	<i>Facts</i>	29
b)	<i>Horizontal Direct Effect</i>	29
c)	<i>Scope</i>	31
d)	<i>Discussed exeptions</i>	31
e)	<i>Justification of the restrictions</i>	33
f)	<i>Critique</i>	34
9.2	Problem of Company Codetermination	35
10	LABOUR LEASING	36
10.1	Differentiation between posted and leased workers	36
10.2	ECJ-Jurisdiction with regards to Labour Lease	36
a)	<i>ECJ C-279/80 (Webb, 1983):</i>	37
b)	<i>ECJ C-279/00 (Commission vs.Italy)</i>	37
c)	<i>ECJ C-493/99 (Commission v. Germany, 2001)</i>	37
11	CROSS-BORDER MERGERS, MOVEMENTS AND TRANSFERS OF UNDERTAKINGS	38
11.1	Situations	38
a)	<i>Cross-Border Takeover</i>	38
b)	<i>Cross-Border Merger</i>	38

c) <i>Cross-Border transfer</i>	38
11.2 ECJ C-242/09 (<i>Albron Catering</i> , 2010)	39
12 FREE MOVEMENT OF WORKERS	41
12.1 ECJ C-202/11 (<i>Las</i> , 2013)	42
12.2 Horizontal effect	42
13 SOCIAL SECURITY LAW	44
13.1 Outline	44
13.2 ECJ C-443/11 (<i>Jeltes and others</i> , 2013):	45
13.3 ECJ C-379/09 (<i>Casteels/British Airways</i> , 2011)	45
13.4 ECJ C-542/09 (<i>Kommission / Niederlande</i> , 2012)	45
14 SOCIAL SECURITY LAW	46
15 FOREIGN CIRCUMSTANCES IN DOMESTIC CASES	47
16 NON-DISCRIMINATION	48
16.1 1.Introduction	48
16.2 2.Cases	48
a) <i>ECJ C-144/04 (Mangold, 2005)</i>	48
b) <i>ECJ C-411/05 (Palacios de la Villa, 2007)</i>	50
c) <i>ECJ C-300/06 (Voß, 2007)</i>	50
d) <i>ECJ C-88/08 (Hütter, 2009)</i>	50
e) <i>ECJ C-341/08 (Petersen, 2010)</i>	50
f) <i>ECJ C-555/07 (Küçükdeveci, 2010)</i>	50
g) <i>ECJ C-250/09 (Georgiev, 2010)</i>	51
h) <i>ECJ C-45/09 (Rosenblatt, 2010)</i>	51
i) <i>ECJ C-159/10 and C-160/10 (Fuchs,2011)</i>	51
j) <i>ECJ C-499/08 (Andersen, 2010)</i>	51
k) <i>ECJ C-447/09 (Prigge/Lufthansa, 2011)</i>	52
l) <i>ECJ C-297/10 and C 298/10 (Hennings, 2011)</i>	52
m) <i>ECJ C-132/11 (Tyrolean Airways, 2012)</i>	52
n) <i>ECJ C-152/11, (Odar, 2012)</i>	52
o) <i>ECJ C-141/11 (Hörnfeldt, 2012)</i>	52
17 SUMMARY: HOW TO DEAL WITH CROSS-BORDER EMPLOYMENT SITUATIONS	54
Auf „Junk“ folgt „Mangold“ - Europarecht verdrängt deutsches Arbeitsrecht	56
Neues Internationales Arbeitsvertragsrecht	56

Table of Cases

C-11/70	Internationale Handelsgesellschaft	1970
C-36/74	Walrave/Koch v. AUCI	1974
C-13/76	Dona v Montero	1976
C-43/75	Defrenne	1976
C-120/78	Cassis de Dijon	1979
C-279/80	Webb	1983
C-152/84	Marshall	1986
C-113/89	Rush Portuguesa	1990
C-292/89	Antonissen	1991
C-392/92	Christel Schmidt	1994
C-43/93	Vander Elst	1994
C-415/93	Bosman	1995
C-55/94	Gebhard	1995
C-272/94	Guiot	1996
C-383/95	Rutten	1997
C-120/95	Decker	1998
C-67/96	Albany	1999
C-369/96	Arblade	1999
C-369/96	Guiot	1999
C-281/98	Angonese	2000
C-493/99	Commission v. Germany	2001
C-165/98	Mazzoleni/Guillaume	2001
C-49/98	Finalarte	2001
BAG 5 AZR 255/00		2001
C-208/00	Überseering	2002
C-279/00	Commission v. Italy	2002
C-208/00	Überseering	2002
C-164/99	Portugaia Construções	2002
C-112/00	Schmidberger	2003
C-36/02	Omega	2004
C 499/04	Werhof	2006
C-411/05	Palacios de la Villa	2007
C-300/06	Voß	2007
C-438/05	Viking Line	2008
C-94/07	Raccanelli	2008
C-341/05	Laval	2008
C-346/06	Rüffert	2008
C-319/06	Commission v. Luxemburg	2008
BAG 10 AZR 355/07		2008
C-88/08	Hütter	2009
C-466/07	Klarenberg	2009
C-341/08	Petersen	2010
C-555/07	Küçükdeveci	2010
C-250/09	Georgiev	2010
C-45/09	Rosenblatt	2010

C-499/08	Andersen	2010
C-242/09	Albron Catering	2010
C-325/08	Olympique Lyonnais SASP	2010
C-297/10, C 298/10	Hennings	2011
C-159/10, C-160/10	Fuchs	2011
C-379/09	Casteels/British Airways	2011
C-108/10	Scattolon	2011
C-463/09	CLECE	2011
C-384/10	Voogsgeerd	2011
BAG AZR 37/10		2011
C-144/04	Hörnfeldt	2012
C-132/11	Tyrolean	2012
C-152/11	Odar	2012
C-141/11	Hörnfeldt	2012
C-542/09	Commission/Netherlands	2012
C-443/11	Jeltes and others	2013
C-202/11	Las	2013
C-617/10	Åkerberg-Fransson	2013
C-426/11	Parkwood-Leisure Ltd.	2013

1 Summary

This analysis presents the current legal situation in European and domestic labour law, as well as International Private law, with regards to cross-border employment situations.

It will present in which various ways cross-border employment can occur (Chapter 3). After introducing the general clash of interest between the European Union and its Member States with regards to cross-border laws (5) the relevant legal provisions will be presented. It will be dealt with International Privat Law (6), with relevant European Directives (7, 10, 11) or Regulations (13) and with primary EU law (8, 9, 12, 14). In each chapter the relevant jurisdiction of the ECJ will be taken into account.

It will be shown that the legislation and jurisdiction with regards to cross-border employment has been and presumably will be subject to significant changes. The EU – legislatively as well as judicially – interferes more and more in this field. It will be shown that the freedom of workers as well as employees, as well as legal certainty have been improved significantly in the past, but also that there are still areas of uncertainty as well as unsolved clashes of interests, mainly with regards to employee protection and/or social security on the one hand, and a free market on the other hand. It will also be shown that the influence of the ECJ on domestic jurisdiction in this field has increased massively, there is a shift from domestic courts to the ECJ with regards to guidelines on cross-border employment.¹ It will be seen that the ECJ tends to value the internal market higher than national legislators in cross-border situations. Despite the valuations of the ECJ being problematic, it will be seen that a shift towards the European level is crucial for a fair balance between employee protection and a european economic integration in cross-border situations.

Due to its practical significance, a large number of judgements and an intense debate about it, it will also be shown that the ECJ grants itself much power with regards to the topic of age discrimination. This field is, especially since 2005 (Mangold-case) in constant change and will probably irritate all parties of European law much more in the near future.

In the end, it will be summed up in which situations which laws will – generally – apply.

¹ ”ECJ“

2 Abbreviations

BAG	Bundesarbeitsgericht (German Federal Labour Court)
EC	European Community
ECJ	European Court of Justice
EU	European Union
FSU	Finnish Seamen's Union
ITWF	International Transport Workers Federation
PWD	European Posting of Workers Directive
TAWD	EU Temporary and Agency Workers Directive
TFEU	Treaty of the Functioning of the European Union
TUD	Transfers of Undertakings Directive
TzBfG	Teilzeit- und Befristungsgesetz (German "Part-time and fix-term employment law")

3 Scope of the analysis

3.1 General

Due to the enlargement of the European Union, increasing international dependence economically and increasing gaps between Member States with high unemployment and such with low unemployment since the economic crisis, more and more often workers are lend out, are posted abroad or cross national borders for employment purposes in other ways.²

All these situations and their treatment in International Private Law, EU law and domestic labour laws (to some extent also social laws) will be assessed. It is important to point out that this analysis will not deal with the free movement of workers **in general**. Its goal is to focus on situations in which – for various reasons – different domestic laws might collide. Typical cases in which an employee wants to move abroad in order to work abroad, might be complicated with regards to the free movement of workers, but are simple in terms of collision laws. This thesis wants to present cases with specific cross-border employment situations from a European perspective.

Due to the current immense relevance and numerous ECJ-judgements that set limits to national legislators and courts, the topic of age discrimination will be dealt with as well.

3.2 Possible cross-border situations

Cross-border situations commonly occur in the following ways³:

- An employer can send an employee abroad to work **temporarily**
- An employer can send an employee abroad **permanently**, means that the place of work is permanently in another state than where the employment contract was concluded
- An employee **occasionally** crosses the border to work abroad, e.g. pilots.
- An employee **permanently** works **parallel** in two countries
- An employee is employed and works in one country, but **lives in another** (*Cross-border commuters*)
- An employer can **lease** an employee out to a lending company abroad
- An employee can **suspend** the original employment contract temporarily and work for **another firm abroad** temporarily under a new employment contract.
- Changes on the side of the employer, who can be
 - Taken over by a foreign company by a share deal
 - Merged with a foreign company
 - Sold to a company abroad by an asset deal

² Otto, EuZA 2012, 137 (Göttinger Forum zum Arbeitsrecht: Auslandsarbeit)

³ Spieler, EuZA 2012, 169, 177

- An employer actually moves a work site due to such a takeover/merger
- An employee works abroad and **concludes another employment contract** there (*"split contract" situation*)⁴
- An employee works, lives and is employed **in the same country**, but **foreign circumstances** might play a role in the application of domestic laws anyway.

After the following analysis, I will get back to these situations and sum up what must be assessed in each case.

⁴ Spieler, EuZA 2012, 169, 170

4 Sources of labour law

Firstly, I want to present the **sources of labor law** that can be problematic in cross-border employment in the first place. Where necessary, I will use Germany's labor law as an example.

Despite the obvious **contract** as a source of rights and duties in employment relations, there are several hierarchical sources of legal provisions concerning labour.

On domestic level, there are, above contracts, **work council agreements**, negotiated between the works council and an individual employer. Above that, there are **collective labour agreements**, negotiated between labour unions and employers or employer unions.⁵ Both can have normative effect.⁶

Above that (even though this hierarchical order has exceptions, collective labour agreements can alternate dispositive law) are **domestic legal provisions**.⁷

Above that there are **constitutional provisions**, in which for example the right to strike can be regulated.⁸

On **supranational level** there are provisions regarding labour law for example in the European Convention of Human Rights.⁹

On the level of the European Community there is an increasing amount of **secondary legislation** in shape of regulations that relate to labour law.¹⁰ Secondary labour law majorily consists of regulations that have been adopted into national legislation, though. Directives with regards to labour law are an exception.¹¹

Finally, there is primary EU legislation, such as the **Treaty of the Functioning of the European Union (TFEU)** that includes laws concerning labour, for example the free movement of workers in Art.45 TFEU¹², and the **Charter of Fundamental Rights of the European Union (ECFR)**, which is formally binding since Art.6 TFEU took effect in December 2009¹³.

⁵ Müncher Handbuch zum Arbeitsrecht, § 5 Rd.5

⁶ Müncher Handbuch zum Arbeitsrecht, § 5 Rd.5

⁷ Müncher Handbuch zum Arbeitsrecht, § 5 Rd.5

⁸ Müncher Handbuch zum Arbeitsrecht, § 5 Rd.5

⁹ Müncher Handbuch zum Arbeitsrecht, § 10 Rd.2

¹⁰ Müncher Handbuch zum Arbeitsrecht, § 10 Rd.15

¹¹ Riesenhuber, Europäisches Arbeitsrecht, p.9

¹² Müncher Handbuch zum Arbeitsrecht, § 10 Rd.10; Riesenhuber, Europäisches Arbeitsrecht, p.7; Däubler, Instruments of EC Labour Law, p.151 ff.

¹³ NZA 2011, 258, 258

With regards to the latter there has recently been published the ECJ-ruling "Åkerberg-Fransson"¹⁴, in which the ECJ widened the scope of the Charter of fundamental rights significantly. Whilst formerly national legal provisions or administrative acts were subject to the scope of the fundamental rights charter only if they were a result of the implementation of European law, the ECJ has now stated that national measures fall under the scope of EU law already, if the national act has just any relation to duties that derive from EU law. That would mean that practically all domestic laws that have any – even wide – relation to duties deriving from EU law must be assessed with regards to their conformity with EU fundamental rights. A problematic consequence would be that – sooner or later – it might happen that a domestic norm must be interpreted in a certain way to be in accordance with domestic constitutional law, but interpreted in another way to be in conformity with EU fundamental rights. In this case, it will lead to an evident clash of power between national constitutional courts and the ECJ. The German constitutional court has recently commented¹⁵ on "Åkerberg-Fransson", basically stating a disagreement with the ECJ. It explicitly said that a purely factual relationship to EU law was not enough to make domestic provisions subject to an ECJ assessment of EU fundamental rights, but only if EU law "determines" German law. This will, in practice, mean that – for the moment – whoever applies German labour law must be aware of the possibility that the norms accordance with EU fundamental rights will be assessed, even if the norm is not a result of implementation of a regulation or directive. For example, the question of "age discrimination" will in the future (according to the ECJ) not only be assessed with regards to implementations of EU law (*more on that under "Mangold", Chapter 16.2 a*) , but with regards to all German laws that have *any* relation to EU law. For legal science it means that the evident clash of power between the ECJ and national constitutional courts since "Solange II" has become even wider and added another facette.

¹⁴ ECJ C-617/10, 26.2.2013

¹⁵ BvG 1 BvR 1215/07, April 2013

5 Interests of national and european legislation

The main political question in European employment- and labour law is, generally formulated, whether the state aims for a strong or a weak employee protection. Economically, a strong employment protection makes work in a member state more expensive, either directly (e.g. by minimum wages), or indirectly (e.g. because dismissals cost more, when law does not make it possible to dismiss an employee). Therefore, economically stronger countries tend to have stronger employment protection laws, because companies in economically strong countries are more likely to be able to afford expensive labour. As a consequence, the level of employee protection in the European member states varies significantly. In particular, the northern European countries (e.g. Sweden) are known for having very strong employment protection laws, whilst e.g. the new member states of the EU in Eastern Europe tend to have weaker protection.

The basic clash of the interest of the EU and Member States with a strong employment protection is that the member states want their domestic employment standards to be imposed even on workers from abroad. The chain of economic logic is this:

A company from abroad has a weaker employment protection, thereby labour is cheaper to get for them, thereby they are able to offer their services for cheaper prices, thereby customers in well-protective countries are more likely to make a contract with cheaper companies abroad, who then send their workers across the border temporarily. This would be a competition disadvantage of domestic employers. Politically, this danger might motivate national parliaments to weaken its domestic employment protection level and thereby cheapen the prices of domestic companies.

From a Unions point of view, a goal of European politics is the adaptation of the common market. The exchange and movement of goods, services, undertakings and workers is a general goal of the Union, reflected fundamentally in the European economic freedoms. Therefore, the EU does not want to give national authorities the opportunity to protect the own market from foreign workers. It is an undebated jurisdiction of the ECJ, concerning all European freedoms, that this comprises not only „directly“ protective laws (e.g. a prohibition to work for a foreign worker), but also implicit and indirect protection. That means that the application of domestic laws on foreign employees could have the effect of a significant economic disadvantage for foreign firms and thereby a protection of the own labour market. If, for example, the foreign firm was obliged to afford expenses that rich domestic firms can afford, but economically weaker foreign undertakings not, then it was not possible for foreign undertakings to offer their services in well-protected countries.

To sum it up: The principle of the country of origin enforces competition, but comprises the risk of a derogation of social standards in Europe. This is the underlying conflict of interests between the EU and member states with strong customer protection. It is thereby clear that – to the extent possible – national courts are more likely to have the tendency to apply domestic laws, whereas the ECJ is more likely to support the country-of-origin-principle..

6 Applicable laws

First, I want to present which laws are generally applicable to each cross border employment relation. Therefore, it must be differentiated between three questions:

- Firstly, which **private laws** apply to the contractual employment relationship between employer and employee?
- Secondly, which **public laws** govern the circumstances of the labour?
- And thirdly, how does European labor law **relate** to domestic labor law.

6.1 Private law: Rome I

a) Introduction

With „private law“ it is meant which law governs the relationship between the employer and the employee that derives from their employment contract. The answer to this is found in International Private Law, namely in Articles 8 and 9 of the Rome I Regulation¹⁶. Rome I applies to employment agreements concluded on or after 17 December 2009. Before that, national collision laws regulated the issue according to the predecessor of ”Rome I”, the ”Convention on the Law Applicable to Contractual Obligations” from 1980, which was not directly binding, but implemented in national legislation.¹⁷ The following analysis will focus on ”Rome I”, because firstly the changes are insignificant¹⁸, and secondly it can be assumed that the ECJ-jurisdiction concerning ”Rome I” will also be applied with regards to situations concerning its predecessors. It applies to all EU Member States except of Denmark.¹⁹ Nevertheless, other Member States except of Denmark apply ”Rome I” even in cases with a connection to Denmark in accordance to Art. 2 Rome I, which allows this practice even if ”Rome I” is not law of the respective Member State.²⁰

b) Agreement

As its predecessor, Rome I prioritizes the **agreement of the parties** on the law applicable to the employment relation (Art. 8 I).²¹

¹⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008; Löwisch, Labor Law in Europe, p.101, 114; Drummonds, Global employment law for the practicing lawyer, p.5; Thüsing, Europäisches Arbeitsrecht,p.278

¹⁷ NZA 2011, 258, 258

¹⁸ NZA 2011, 258, 258

¹⁹ Deinert, Neues Internationales Arbeitsvertragsrecht, RdA 2009, 144, 145

²⁰ NZA 2010, 1380, 1381

²¹ Nielsen, European Labour Law, p.177; Löwisch, Labor Law in Europe, p.101, 114; Thüsing, Europäisches Arbeitsrecht,p.278

c) Favourability-clause

In labour law, there is the risk, that the parties circumvent national employee protection laws by choosing a less protective law to govern the contract. That is why Rome I defines an **exception** by Art. 8 I (2), which ensures that employers cannot circumvent national domestic employee protection laws. It says that it must be ascertained which law would be applicable without an agreement according to Art. 8 II-IV, and then a **favourability-comparison** must be made between this law and the law chosen by the parties²², and it must be assessed if this foreign law was – according to its own jurisdiction – **indispositive**. If all those conditions are met, the foreign law remains applicable despite an alternating agreement of the parties.²³

How this **favourability-comparison** must be applied has not yet been decided by the ECJ. Theoretical possibilities are the comparison of individual norms, or a norm-complex or of the complete competing legislations.²⁴ A comparison of the complete employment law legislation is too complex to assess, whilst a comparison of individual norms is not practical, because norms as good as never "stand alone", but are embedded in correlating norms. Consequently, a comparison of "norm complexes" should be the most practical approach.²⁵

What is important to point out is that the comparison of favourability even comprises **collective agreements**, as long as the employee is party of such or if they are universally binding.²⁶

d) Lex loci laboris

In the absence of an explicit or implicit agreement, Rome I had to make a decision between the two generally available principles: The principle of the country of origin and the principle of the country in which the work takes place²⁷. Rome I stuck to the decision of the convention from 1980, which is a compromised decision for the Place-of-Work-principle with exceptions.

Generally, the country where the employee **habitually carries out** ("lex loci laboris", Art. 8 II Rome I) his work applies to the substantive part of the employment contract.²⁸

e) Employing branch

If the "habitual workplace" cannot be defined, according to Art. 8 III the place of the **employing branch** decides upon the applicable law.²⁹ The most

²² Thüsing, Europäisches Arbeitsrecht, p.371

²³ Riesenhuber, Europäisches Arbeitsrecht, p.134; Thüsing, Europäisches Arbeitsrecht, p.370; Löwisch, Labor Law in Europe, p.101, 114

²⁴ NZA 2010, 1380, 1381

²⁵ NZA 2010, 1380, 1383

²⁶ RdA 2009, 144, 149

²⁷ Thüsing, Europäisches Arbeitsrecht, p.275

²⁸ Nielsen, European Labour Law, p.178; Löwisch, Labor Law in Europe, p.101, 114

²⁹ NZA 2010, 1380, 1383

important cases of this are such in which the workplace itself is moving (trains, airplanes, ships).³⁰

f) ECJ C-383/95 (Rutten, 1997), ECJ C-29/10, Koelzsch, 2011)

There can be cases in which the "habitual" workplace is in **various countries**, for instance a sales agent who works in Germany, Belgium and the Netherlands to the same extent. Opposed to a minor opinion that always wants to apply the law of the place of the employing branch³¹, the ECJ has decided that even in if an employee works in various countries, the country in which he mainly habitually works can and must be assessed. In its ruling "Rutten"³², that concerned a case of enforcement law though, the ECJ stated that a strong indicator for the habitual place of work was the place where the employee organizes his work from and where he returns to. Recently, in its Koelzsch-judgement³³ the ECJ confirmed this jurisdiction with regards to the – now entered into force – Rome I. It clarified that the term "habitual place of work" must – for the purpose of a strong employee protection – be **interpreted widely**.³⁴ It was the place where the employee provides the major part of his work.³⁵ The ECJ thereby opposes minor opinions in legal literature that suggest that a "habitual place of work" does not exist in cross-border cases, for the purpose of legal certainty. The – admittedly easier – tie to the employing branch would be to the disadvantage of the employee, so that the ECJ rejected this opinion. The ECJ defines the "place of habitual employment as *"the place in which or from which the employee performs the greater part of his obligations towards his employer"*. Relevant indicators are where and from where the employee mainly fulfills his transport tasks, where he receives his instructions for his tasks and where he organizes his work, where the work instruments are situated and to which place he returns after fulfilling of his tasks. According to the ECJ, only if it is **impossible** to determine a country in which the employee works most habitually, the second criterion applies, which is the place in which the employment contract was concluded.³⁶

g) ECJ C-384/10 (Voogsgeerd, 2012)

In its recent "Voogsgeerd"-judgement, the ECJ clarified the controversial interpretation of the formulation "*country where the place of business through which the employee was engaged is situated*" in Art. 8 III Rome I. It completes the ECJ-jurisdiction concerning Art.8 Rome I after the Koelzsch-judgement.³⁷

The ECJ had to deal with the question, whether the relevant place was the one of the formal employer according to the employment contract, or the

³⁰ RdA 2009, 144, 148

³¹ Deinert, RdA 1996, 339, 341

³² ECJ C-383/95 (Rutten, 1997)

³³ ECJ C-383/95 (Rutten, 1997), Rd.45

³⁴ ECJ C-383/95 (Rutten, 1997), Rd.45

³⁵ ECJ C-383/95 (Rutten, 1997), Rd.45

³⁶ Thüsing, Europäisches Arbeitsrecht, p.278

³⁷ EuZW 2012, 139

one that practically directed the employee. For the first opinion speaks the argument of legal certainty. The danger with the first opinion is the risk of manipulation though, for instance a firm could install "employment-offices" in a country with low employee protection for the only reason to sign the contract there (obviously only in cases where there is not a "habitual workplace" already anyway). The ECJ follows the first opinion anyway.³⁸ It argues with the wording of Art. 8 III. Furthermore, according to the Koeltzsch-judgement, in most cases there is a "habitual place of work" anyway, so that Art. 8 III cannot use arguments of the habitual workplace to decide the location of the employer, and at last, if this ruling leads to misuse on behalf of employers, this can be corrected by the general clause of Art. 8 IV.

h) General clause

Apart from the system of Art. 8 I-III, there is a **general clause** in Art. 8 IV. It statutes that – in case the general rules lead to inappropriate results, the law of another country can be applied if **exceptional circumstances** lead to the contract being more closely related to another state.³⁹ Main cases of such exceptions are branch managers⁴⁰. Also the place of residence of the employee can play a role, as well as a common nationality of the parties.⁴¹

i) Art. 9

Art. 9 Rome I correlates to the exceptions of Art. 8 I (2). Art. 8 I (2) decides, which domestic laws must *not* be applied. For example: The parties choose polish law for a contract that is exercised habitually in Germany. That means that polish law is the governing law, but a polish court must not apply a polish provision that is disadvantageous compared to an indispensable German provision in the sense of Art. 8 I (2). Art. 9 is the "active" counternorm of Art. 8 I (2). It ensures that the responsible court can apply the norms that it considers "indispositive" due to a public interest, even if actually, according to Art. 8, the law of another country would be applicable.⁴²

j) Indispositive laws

The evaluation which laws are indispositive is up to national courts of the country in which the norm in question is in force to ascertain, e.g. the Federal Labour Court in Germany has declared laws on mass dismissals, dismissal protection of work councils, protection of mothers and disabled persons, and the posted workers law, as well as laws on antidiscrimination as unconditionally applicable. It has rejected the indispensable character of basic dismissal protection or continuation of payments to sick workers.

³⁸ ECJ C-384/10

³⁹ NZA 2010, 1380, 1384

⁴⁰ RdA 2009, 144, 147

⁴¹ RdA 2009, 144, 147

⁴² Thüsing, Europäisches Arbeitsrecht, p.373, BAG 5 AZR 255/00 12.12.2001 (German Federal Labour Court)

k) Wide scope of Art. 8

Despite the fact that the scope of Rome I is, according to Art. 1, only private law, according to the wording of Art.8 Rome I with regards to employment contracts it covers **all employment-related laws**, not only such from contract law.

6.2 Directive on services in the internal market 2006/123

In 2006 the Directive on services in the internal market⁴³ was enforced. It regulates the applicable jurisdiction for cross-border services, similar to "Rome I". "Rome I" is a "lex specialis", though, because Art. 1 VI DS excludes labour law from the scope of its application. Nevertheless, this exclusion causes problems, because there is no common European differentiation between "services" and "labour contracts", so that the differentiation must be assessed by the national courts where the specific action takes place.⁴⁴ The main difference in the national jurisdiction regarding this question is the treatment of "fake-independence", officially independent workers, that in practice depend on one "employer". Since the treatment of such is up to national courts to ascertain, in each case the national jurisdiction of the country in question must be assessed to find out whether the case is subject to "Rome I" or not.

6.3 The relationship between EU labour law and domestic labour law

Several EU regulations, Directives and the Treaty of the Functioning of the European Union include regulations with regards to employment relationships.

Regulations are generally directly applicable, Directives are only in exceptions directly applicable if certain conditions are met (more on that later). In case of the TFEU it depends on ECJ jurisdiction, whether a certain provision is directly effective or not. The ECJ has ruled with regards to many EU labour law provisions that they are directly effective. For example Article 18 TFEU (general ban of discriminations on grounds of nationality), Article 45 (free movement of workers) and Article 157 TFEU (gender equality) are directly effective.⁴⁵

With the special phenomenon of "horizontal direct effect", I will deal later on when it becomes relevant.

In other judgements the ECJ has ruled, though, that certain provisions of EU law are not directly effective, for instance Article 151 TFEU.⁴⁶

⁴³ i.f. "DS"

⁴⁴ NZA 2011, 258, 258

⁴⁵ Nielsen, European Labour Law, p.58

⁴⁶ Nielsen, European Labour Law, p.59

We can conclude that with regards to European Legal provisions that relate to employment relationships, the direct applicability must be assessed in each case concerning the respective provision.

6.4 Jurisdiction

The question, which jurisdiction is competent to decide employment related cases, is answered by the Regulation 44/2001 (Brussels I, also "EuGVO"), which is in force since 1.3.2002. For the EFTA-states (Iceland, Norway, Switzerland, but not Liechtenstein) the "Lugano-convention" from 30.10.2007 regulates literally the same as Brussels I with regards to employment contracts.

Generally, if a domestic court is competent according to domestic procedure law, it remains responsible in international cases⁴⁷, unless superior law, such as Brussels I, regulates something altering.

A company domiciled in one EU state may also be sued in another EU country in which it maintains a branch office from which the dispute arose (Art. 5 V). For employment contracts, there are special additional provisions in Art. 18-21. Employers can additionally to the described standard rules be sued at the place where the employee usually carries or carried out his or her work" or "where the business which engaged the employee is or was situated" (Art.19).⁴⁸ Thus, Brussels I provides several places of jurisdiction for the claimant.

Files of the employer against the employee must take place in the usual place of residence of the employee (Art. 19).⁴⁹

Derivations from Brussels I based on foreign law, e.g. agreements on jurisdiction in a collective agreement, are void.⁵⁰

Concerning employers from Non-Member-States, Brussels I is applicable, if they have a branch in a Member State.⁵¹

For non-contractual arguments (e.g. a claim of an employer against a labour union concerning a strike), Rome-II regulates the jurisdiction.⁵² Due to the smaller significance, details will be blend out here.

⁴⁷ Thüsing, Europäisches Arbeitsrecht, p.378

⁴⁸ Thüsing, Europäisches Arbeitsrecht, p.378

⁴⁹ Thüsing, Europäisches Arbeitsrecht, p.378

⁵⁰ BAG 02.07.2008 10 AZR 355/07

⁵¹ Thüsing, Europäisches Arbeitsrecht, p.378

⁵² Anja Zelfel, Der Internationale Arbeitskampf nach Art. 9 Rom II-Verordnung, p.23

6.5 Interim result

So far, we can conclude that

- Firstly it must be assessed which domestic law generally governs the employment contract, which is done by an assessment of Rome I.
- Secondly, if and which foreign laws exceptionally can be applied to the worker anyway, and
- Thirdly, which courts are responsible to decide upon the matter.

7 Posting of workers

The first situation of cross-border employment is the posting of workers. That means that workers who are employed in one state, are temporarily sent abroad to work in another state.

These situations are regulated by the respective domestic implementations of the European "Posting of Workers Directive"⁵³ (96/71). In the following, the directive will be introduced and problems that have been dealt with by the ECJ so far will be discussed.

7.1 Legal protection of the home country

In the absence of European legislation, only a few Member States have explicit laws that protect workers from their home countries when they are posted abroad, such as Ireland, Lithuania and Portugal. Such rights are mainly information rights. Due to a lack of a European level and the practical insignificance, this topic is, in my opinion, dealt with sufficiently by this short notice. All problems in the field of posted workers derive from the treatment of posted workers by the host countries, as follows.

7.2 Introduction to the PWD

Employers from member states with cheap labour and weak employee protection laws can send workers abroad temporarily.

The term "temporarily" is a subjective one, deciding is the will of the parties that the employee will return ("animus retrahendi"). Only a few⁵⁴ national implementations of the Directive have set time limits⁵⁵. In most (but not all) member states, the period of posting has no static time limit.⁵⁶

In order to understand the PWD, it is necessary to see where it comes from. Originally, the situation of posted workers was dealt with by the Rome-Regulation of 1980, which is for employees – as said – very similar to Rome I. Today, the system of Rome I could have been the only law solving the situation of posted workers. Compared to other cross-border situations, though, there is a significant difference to posted workers. The latter go abroad temporarily, which means they never have the intention to become subject of another legislation in the first place.⁵⁷ Furthermore, the posting of workers is way more common than the situation that a worker is permanently working in another country than where his employment

⁵³ i.f.: „PWD“

⁵⁴ E.g. Bulgaria, Hungary, Luxemburg, Malta

⁵⁵ Riesenhuber, Europäisches Arbeitsrecht, p.131; Drummonds, Global employment law for the practicing lawyer, p.14

⁵⁶ Thematic Report 2008: Challenges of Cross-Border mobility, p.8

⁵⁷ Thüsing, Europäisches Arbeitsrecht, p.278; Riesenhuber, Europäisches Arbeitsrecht, p.131; Drummonds, Global employment law for the practicing lawyer, p.14

contract was signed. Therefore, the PWD can be seen as a special regulation that regulates the situation of posted workers in greater detail than Rome I. Whilst the general valuations remain the same (the intention to protect a worker), the fundamental difference between Rome I and the PWD – as a consequence of the ”temporary” character of the posting - is that the place-of-work-principle is generally **substituted by the place-of-origin-principle**.

Due to the European freedom to provide services, the destination country cannot prohibit the posting of workers. Thereby originates the risk that employment protection is circumvented by employment contracts governed by countries in which labour is cheap, whilst workers are regularly temporarily sent abroad to work there.⁵⁸ This risk of the uncompromised principle of state of origin ought to be balanced out by the European Posting of Workers Directive⁵⁹ (96/71) enacted in 1996.⁶⁰ It was implemented in the member states, for example in Germany by the Posting of Workers Act („Arbeitnehmerentsendegesetz“). Its method is to replace the general principle of place of origin *partly* by the place of work principle (”territorial approach”⁶¹) concerning ”hardcore” employee protection laws.⁶²

According to Art. 1 III of the PWD, it covers three situations:

- The posting of workers to a customer due to contract for services or work and services
- The posting of workers to an establishment or undertaking owned by a group
- The lease of workers cross-border.

In all situations, there must be an employment relationship between the undertaking making the posting and the worker.⁶³

7.3 Indispensible national laws

What would – without the PWD – be subject of jurisdiction with regards to Art.9 Rome I, namely a list of indispensable domestic laws that must not be derogated from even by the general applicability of a foreign legislation, is laid down as a catalogue in Art. 3 of the PWD.⁶⁴ The list comprises:

- No.1: Minimum wage laws
- No.2: Minimum vacation and paid vacation
- No.3: Working time
- No.4: Leasing of workers
- No.5: Employment protection laws
- No.6: Protection of youth and mothers
- No.7: Anti-discrimination laws

⁵⁸ Riesenhuber, Europäisches Arbeitsrecht, p.144

⁵⁹ „PWD“

⁶⁰ Thüsing, Europäisches Arbeitsrecht, p.281

⁶¹ Thematic Report 2008: Challenges of Cross-Border mobility, p.30

⁶² Thüsing, Europäisches Arbeitsrecht, p.281

⁶³ Thematic Report 2008: Challenges of Cross-Border mobility, p.7

⁶⁴ RdA 2009, 144, 152; Riesenhuber, Europäisches Arbeitsrecht, p.144

This list is not exclusive. For example, according to the German Federal Labour Court, the necessity of the integration agency before dismissals of disabled employees, rules on mass dismissals, or ongoing payments during sicknesses are indispensable laws, whilst basic dismissal protection or a limited liability of employees in tort law were seen as indispensable.⁶⁵

For example, a Japanese worker carrying out work in a German branch will be entitled to the minimum vacation of 24 working days according to the German Federal Vacation Act (Bundesurlaubsgesetz), although Japanese employment contract law applies.⁶⁶

With regards to the assessment of indispensable laws, it must be taken care that "Rome I" and the "PWD" are not mixed up. As said before, there is jurisdiction on which laws are indispensable according to Art. 9 Rom I, as well as jurisdiction on the domestic implementations of Art. 3 PWD. Even though there is no binding necessity that both line of judgements would be valid even for the other provision, since – as said – the basic valuations behind "Rome I" and the "PWD" are the same and, before the PWD, the predecessor of "Rome I" governed posted workers as well, it can be assumed that if a court considers a norm "indispensable" with regards to Rome I, it is probably also indispensable with regards to the PWD, and vice versa.

7.4 Other problems and concretions of the PWD

a) No minimum protection

It is important to point out that the Directive does not set any standards of minimum protection, it only circumscribes the areas in which domestic laws must be applied.⁶⁷

b) Lack of definitions

A problem of the PWD is a lack of definitions, namely of "workers" and "posted" workers.

In the absence of a European definition, the jurisdiction of the receiving states are to define the term "worker".⁶⁸ The biggest difference concerning the definition of "workers" are cases of "fake independence" ("One-man-companies" that factually depend on one company, which is – in some Member States – the "employer" anyhow).⁶⁹

Also the definition of the term "posted worker" can vary amongst the Member States.⁷⁰

⁶⁵ RdA 2009, 144, 153

⁶⁶ Löwisch, Labor Law in Europe, p.101, 114

⁶⁷ Thüsing, Europäisches Arbeitsrecht, p.290

⁶⁸ Thüsing, Europäisches Arbeitsrecht, p.288

⁶⁹ Thüsing, Europäisches Arbeitsrecht, p.288

⁷⁰ Thematic Report 2008: Challenges of Cross-Border mobility, p.30

c) Collective Agreements

A special problem are collective agreements. They might regulate issues that fall into one of the seven categories of the PWD, for example collective agreements often regulate the working time. In such a case, collective agreements do not necessarily apply according to the respective implementations of the PWD, because they are no "laws".⁷¹

Then again, many member states have a system in which (under different conditions) collective agreements can be declared universally applicable⁷² and consequently included universally binding collective agreements in their domestic implementations of the PWD⁷³

Opposed to a minor opinion in legal literature⁷⁴ that claims that even universally applicable collective agreements are agreements and not laws, the ECJ rightfully accepts universally applicable collective agreements as laws that fall within the scope of the PWD.⁷⁵ That is justified, because universally applicable collective agreements function like laws and "tariff autonomy" is even mentioned in Art.1 (2) PWD.

d) "Nordic Model"

In Denmark and Sweden, the "Nordic Model" exists, which means that instead of a universal applicability of collective agreements, the application of collective agreements is brought about by means of industrial action.⁷⁶ That means that in these countries, collective agreements do not fall under the scope of the PWD, which became a problem in the "Laval"-case (see later).

e) Fundamental freedoms

Immense problems have been caused by the relationship between the PWD and European fundamental economic freedoms. Therefore, in the following, these freedoms will be introduced and the core-judgements of the ECJ with regards to the PWD, afterwards I will get back to the PWD and consequences from the judgements.

⁷¹ Riesenhuber, Europäisches Arbeitsrecht, p.152; Thematic Report 2008: Challenges of Cross-Border mobility, p.31

⁷² Thematic Report 2008: Challenges of Cross-Border mobility, p.9

⁷³ E.g. §.4 of the „Arbeitnehmerentsendegesetz“, the German implementation.

⁷⁴ Thüsing, Europäisches Arbeitsrecht, p.279

⁷⁵ Implied for instance in C-346/06 (Rüffert)

⁷⁶ Thematic Report 2008: Challenges of Cross-Border mobility, p.16

8 History of jurisdiction with regards to the Posting of Workers

The ECJ has dealt with the posting of workers in several judgements. Most of them were related to the freedom to provide services, which is why I will introduce essentials of this freedom shortly first.

8.1 Freedom to provide services

The freedom to provide services will only be summed up to the extent that it is relevant for labour law here. Mainly it is relevant for the posting of workers and for temporary workers (workers that are „lend out“ from the employee to temporarily work for another company).⁷⁷

Services are performances that are regularly provided for remuneration, in so far as they are not covered by the freedom of goods and capital.⁷⁸ Forbidden are discriminations and restrictions.⁷⁹ The freedom to provide services binds, according to the ECJ, besides the member states also privates to the extent that they have a collective power of regulation.⁸⁰

A restriction is, for instance, if a **member state applies national employee protection laws even to employers that have an employment contract governed by a foreign member state**, but that are sent abroad temporarily to work.⁸¹ This restriction must be justified, then. More about that later.⁸²

Discriminations of the freedom to provide services can be justified only by the „ordre-public“- exception in Art.56 TFEU.⁸³ Restrictions can also be justified by compelling reasons in the general interest („Cassis-formula“⁸⁴). Also, all justifications must be proportionate.⁸⁵

The ECJ has **accepted the protection of workers** as a „compelling reasons in the **general interest**“ in the mentioned sense.⁸⁶ That means the imposition of national employee protection laws on foreign workers is generally possible, but its legality must be assessed in every individual case.⁸⁷

⁷⁷ Riesenhuber, Europäisches Arbeitsrecht, p.80

⁷⁸ Riesenhuber, Europäisches Arbeitsrecht, p.81

⁷⁹ Riesenhuber, Europäisches Arbeitsrecht, p.82

⁸⁰ Riesenhuber, Europäisches Arbeitsrecht, p.83

⁸¹ Riesenhuber, Europäisches Arbeitsrecht, p.83

⁸² Riesenhuber, Europäisches Arbeitsrecht, p.83

⁸³ Riesenhuber, Europäisches Arbeitsrecht, p.83

⁸⁴ C-120/78 Cassis de Dijon

⁸⁵ Riesenhuber, Europäisches Arbeitsrecht, p.85

⁸⁶ Riesenhuber, Europäisches Arbeitsrecht, p.87

⁸⁷ Riesenhuber, Europäisches Arbeitsrecht, p.86

8.2 Horizontal direct effect

In the Laval-case, the ECJ ruled that Art. 56 TFEU is applicable to trade unions as well.⁸⁸

8.3 Jurisdiction

a) ECJ C-113/89 (Rush Portuguesa, 1990); ECJ C-43/93 (Vander Elst, 1994)

In "Rush Portuguesa", after Portugal has become a member of the EU, a portuguese construction company has sent workers to France, to work on a site there. A french court asked the ECJ, wheather it was an accordance with the freedom of services to demand an employment permit from portuguese workers in France.⁸⁹ The ECJ has stated that the demand of a french permit from foreign workers discriminates foreign service providers unproportionally.⁹⁰ Thereby the ECJ made clear that, in case of voluntary temporary work abroad, the labour laws of the receiving country were generally not applicable, because the employee never intended to become subject to foreign employment laws.⁹¹ This ascertainment was the historical precondition of the necessity of the "PWD", because it was necessary to make exemptions from the general "place of origin"-principle. It was repeated in "Vander Elst"⁹², this time with regards to workers from third countries outside of the EU. The reasoning of the ECJ also made the difference between posted and leased workers clear: Because leased workers intend to become subject to foreign laws, they intend to make themselves subject to the directive rights of the hirer.⁹³ Posted workers do not, so that they can not rely on the freedom of movement for workers.⁹⁴

b) ECJ C-369/96 (Guiot, 1999)

In this case, the ECJ decided that in case of a posting of a worker from Luxemburg to Belgium, the employer must not be forced to pay social security fees in Belgium. The posted worker does not benefit from social security in Belgium, so that the obligation to pay contributions – which is a restriction of the freedom of services - cannot be justified with the protection of workers.⁹⁵

⁸⁸ C-341/05

⁸⁹ Thüsing, Europäisches Arbeitsrecht, p.172

⁹⁰ Thüsing, Europäisches Arbeitsrecht, p.172; ECJ C-113/89 Rd.1444

⁹¹ Thüsing, Europäisches Arbeitsrecht, p.275; ECJ C-113/89 (Rush Portuguesa), ECJ C-43/92 (Vander Elst)

⁹² ECJ C-43/93 Rd.3803

⁹³ Thüsing, Europäisches Arbeitsrecht, p.275; ECJ C-113/89 Rd.1444 Rush Portuguesa; Schiek, Europäisches Arbeitsrecht, p.178

⁹⁴ Schiek, Europäisches Arbeitsrecht, p.178

⁹⁵ ECJ C-272/94 (28.3.1996)

c) ECJ C-369/96, (Arblade, 1999)

In "Arblade", a French construction company was fined in Belgium, because they did not pay their posted workers in Belgium the minimum wages for workers mandatory according to Belgian law. The ECJ stated that the application of Belgian law restricts the freedom of services (Art. 56 TFEU), but the protection of employees as a public interest can justify this restriction. This judgement was necessary, even though minimum wages are an explicit exception laid down in Art. 3 PWD, because the TFEU – being primary EU law – is superior to the PWD, so the PWD could not have justified a breach of the freedom of services, in case there had been one. The ECJ stated for the first time that the imposition of domestic minimum wage laws onto posted workers from abroad do restrict, but not generally breach the freedom of service of the employer.⁹⁶

d) ECJ C-165/98 (Mazzoleni/Guillaume, 2001)

The ECJ sets a first limit to the enforcement of domestic minimum wage laws on foreign posted workers. In this case, the lower wages in the home country were balanced out by advantages of lower taxes and social security fees at home. Consequently, the ECJ argued that an application of domestic minimum wage laws would not only balance out the disadvantages of the foreigner, but actually favour foreign workers, which exceeds the purpose of the PWD. Therefore, the restriction of the freedom of services of the employer was not necessary. As said, a breach of the freedom of services cannot be justified by the PWD, since primary law overrules secondary laws.⁹⁷

e) ECJ C-49/98 (Finalarte, 2001)

In "Finalarte", a Portuguese construction company that posted workers to a site in Germany, was supposed to pay fees to the German vacation fund for construction workers (according to a universally binding collective agreement), and grant the workers the minimum vacation days that the German law foresees. The purpose of this fund is to make sure that construction workers can have their annual minimum vacation despite the fact that in the construction branch, a change of employer happens quite frequently. The problem was that a German employer can demand its paid fees back under given circumstances, which a foreign company cannot, German law grants this right only the posted worker itself.

The first question could – quite easily – be answered: The granting of minimum vacation to posted workers was a justified restriction of the freedom of services, because it served the protection of workers. The condition is, though, that it is assessed whether the worker can have the demanded minimum vacation in his home country anyway – which was in Portugal not the case.⁹⁸

⁹⁶ NZA 2002, 1428, 1453

⁹⁷ ECJ C-165/98 (15.3.2001)

⁹⁸ Kort, NZA 2002, 1248, 1249

More complicated to answer was the second question. Also here the ECJ stated, though, that such a provision can be legal, because the German administration cannot control if the foreign employer will in fact pay the money that the posted worker can claim from the insurancy fund according to German law, therefore even this restriction of the freedom of services can be justified for the purpose of the protection of workers.⁹⁹

f) ECJ C-164/99, (Portugaia Construções, 2002)

In "Portugaia Construções" there was a German universally binding collective agreement, which was supposed to be applied to foreign workers. The problem was, that German companies had the option to negotiate "firm collective agreements" with lower minimum wages and thereby circumvent the collective agreement. This opportunity obviously does not exist for foreign employers.¹⁰⁰ First, the ECJ restated the obvious, which is that the application of minimum wage laws restrict the freedom of services and this restriction can be justified by the protection of workers. In this case, though, the restriction could not be justified, because it was discriminatory against foreign companies.¹⁰¹

g) ECJ C-341/05 (Laval, 2008)

The most controversial case with regards to the posting of workers so far has been the "Laval"-case from 2008.

Facts: Laval

In the „Laval“ case, there was a Latvian building company („Laval“) that has sent workers to Sweden for roughly half a year to build a school premise for its Swedish subsidiary company.¹⁰² Laval was not bound by collective agreements in Sweden, since negotiations with the responsible Swedish labour union („Byggettan“) failed.¹⁰³ Consequently, Byggettan initiated a blockade of the construction site. Laval demanded the Swedish police to stop the blockade, that request was rejected because the police considered the blockade legal according to Swedish law.

Applicability / Scope

In "Laval" the ECJ stated that the collective action is

- „...liable to make it less attractive, or more difficult, for such undertakings to carry out construction work in Sweden, and therefore constitutes a restriction on the freedom to provide services within the meaning of Article 49 EC.“¹⁰⁴

Concludentially, **collective actions can restrict the freedom to provide services.**

⁹⁹ Schriek, Europäisches Arbeitsrecht, p.182

¹⁰⁰ ECJ C-164/99, Rd.787 (Portugaia Construcoes);

¹⁰¹ ECJ C-164/99, Rd.787 (Portugaia Construcoes)

¹⁰² C-341/05 Laval, Rd.27

¹⁰³ C-341/05 Laval, Rd.33

¹⁰⁴ C-341/05 Laval, Rd.99

Justification: Service (Laval)

The main problem of the judgment was to assess whether the collective action at issue was in accordance with the freedom of service.¹⁰⁵

The right to take **collective action against social dumping** may constitute an overriding reason of public interest which can, in principle, justify a restriction of „one of the fundamental freedoms“ guaranteed by the treaty“. It must be kept in mind that the EU has „not only an economic, but **also a social purpose**“.¹⁰⁶ In this case, the purpose of the collective actions was the protection of workers.¹⁰⁷ It must in each case be assessed what the purpose of the collective action is, even though it lies in the nature of labor unions that the protection of workers will be the usual goal.

EU law does not prohibit Member States from requiring such undertakings to comply with their rules on minimum pay by appropriate means¹⁰⁸, as the PWD and past ECJ jurisdiction had made clear. In this case, the protection of workers cannot outweigh the freedom to provide services, because the **Swedish legislation was not clear enough** to determine the obligations arising from Swedish law for foreign undertakings. That is because of the “Nordic Model” of imposing minimum wages only by collective agreements and, if necessary, collective actions, instead of e.g. universally binding collective agreements.

- „...where the negotiations on pay, which that action seeks to require an undertaking established in another Member State to enter into, form part of a national context characterized by a lack of provisions, of any kind, which are sufficiently precise and accessible that they do not render it impossible or excessively difficult in practice for such an undertaking to determine the obligations with which it is required to comply as regards minimum pay (see, to that effect, *Arblade and Others*, § 43).“¹⁰⁹

Furthermore, the strike took place without the participation of the employees of Laval. None of the workers was member of the Swedish labour union or partook in the strike.¹¹⁰ Goal of the Union was not the representation of these workers, but forcing Laval to replace the Latvian collective agreement with Swedish minimum wages for the purpose of – indirectly – protecting Swedish employees from “loan dumping”.¹¹¹ Therefore, the case was subject to the Posted Workers Directive and more than what the Directive regulates can a member state not impose.¹¹²

¹⁰⁵ C-341/05 Laval, Rd.86

¹⁰⁶ C-341/05 Laval, Rd.104

¹⁰⁷ C-341/05 Laval, Rd.106

¹⁰⁸ C-341/05 Laval, Rd.109

¹⁰⁹ C-341/05 Laval, Rd.110

¹¹⁰ Thüsing, Europäisches Arbeitsrecht, p.306

¹¹¹ Thüsing, Europäisches Arbeitsrecht, p.306

¹¹² Thüsing, Europäisches Arbeitsrecht, p.306

The Laval-ruling was criticized, because the EU has no legislative competence in the field of strikes, nevertheless the ECJ defines in detail how the right to strike must be applied.¹¹³ This critique is wrong, though: The ECJ can apply the economic freedoms as borders of domestic legislation in all fields, regardless if there is a legislative competence, because the economic freedoms are hierarchically above basic national laws.

Consequences of Laval

Since the collective action taken was illegal according to the ECJ, the Swedish government started to initiate legislative reforms with the goal to regulate in written law the applicability of domestic minimum wages on posted workers from abroad.¹¹⁴

ECJ C-426/11 (Parkwood Leisure)

Recently, the ECJ issued the ruling in the Case "Alemo-Herron / Parkwood Leisure Ltd"¹¹⁵. In this case, there was an English private company, Parkwood Leisure, who had taken over a business to which a public collective agreement was applicable. After the takeover the parties of the collective agreement renegotiated this agreement backdatedly and "dynamically" referred to all undertakings that were by that date subject to the collective agreement.

In the preceding judgement "Werhof"¹¹⁶ in 2006 the ECJ stated that, if a company that is by contract bound to a specific collective agreement, the buyer of this business is, after a transfer of undertakings, only bound to the agreement in the shape in which it was on the day of the transfer. Renegotiations after the takeover do *not have to be* considered by the overtaking company. That means that it is legal, if the domestic laws follow a "static" approach on the binding effect of collective agreements in case of takeovers.

In "Parkwood Leisure" the ECJ had to decide on the opposite situation: Domestic laws followed a "dynamic" approach, meaning that buyers were supposed to be bound by collective agreements, even if they were changed after the takeover had taken place. Such a domestic law is, according to the ECJ, illegal and thereby void.

Both judgements do not have a specific relevance for cross-border situations. Nevertheless, they are relevant for situations as in the "Laval"-case, because it adds on to the limitation of the power of labour unions by the ECJ. The consequence of "Parkwood Leisure" is that with every transfer of an undertaking, employees lose their protection by collective agreements on the day the current collective agreement expires, unless a completely new one is negotiated. That is an enormous risk for all those countries, in which currently a "dynamic" approach had applied so far, even more so if

¹¹³ Blanke, Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rueffert, p.13

¹¹⁴ Rönmar, Laval returns to Sweden, 284

¹¹⁵ ECJ 18.7.2013, C-426/11 (Parkwood Leisure)

¹¹⁶ ECJ 9.3.2006 - C 499/04 (Werhof)

collective agreements have a major relevance, such as – as stated above – Scandinavia. Obviously, collective actions will from now on also be illegal, if it aims at the enforcement of rights deriving from a collective agreement that is now inapplicable. Basically, if countries with a dynamic approach want to ensure to keep up their level of protection, the tendency should go towards the usage of ”declarations of universal applicability” (as possible in Germany, but not Sweden), or to regulate the rights that are considered most crucial (in Sweden that might be minimum wages) as laws and not only by collective agreements, to prevent a circumvention of such rights by transfers of overtakings.

h) ECJ C-346/06 (Rüffert, 2008)

”Rüffert”¹¹⁷ was a case that dealt with the habit of states to ensure compliance with standards of tariffs of collective agreements by contractual obligations. In Germany there were two levels of collective agreement which applied to the construction industry. The construction industry as a whole was governed by a collective agreement providing a minimum wage (referred to as the TV Mindestlohn). This was clearly within Art. 3(1)(c) PWD. However, there were also a series of specific collective agreements (such as the Buildings and public works collective agreement at issue in the case) with limited territorial scope and which set wages which were well above those required throughout Germany under the TV Mindestlohn. The question was whether it was legitimate to contractually require compliance with a local collective agreement guaranteeing higher wages.

The ECJ stated that this habit was a breach of the freedom of services.¹¹⁸ Opposed to the Advocate General, it stated that Art. 3 (VII) PWD could not be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go **beyond the mandatory rules** for minimum protection. Only ”legal” obligations were qualified to justify the restriction of the freedom of services.¹¹⁹ Binding foreign construction companies to domestic collective agreement standards is not a legal mean to ensure social standards of workers. The latter aim must only be achieved within the borders of the PWD.¹²⁰ The practice of Lower Saxony remains legal, though, with regards to employers from third countries outside of the EU.¹²¹

i) C-319/06 (Commission v. Luxemburg, 2008)

Luxemburg had legally explicitly provided that all its employment rights in certain areas (e.g. minimum wage laws) were mandatory rules within the meaning of Art. 9 (2) Rome I. These areas encompassed rules that went beyond the matters listed in Art. 3 I PWD. As Laval and Rüffert have

¹¹⁷ EuGH, Urt. v. 3. 4. 2008 – C-346/06 (Rüffert)

¹¹⁸ Thematic Report 2008: Challenges of Cross-Border mobility, p.25

¹¹⁹ Thematic Report 2008: Challenges of Cross-Border mobility, p.32

¹²⁰ RdA 2010, 351, 351

¹²¹ NZA 2009, 183, 185

shown, such provision are a breach of the PWD. Luxemburg argued, though, that Art. 3 X PWD allowed its provisions, as they were such of public policy. The ECJ interpreted Art. 3 X PWD in the way that "public policy" provisions are only such which are crucial for the protection of the political, social or economic order in the Member State. The exception of Art. 3 X must be understood in a narrow sense and in particular its scope cannot be decided by the Member State itself, but be controlled, otherwise Art. 3 X would be a mean of circumvention Art.3 to derogate from the PWD.¹²² Luxemburg had not proven that and why the provisions should be such crucial for its public policy, therefore it lost the case.

¹²² EuGH, Urt. v. 19. 6. 2008 – C-319/06 (Commission v. Luxemburg); EuZW 2010, 687, 690

9 Freedom of establishment

The scope of the freedom of establishment comprises the establishment of independent persons. As the freedom to provide services, it binds the state as well as privates, to the extent that they apply collective regulative power.¹²³ It prohibits discriminations as well as restrictions.¹²⁴ Also the justification works in accordance to the freedom to provide services: Discriminations can only be justified by the „ordre-public“- exception in Art.49 TFEU.¹²⁵ Restrictions can also be justified by compelling reasons in the general interest („Cassis-formula“¹²⁶). The main relevance of the freedom of establishment with regards to labour law is its effect on Company Codetermination and collective actions¹²⁷, the most important judgement with regards to the latter was the ”Viking-Line“-case¹²⁸.

9.1 ECJ C-438/05 (Viking Line, 2007)

a) Facts

Viking Line is a transportation company with seat in Finland. It operated a ship between Helsinki/Finland and Tallinn/Estonia.¹²⁹ Since an estonian competitor operated more profitable, because it had to pay lower wages, Viking Line decided to register its ship in Tallinn instead of Helsinki, for the purpose of making estonian laws applicable on the ship and thereby making labour cheaper.¹³⁰ The Finnish Seamens Union (FSU) planned industrial actions against this reflagging and the International Transport Workers Federation (ITWF) told all its domestic partners not to negotiate with Viking Line and hinder its business. The ECJ had to decide weather these collective actions were justified or if national authorities (in that case England, because the ITWF headquarter was in London) was obliged to prevent the actions in question of FSU and ITWF.¹³¹

b) Horizontal Direct Effect

As it was published before the ”Laval“-jurisdiction (which copied the argumentation on the ”horizontal direct effect“ from ”Viking Line“), the ECJ dealt with the question, to which extent the freedom of establishment has horizontal direct effect.

The ECJ stated that

- „...the abolition, as between Member States, of obstacles to freedom of movement for persons and freedom to provide services would be

¹²³ C-438/05 Viking Line; Riesenhuber, Europäisches Arbeitsrecht, p.91

¹²⁴ Riesenhuber, Europäisches Arbeitsrecht, p.91

¹²⁵ Riesenhuber, Europäisches Arbeitsrecht, p.91

¹²⁶ C-120/78 Cassis de Dijon

¹²⁷ Riesenhuber, Europäisches Arbeitsrecht, p.89

¹²⁸ C-438/05

¹²⁹ Craig / De Burca, p.786

¹³⁰ Craig / De Burca, p.786

¹³¹ Craig / De Burca, p.786

compromised if the abolition of State barriers could be neutralized by obstacles resulting from the exercise, by associations or organizations not governed by public law, of their legal autonomy...It follows that Article 43 EC must be interpreted as meaning that...it may be relied on by a private undertaking against a trade union or an association of trade unions.“

and

- „collective action such as that described in the first question referred by the national court falls, in principle, within the scope of Article 43 EC.“¹³²

It is thereby clear that the freedom of establishment binds trade unions and trade union organizations. It is not clear, though, how far the horizontal effect goes concerning other actors in employment law.

There are **arguments for a broad interpretation** of the freedom of service, some of which can be concluded from the judgement of the ECJ. Firstly the wording of the court is „actions by individuals“. This might imply that the ECJ means all individuals, because it could have said „actions by labour unions“ instead, but did not.¹³³ Secondly, privates can have as much power as the state, for instance when they are given exclusive control over a specific regulatory area, like sports (Bosman-ruling¹³⁴).¹³⁵

On the other hand, there are **arguments for a narrow interpretation** of the freedom of service, meaning that – apart from the state - *only* labour unions are bound by it, because of their „state-like“ quasi-legislative power. Firstly, labour unions or labour union organizations can be, and are in most member states, quite powerful organizations that can negotiate agreements that have normative effect. It can be seen so that such Unions are, in practice, more „like the state“ and just „formally“ privates. Hereby it can be argued that the broadening of the scope of the freedom of service to labour unions is a special, narrow exception due to the specialities of labour law.¹³⁶ Secondly, a broadening of the interpretation would lead to even less legal certainty.¹³⁷ Because it could be argued that for instance work councils have much regulatory power, or firms in themselves, or loose coalitions of customers, or landowners¹³⁸ ...as soon as the debate about the width of the horizontal effect is furthermore generalized, legal uncertainty will be the consequence.¹³⁹ Therefore, trade unions should remain the one rare exception for horizontal effect due to the specialities of labour laws.

¹³² C-438/05 Viking Line, Rd.36

¹³³ Craig / De Burca, p.768

¹³⁴ ECJ Bosman C-415/93

¹³⁵ Davies, One step forward, to steps back, p.136

¹³⁶ Craig / De Burca, p.768

¹³⁷ Craig / De Burca, p.767

¹³⁸ Davies, One step forward, to steps back, p.137

¹³⁹ Craig / De Burca, p.768

c) Scope

The court shortly concludes that the registration of a vessel is the exercise of the freedom of establishment.¹⁴⁰ This question is a speciality of the case without any relevance for labour law, so it will not be analysed here. The ECJ concluded in "Viking Line" that a collective action of the FSU has

- *„...the effect of making less attractive, or even pointless, ... Viking's exercise of its right to freedom of establishment, inasmuch as such action prevents both Viking and its subsidiary, Viking Eesti, from enjoying the same treatment in the host Member State as other economic operators established in that State.*¹⁴¹

The same is valid for collective actions of the ITF.¹⁴² Consequently, both collective actions restrict the freedom of establishment.¹⁴³

d) Discussed exceptions

Several possible exceptions from the scope of the freedom of establishment have been discussed and rejected by the ECJ.

Strikes

The ECJ rejected¹⁴⁴ arguments of the Danish government that argued for a limitation of the scope of the freedom of establishment with regards to the

- **right of association**
- **right to strike**
- **right to impose lock-outs**

Generally formulated, the question was whether rights that are transferred by domestic laws in areas where the Union does not have legislative competences must be excluded from the scope of the freedom of establishment. The ECJ held that¹⁴⁵

- *„...the answer to the first question must be that Article 43 EC is to be interpreted as meaning that, in principle, collective action initiated by a trade union or a group of trade unions against an undertaking in order to induce that undertaking to enter into a collective agreement, the terms of which are liable to deter it from exercising freedom of establishment, is not excluded from the scope of that article.*¹⁴⁶

The rejection of this argument was to be expected and is quite obvious, because – as the ECJ has stated¹⁴⁷ – by applying the freedom of establishment to cases with regards to rights transferred by domestic laws,

¹⁴⁰ C-438/05 Viking Line, Rd.70

¹⁴¹ C-438/05 Viking Line, Rd.72

¹⁴² C-438/05 Viking Line, Rd.73

¹⁴³ C-438/05 Viking Line, Rd.74

¹⁴⁴ C-438/05 Viking Line, Rd.37

¹⁴⁵ C-438/05 Viking Line, Rd.54

¹⁴⁶ C-438/05 Viking Line, Rd.55

¹⁴⁷ C-438/05 Viking Line, Rd.38

the Union does not enact laws in a field it has no competence in. The fields brought forth by the Danish government can be fully governed by the national legislative powers without any interference from the EU. Nevertheless, in all fields in which national parliaments have the full legislative competence, the application of such must comply with community law.¹⁴⁸

Exceptions for fundamental rights

Moreover, the Swedish and Danish governments argued that the right to strike was a fundamental right and must therefore be excluded from the scope of the freedom of establishment.¹⁴⁹ This point of view was also, rightfully, rejected by the ECJ:

- *„...the right to take collective action, including the right to strike, must ... be recognized as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures, the exercise of that right may none the less be subject to certain restrictions. As is reaffirmed by Article 28 of the Charter of Fundamental Rights of the European Union, those rights are to be protected in accordance with Community law and national law and practices.“¹⁵⁰*

This ruling is logical and consequent, as it is in accordance with previous jurisdiction. Namely in the cases „Schmidberger“¹⁵¹ and „Omega“¹⁵² the Court held that the protection of fundamental rights can be a legitimate interest that justifies the restriction of obligations deriving from community law (in those cases concerning the free movement of goods, respectively the freedom to provide services), but does not restrict the scope of application of such.¹⁵³

Later in Laval, the ECJ confirmed this jurisdiction with concern of the freedom of service.¹⁵⁴

Albany judgement analogous

The court had to decide as well if the freedom of establishment must be restricted, analogous to the „Albany“-judgment¹⁵⁵ with regards to collective actions in collective negotiations. In „Albany“ the ECJ stated that agreements concluded in the context of collective negotiations between management and labor must fall outside the scope of Art. 85 (I) of the Treaty, because there was no way to reconcile a pension fund, set up by the

¹⁴⁸ Regular jurisdiction of the ECJ, for example in Case C-120/95 Decker (1998) ECR I 1831

¹⁴⁹ C-438/05 Viking Line, Rd.42

¹⁵⁰ C-438/05 Viking Line, Rd.44

¹⁵¹ C-112/00 Schmidberger, par. 74

¹⁵² C-36/02 Omega, par. 35

¹⁵³ C-438/05 Viking Line, Rd.45

¹⁵⁴ C-341/05 Laval, Rd.91

¹⁵⁵ C-67/96 Albany

social partners, with EU competition law.¹⁵⁶ This reasoning cannot be applied analogous to the economic freedoms in Title III of the treaty, though.¹⁵⁷ Firstly, it is not inherent in the exercise of collective actions that such necessarily affect fundamental freedoms.¹⁵⁸ Secondly the provisions on competition in the treaty have another goal, which is mainly the unification and liberalization of the market, whilst the economic freedoms aim to transfer individual rights, thereby the provisions must not necessarily have correlating scopes.¹⁵⁹

e) Justification of the restrictions

After neglecting all restrictions, the ECJ had to deal with the possibility to justify the restriction of the freedom of establishment. The public interest must not only be **overriding** the restriction, but the mean must also be **suitable** and the **least restrictive** mean.¹⁶⁰

With regards to the necessity of the collective action, it depends on the **possibilities that national laws give trade unions**, whether there would have been alternative, **less restrictive means** to achieve the own goal and to which extent the trade union had exhausted them before initiating the action in question.¹⁶¹

In the proportionality test, the ECJ points out the importance of the economic freedoms as „*fundamental economic freedom rights*“.¹⁶²

It furthermore decides that the right to strike itself, even as an acknowledged fundamental right, is not enough to justify a restriction of an economic freedom, instead the purpose of the strike must be taken into consideration.¹⁶³

The purpose of the strike that was argued for was the **protection of workers**.¹⁶⁴ In general, this can be an overriding legitimate interest, according to the ECJ.¹⁶⁵ On the other hand, not every action that aims at the protection of workers is an overriding mean. It must be analyzed, under which circumstances which value overweighs.

For the importance of the protection of workers speaks that the EU has not only the goal to abolish obstacles of the common market, but also a „**policy in the social sphere**“.¹⁶⁶

¹⁵⁶ C-67/96 Albany par. 60; Industrial Law Journal, Vol.37, 2008, p.140

¹⁵⁷ C-438/05 Viking Line, Rd.51

¹⁵⁸ C-438/05 Viking Line, Rd.52

¹⁵⁹ C-438/05 Viking Line, Rd.53

¹⁶⁰ C-55/94 Gebhard (1995) par. 37

¹⁶¹ C-438/05 Viking Line, Rd.87

¹⁶² Blanke, Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rueffert, p.8

¹⁶³ Blanke, Die Entscheidungen des EuGH in den Fällen Viking, Laval und Rueffert, p.8

¹⁶⁴ C-438/05 Viking Line, Rd.76

¹⁶⁵ C-438/05 Viking Line, Rd.77

¹⁶⁶ C-438/05 Viking Line, Rd.78

The ECJ furthermore states that it should be

- „...borne in mind that it is common ground that collective action, like collective negotiations and collective agreements, may, in the particular circumstances of a case, be one of the main ways in which trade unions protect the interests of their members“¹⁶⁷

On the other hand, the ECJ clearly states two conditions of proportionality that restrict the freedom of the Union:

Firstly, if the jobs or conditions of employment were **not seriously jeopardized** without the collective action, the freedom of establishment should always outweigh.¹⁶⁸

Also, in case ship-owners are, as a consequence of the collective action, **fully prevented** from registering their vessels in another member state, the restriction of the freedom of establishment cannot be justified.¹⁶⁹ It can be abstracted from that for general judgments that an **absolute prevention of the exercise of the freedom** of establishment cannot be justified with the purpose of the protection of workers. If this conclusion can analogously be applied to other economic freedoms, must be evaluated in the future.

The ECJ comes to the conclusion, that – even though it is up to national courts to ascertain, to which extent collective actions protect workers and consequently if this protection is more important than the freedom of establishment¹⁷⁰, in this case the arguments of the Union weigh little.

f) Critique

About the judgment is criticized that the ECJ considered the right to strike as a right that is „below“ the economic freedoms, by saying that the right to strike needs profound arguments to restrict the economic freedom – and not vice versa. This critique is not justified, though: The right to strike is a „fundamental freedom“, and those are – in line with constant jurisdiction of the ECJ – typically „public interests“ that can justify the restriction of economic freedoms.

What is actually critical about the judgment of the ECJ is, first of all, that the judgment does not provide a deep clarity about the system and values of the relevant criteria.

Substantially, the court oversees that the core purpose of collective actions is the restriction of economic freedom, because precisely the restriction of economic freedom is what makes strikes effective. That means there can necessarily not be a „less restrictive mean“ to achieve the goal, the intensity of the restriction and the effectivity of the mean stand in a necessarily

¹⁶⁷ C-438/05 Viking Line, Rd.86

¹⁶⁸ C-438/05 Viking Line, Rd.81; Thüsing, Europäisches Arbeitsrecht,p.305

¹⁶⁹ C-438/05 Viking Line, Rd.88

¹⁷⁰ C-438/05 Viking Line, Rd.80

congruent relation, so the „intensity“ of the strike should logically not have been taken into consideration, in my opinion.

9.2 Problem of Company Codetermination

National companies are founded by the law of one member state. Which law applies to them is determined by international corporate law.¹⁷¹ National laws have two different solutions to decide upon the applicable law: The incorporation theory and the real seat theory.¹⁷² Despite the fact that this particular problem of corporate law is not subject to this analysis, the question which law governs the corporation can affect labour law anyway with regards to company codetermination, because the applicable law for company codetermination derives from the applicable law on the corporation contract.¹⁷³

First, the company that was founded in a member state „brings“ the company codetermination law of its home country with it if it replaces its seat to another state.¹⁷⁴

The receiving member state can, due to the freedom of establishment, not keep a foreign company from replacing its seat.¹⁷⁵ If the receiving member state wants to prevent the risk that national employee protection is circumvented by that, it must apply national company codetermination laws even on foreign companies.¹⁷⁶ Just as with regards to the freedom to provide services, the protection of employees is a legitimate general interest that can justify a restriction of the freedom of establishment.¹⁷⁷ The justification fails, if the foreign state has an equivalent level of Company Codetermination.¹⁷⁸

¹⁷¹ Riesenhuber, *Europäisches Arbeitsrecht*, p.93

¹⁷² Riesenhuber, *Europäisches Arbeitsrecht*, p.93

¹⁷³ RdA 2004, 257, 258; Riesenhuber, *Europäisches Arbeitsrecht*, p.94

¹⁷⁴ Riesenhuber, *Europäisches Arbeitsrecht*, p.94

¹⁷⁵ Riesenhuber, *Europäisches Arbeitsrecht*, p.94

¹⁷⁶ Riesenhuber, *Europäisches Arbeitsrecht*, p.94

¹⁷⁷ Riesenhuber, *Europäisches Arbeitsrecht*, p.95; C-208/00 *Überseering*

¹⁷⁸ RdA 2004, 247, 262 f.

10 Labour Leasing

Another situation in which employees can be sent abroad is a "labour lease". In such cases, not the implementations of the PWD apply, but the implementations of the EU Temporary and Agency Workers Directive¹⁷⁹ (2008/104). That means, first of all, that – in the absence of an explicit agreement – not the law of the home country, but the law of the host country is generally applicable (according to Rome I Art. 8).

Art.3 (1)(f) of the TAWD makes it necessary for the leaser to grant the employee equal treatment compared to comparable permanently employed employees with regards to pay, working time, rest periods, night work, paid holidays, public holidays, pregnancy and motherhood protection, youth protection, and anti-discrimination practices. Obviously this also applies to foreign employees.

10.1 Differentiation between posted and leased workers

Opposed to a posted worker, a leased worker becomes subject to the directive right of the leaser, and the intention to return to the home state must not necessarily be given.

It is usually in the interest of employers to make their posted workers subject to the PWD; because of the general "place of origin"-principle. Not only because often the place of origin guarantees a weaker employee protection, but also simply because the own jurisdiction is known to the employer. Therefore, employers should make sure that the subjective intention of the employee to return, which is generally hard to prove, is indicated by formal evidence. These can, for instance, derive automatically from a project-orientated work abroad (a construction worker, who works on a specific construction site). If that is not the case, an agreement with the employee to return "latest after x months" for example, or an agreement on the right to call the employer back any time can function as indicators.

10.2 ECJ-Jurisdiction with regards to Labour Lease

Also in labour lease situations the ECJ gives guidance about how to treat cross-border situations to some extent. Generally, the situation is easier than cases of posted workers, because the law of the host country applies generally. Nevertheless, there have been a few judgements in which the ECJ has set borders to how far Member States can go with the imposition of own laws on leased workers from abroad.

¹⁷⁹ i.f. "TAWD"

a) ECJ C-279/80 (Webb, 1983):

In the absence of the "TAWD", the Webb-case dealt only with the European freedom of service. In "Webb", the claimant Mr. Webb was the CEO of an English temporary employment agency. He leased out an employee to the Netherlands without having a respective "labour lease"-permit there, for which he was fined by Dutch authorities. Mr. Webb argued that this breached his freedom of service. The ECJ partially agreed:

On the one hand, Mr. Webb was approved already by English authorities. Therefore, it restricts his freedom of service, if he was – opposed to Dutch competitors – assessed twice. In that sense, the argument of the Netherlands, that the assessment was justified because its purpose was the protection of the Dutch labour market¹⁸⁰ was rejected by the counter-argument that the double-assessment was not necessary.

On the other hand, the English authorities do not know the Dutch labour market, hence they could not consider Dutch circumstances when they granted Mr. Webb the permit in England.¹⁸¹ As a consequence, the Dutch authorities can demand a second assessment of Mr. Webb, but only to the extent he was not yet assessed before. Circumstances that have been considered in England must be accepted as given.¹⁸²

b) ECJ C-279/00 (Commission vs. Italy)

In this case, the ECJ stated that the legal requirement that temporary employment agencies must have their domicile in the domestic state where the lease takes place was a breach of the freedom of services as well.

c) ECJ C-493/99 (Commission v. Germany, 2001)

Germany demanded foreign lessors, that lend out workers to Germany, to have a branch in Germany. The ECJ stated that this was a breach of the freedom of service of the foreign employer.¹⁸³

¹⁸⁰ ECJ 279/80 (Webb); Schiek, *Europäisches Arbeitsrecht*, p.170

¹⁸¹ ECJ 279/80 (Webb); Schiek, *Europäisches Arbeitsrecht*, p.170

¹⁸² ECJ 279/80 (Webb); Schiek, *Europäisches Arbeitsrecht*, p.170

¹⁸³ NZA 2002, 1248, 1249

11 Cross-border mergers, movements and transfers of undertakings

11.1 Situations

Even though it does not actually fall under the scope of this thesis, to complete the topic I want to outline the legal situation in employment law if not the employee, but the employer crosses an inner-european border either by being taken over by another company (1), or by merging with another company (2), or by transferring an undertaking to a new company (3).

a) Cross-Border Takeover

In case of a cross-border take-over by a share deal without the movement of any working sites or an actual change of the formal employer, nothing changes at all with regards to the employment contracts, because the habitual place of work and the seat of the employer remain the same.

b) Cross-Border Merger

In case of a cross-border merger, the habitual place of work remains the same, but the employer and its seat change. Usually there are no further domestic laws that regulate this situation in more detail.¹⁸⁴ Thereby, there are no consequences for the law governing the employment contract, but consequences for company codetermination rights of employees. These, as well as information rights, are regulated in the national implementations of the Directive 2005/56.

c) Cross-Border transfer

It can also happen that an undertaking is sold by an asset deal. Such cases are dealt with in the "Transfers of Undertakings Directive"(TUD) 2001/23.¹⁸⁵ In such a deal, it can also happen that the site of work itself is moved across the border. It is relevant for cross-border employment relations, because the transfer of an undertaking affects the responsible jurisdiction for the employment contract. Its domestic implementations basically regulate, that the buyer of an undertaking is bound to the employment contracts of the seller. The problem is that the Directive does not define what happens if the Transfer of this undertaking takes place over national borders.¹⁸⁶ Which domestic implementation regulates the transfer of an undertaking is decided by Art. 8 Rome I¹⁸⁷, consequently it is usually the place from which the undertaking is moved away (either because the company is seated there, or because the employees have their habitual

¹⁸⁴ Thematic Report 2008: Challenges of Cross-Border mobility, p.75

¹⁸⁵ Thematic Report 2008: Challenges of Cross-Border mobility, p.33

¹⁸⁶ NZA 1999, 1184, 1185

¹⁸⁷ Ascheid/Preis/Schmidt, Kündigungsrecht, § 613a Rd.9

workplace there).¹⁸⁸ Let us assume that this national law has ascertained that a transfer of an undertaking in the sense of the domestic implementation of the TUD has taken place (e.g. the German federal labour court, just like labour courts in almost every Member State¹⁸⁹ interprets the German provision that regulates transfers of undertakings as applicable even to cross-border transfers¹⁹⁰). The applicable legislation changes, in case the employment relation is transferred.¹⁹¹ For instance, if a storage depot is moved over the border to Poland and thereby the habitual workplace of the worker, the employment contract is then governed by Polish law (unless, of course, the worker rejects the transfer of his employment contract).¹⁹² The opinion, that the domestic implementations of the TUD should not be applied to cross-border transfers of undertakings, is a minor opinion.¹⁹³

The domestic implementations of the TDU¹⁹⁴ § 613a are no indispensable norms in the sense of Art. 9 Rome I, because they only indirectly serve the purposes of a social order, primarily they serve the protection of workers.¹⁹⁵

11.2 ECJ C-242/09 (Albron Catering, 2010)

There is a wide range of judgements of the ECJ to the concretion of the Directive¹⁹⁶, but these do not concern specifically cross-border situations. In my opinion, there is only one recent judgement that actually concerns cross-border situations, which is ECJ C-242/09 (Albron). It is relevant for cross-border situations, because it concerns the treatment of leased workers. In the judgement the ECJ had to assess, whether the leaser – to whom the worker formally does not have an employment contract – can be the transferring undertaking, with the consequence that the labour lease relationship becomes an actual employment relationship with the overtaking company.

With the argument that the Art. 3(1) of Directive 2001/23 uses both "employment contracts" and "employment relationships" as equivalents, the court rules that an employment relationship can exist even without an employment contract. The ECJ also states that there is no hierarchy between the contractual employer, and the factual employment relationship¹⁹⁷, with the consequence that even the leaser can be "transferor" in the sense of the directive. Thereby, if a company is transferred within a Member state, eventual employment relations with leased workers will be transferred as well.

¹⁸⁸ NZA-Beil. 2012, 8, 16

¹⁸⁹ Thematic Report 2008: Challenges of Cross-Border mobility, p.36

¹⁹⁰ BAG 8 AZR 37/10 26.5.2011; NZA 1999, 1184, 1185; ArbRAktuell 2012, 337

¹⁹¹ BAG, Urt. v. 26. 5. 2011 – 8 AZR 37/10

¹⁹² Junker, NZA-Beil. 2012, 8, 17: Rechtsfragen grenzüberschreitender Betriebsverlagerung; Raif/Ginal, GWR 2013, 217, 220

¹⁹³ Feudner, NZA 1999, 1184, 1188

¹⁹⁴ E.G. in Germany § 613a BGB

¹⁹⁵ Fuchs/Marhold, Europäisches Arbeitsrecht, p. 80 f.

¹⁹⁶ Much debated were ECJ C-392/92 (Christel Schmidt, 1994), ECJ C-108/10 (Scattolon, 2011), ECJ C-466/07 (Klarenberg), ECJ C-463/09 (CLECE)

¹⁹⁷ ECJ C-242/09, Rd.24

12 Free movement of workers

The free movement of workers guarantees workers to be treated in every European country as if they were a citizen of that country. The free movement of workers comprises all workers that carry out economic work according to somebody else's directions for a reward.¹⁹⁸ It guarantees the right to search for work abroad, to work abroad, to go abroad and to stay abroad.¹⁹⁹ An exception is the public administration.²⁰⁰ By virtue of the case law of the ECJ they are also allowed to reside in the Member State where they go looking for a job, as long as they can prove that they are really looking for a job and have a genuine chance of being engaged.²⁰¹ Prohibited are discriminations as well as restrictions.²⁰² A restriction of the free movement of workers lies in every national act that makes the access to a foreign employment market more difficult for an employee.²⁰³ Indirect discriminations are comprised just as direct discriminations.²⁰⁴ Restrictions of the free movement of workers can be justified by the „ordre public“-exception in Art.45 III TFEU as well as compelling reasons in the general interest („Cassis-formula“²⁰⁵). A limit to those justifications is the principle of proportionality.²⁰⁶

Even though this freedom has a wide relevance for workers and there is a wide range of judgements on it, for the scope of this analysis it has a minor significance. The reason is the following: Art. 45 TFEU aims to prevent legislation that keeps foreign workers from immigrating into the respective country. The usual question is, whether this national provision was a breach of Art. 45 TFEU. It is seldomly a problem, though, *which* domestic law is applicable. It is usually clear that – if the national provision is legal – it must be applied to the immigrating worker, because permanently immigrating workers always and without exceptions become subject to the legislation of the receiving state.

The ECJ has stated repeatedly that posted workers naturally do not fall under the scope of Art. 45 TFEU, because it is a natural core condition of „postings“ that the worker in question does not have the intention to become subject to a new legislation²⁰⁷, but wants to remain a subject under the legislation of his country of origin.

¹⁹⁸ Riesenhuber, *Europäisches Arbeitsrecht*, p.64

¹⁹⁹ Riesenhuber, *Europäisches Arbeitsrecht*, p.67

²⁰⁰ Riesenhuber, *Europäisches Arbeitsrecht*, p.68

²⁰¹ C-292/89 Antonissen (1991)

²⁰² Riesenhuber, *Europäisches Arbeitsrecht*, p.73

²⁰³ Riesenhuber, *Europäisches Arbeitsrecht*, p.69

²⁰⁴ Riesenhuber, *Europäisches Arbeitsrecht*, p.71

²⁰⁵ C-120/78 Cassis de Dijon

²⁰⁶ Riesenhuber, *Europäisches Arbeitsrecht*, p.77

²⁰⁷ ECJ C-49/98 (Finalarte)

Cases in which Art.45 TFEU is relevant with regards to collision laws are thereby seldom. The main field in which they might arise are cases of social security, with such will be dealt with later in an own chapter.

Apart from that, there are few cases with actual cross-border situations in the sense of this analysis.

12.1 ECJ C-202/11 (Las, 2013)

In C-202/11(Las, 2013)²⁰⁸ the ECJ has decided that a national provision that demands employees situated within the state to formulate employment-contracts with a cross-border element always in the language of the home state. In this case, a dutch employer with residence in the Netherlands was working in Belgium. Its employment contract was written in English, which was against belgium law. The employer, who wanted a certain provision of the contract to be enforced,claimed that the obligation to formulate contracts in dutch was a breach of the free movement of workers. Peculiar about this judgement was that the free movement of workers took effect against the interest of the employee in this case. That is because not this specific employee, but unspecified employees in general are the ones who are affected by such a prohibition of foreign languages, because it might keep them from working in the Belgium, if they do not speak dutch.²⁰⁹

12.2 Horizontal effect

Article 45, the freedom of movement of workers, binds even private parties.²¹⁰

In Walrave/Koch²¹¹, Dona v Mantero²¹², Bosman²¹³ and "Union Cyclist International"²¹⁴ rules of "state-like" sports organizations breached the freedom of movement of workers. The ECJ ruled that Article 45 TFEU can even have horizontal direct effect against national organisations in the area of sporting activities.²¹⁵ It has also clarified that it binds collective organs, such as work councils or labour Unions.²¹⁶ In Angonese²¹⁷ the ECJ for the first time held that Art.45 TFEU was directly applicable even against private employers, in this case an austrian Bank that rejected an application of Mr. Angonese, because he did not present a specific language certificate, but

²⁰⁸ ECJ C-202/11 (Las, 2013)

²⁰⁹ ECJ C-202/11 (Las, 2013)

²¹⁰ Craig / De Burca, p.767

²¹¹ ECJ C-36-74 (Walrave and Koch, 1974)

²¹² Case 13/76, Dona v Montero (1976)

²¹³ C-415/93, Bosman (1995)

²¹⁴ EuZW 2010, 687, 689; EuGH, C-325/08 (Olympique Lyonnais SASP)

²¹⁵ C-415/93 Bosman, Slg.1995, I-4921

²¹⁶ Craig / De Burca, p.768

²¹⁷ C-281/98 Angonese (2000)

could prove his ability to speak the language in another way. The ECJ saw a breach of his free movement right by the bank.²¹⁸ The ECJ argued with its own decision in the case "Defrenne"²¹⁹, when it applied Art.157 TFEU – that is literally only binding to Member States – to privates. If Art. 157 TFEU is applied to privates, a fortiori Art. 45 TFEU must be applicable to privates, because it does not explicitly state that it only binds states. Lately the ECJ conformed its jurisdiction in the case "Raccanelli"²²⁰, when it considered a rejection of Mr. Raccanelli as an applicant for a doctoral thesis only due to his nationality as a breach of the free movement by the international private organization "Max-Planck-Gesellschaft". We can conclude by now that the free movement is horizontally applicable without any restrictions, according to the ECJ.

²¹⁸ ECJ C-281/98 (Angonese, 2000).

²¹⁹ ECJ C-43/75 (Defrenne, 1976)

²²⁰ ECJ C-94/07 (Raccanelli, 2008)

13 Social Security Law

13.1 Outline

Even though social security norms are not such of labour law and thereby are – strictly seen – not subject of this thesis, I present them shortly anyway because they are so closely related to employment relations and highly relevant in cross-border situations. In International tax law, there are also special provisions for cross-border commuters, but they cannot be dealt with here.²²¹

Since 2004 there is the **EU Regulation 883/2004** (in force since 1. 5. 2010), which is directly applicable in all Member States. It is supplemented since the **EU Regulation 987/2009**. They both regulate the conditions and modalities of social benefits in cross-border cases. It is a concretion of the free movement of workers. Recent jurisdiction about the free movement of workers concerns mainly the social security of cross-border commuters.²²²

The basic principle of the Regulation is the one of equality. That means that generally, all employees of a member state have **the same social rights in this state as all citizens of this state**. Relevant is the place of work (lex loci laboris), even for cross-border commuters.²²³ That basically means that with respects to social security, the times that an insurant spent in another country must be taken into account as if they had been spend in the country in question, for example when it comes to the calculation of retirement pensions.

For **cross-border commuters** there are a few special norms, most importantly that retirement pensions depend on the country where the employee was working at last (Art. 28).

There are a few **exceptions** to the „Lex loci laboris“-principle, though.

Receivers of short-term financial aid, as well as sick benefits or parents' money, must hold the state of residence responsible (Art. 11 Abs. 2 VO)²²⁴

For unemployed cross-border commuters, the place of residence is responsible (Art. 11 Abs. 2 und 3 c).

State servants are always subject to the social law of their home country, and people that work in various countries, so that the place of work cannot

²²¹ http://ec.europa.eu/taxation_customs/taxation/personal_tax/crossborder_workers/

²²² EuZW 2012, 926, 928

²²³ Plagemann, Müncher Anwaltshandbuch Sozialrecht, § 4 Rd.37; Melms, Münchener Anwaltshandbuch Arbeitsrecht, § 11 Rd.44

²²⁴ Plagemann, Müncher Anwaltshandbuch Sozialrecht, § 4 Rd.37

clearly be decided, according to Art. 11 Abs. 3 e) VO) the place of residence is generally applicable.²²⁵

For **posted workers**, the law of the country of origin stays the relevant one for the period of 24 months (Art.12).

13.2 ECJ C-443/11 (Jeltes and others, 2013):

An unemployed cross-border commuter can claim unemployment benefits only in the country of his residence, regardless of close relations to the country of his last employment. The ECJ clearly states that the Regulation 883/2004 must not be interpreted in the light of earlier ECJ-jurisdiction. The lack of an explicit expression in the Regulation, that the state of the last work was obliged to pay unemployment benefits, was intended by the legislator.

13.3 ECJ C-379/09 (Casteels/British Airways, 2011)

This case concerned an additional retirement pension that Germany grants, but which Mr. Casteels, an employee of British Airways, did not receive, because he was not permanently employed in Germany.²²⁶ Mr. Casteels has accomplished the necessary minimum years of service, but not in the minimum years in Germany that were necessary according to a collective agreement.²²⁷ The ECJ considered that a breach of the free movement of Mr. Casteels, because the regulation demotivates employees to leave Germany for a temporary work abroad.²²⁸ A justification of this restriction did not exist, so Germany must consider the workyears of Mr. Casteels abroad.²²⁹

13.4 ECJ C-542/09 (Kommission / Niederlande, 2012)

In this case the commission has sued the Netherlands. The Netherlands had as a legal requirement for the granting of student funding for students that study abroad, that they have lived at least 3 out of the last 6 years in the Netherlands before the beginning of the studies.²³⁰ This requirement can be fulfilled easier by dutch employees (or students, which are as pre-workers protected by the free movement of workers as well).²³¹

²²⁵ Plagemann, Münicher Anwaltshandbuch Sozialrecht, § 4 Rd.37

²²⁶ EuZW 2012, 926, 928

²²⁷ EuZW 2012, 926, 928

²²⁸ EuZW 2012, 926, 928

²²⁹ EuZW 2012, 926, 928

²³⁰ ECJ, C-542/09; EuZW 2012, 926, 928

²³¹ ECJ, C-542/09, Rd.48 ff.; EuZW 2012, 926, 928

14 Social Security Law

As social security laws depend on a variety of specialities that are not subject of this thesis, at this point it should just be stated that the general guideline with regards to the applicability of domestic laws is valid for international taxation and social security situations as well, but it must be considered that there is a variety of special legislation and domestic jurisdiction that alternatives the result of the applicability of domestic laws. For instance, there is an international tax law with special regulations. Also, in social security law there are diverse specialities. E.g. according to the EU Regulation No. 883/2004 on coordination of social security systems entered into force on 1 May 2010, an employee remains subject to the social security legislation of the Member State in which he or she pursues a gainful activity for 24 months, if he/she is send to another member state. Anyhow, in detail tax law and social security law must be assessed individually, assumed the general guidance given in this thesis, though.

15 Foreign circumstances in domestic cases

Another situation that has not yet been dealt with is the following: A case is generally purely domestic in the sense that every employee concerned is employed, lives and works in the same country. When domestic laws are applied, the question might arise, though, if and to which extent foreign *circumstances* must be taken into account, for example if in case of a mass dismissal the social selection can or must include colleagues that work behind a national border²³², or if a "small-business-clause" must consider employees behind national borders²³³ or if, with regards to company codetermination, foreign branches of a mother company must be taken into account to count out the number of employees of the corporate group or any other example. Obviously, there are no problems visible concerning collision laws, the applicable laws are obviously purely domestic.

²³² Caroline Gravenhorst Kündigungsschutz bei Arbeitsverhältnissen mit Auslandsbezug, RdA 2007, 283, 287

²³³ Ascheid/Preis/Schmidt, Kündigungsrecht, Rd.85

16 Non-discrimination

16.1 1.Introduction

Recently, the issue of Anti-discrimination has been subject to a large series of ECJ-judgements. That is the consequence of the "Mangold"-judgement from 2005. Even though these cases do not necessarily have relevance for cross-border employment, they will be discussed as follows, because it is probably the most controversial area in European labour law jurisdiction these days.

The European Charter of Fundamental Rights²³⁴ is binding according to Art.6 I TEU and completed by the general principles of the constitutions of the member states.²³⁵ Moreover, there is a set of unwritten fundamental rights that the ECJ has recognized that derive from "the constitutional traditions common to the member states."²³⁶ Both are binding to the EU and to the Member States to the extent they are applying or implementing Union law. Such an action is given, if the act of the Member State is regulated by binding instructions deriving from EU law.²³⁷

16.2 2.Cases

There are several judgments of the ECJ since 2005 in which fundamental rights have affected employment relations with regards to national implementations of EU directives.

a) ECJ C-144/04 (Mangold, 2005)

In "Mangold", the ECJ dealt with the European fundamental right of age non-discrimination. § 14 III 4 TzBfG, the German law on part-time-work and fix-term contracts, said that for workers older than 58 (later the age was changed to 52), no justification for a fix-term contract longer than two years was necessary, whilst for all other employees it was.²³⁸ The norm was an implementation of the EU Directive 99/70 on fixed term work

The ECJ has ascertained that this was an unjustified restriction of the right of non-discrimination due to age.²³⁹ The judgement was subject to a debate mainly because of two question-fields:

Firstly, it was debated whether the appraisal and interpretation of the right of non-discrimination was correct. Main problems were the following:

²³⁴ ECFR

²³⁵ Krebber, EuZA 2013, 188

²³⁶ ECJ C-11/70, Internationale Handelsgesellschaft

²³⁷ NZA 2011, 258, 258

²³⁸ Forscher, ZJS 2011, 456, 460

²³⁹ NZA 2011, 258, 258

First, the ECJ seemed to "mix up" the fundamental European freedom and the EU Directive 2000/78 (Employment Equality Framework) as sources of this principle, by arguing with the Directive to state the existence of the newly "invented" fundamental right of age non-discrimination.²⁴⁰ This confuses the norm hierarchy of Union Law: Secondary legislation can never define primary law.²⁴¹ The ECJ then argued for its judgement with primary EU law (without clearly stating why it discussed the secondary law issues at all then).²⁴²

The ECJ first stated that there is (without clearly explaining where this derives from) a general European principle of the prohibition of discrimination with regards to age (inter alia).²⁴³ This was a main novelty of the judgement.

The second debate was on the evaluation that the discrimination was not justified even though it actually served the purposes of older employees, namely to balance out their disadvantages on the employment market. Many scholars argued that the exemption of § 14 III TzBfG was legal despite the discriminatory character, because it fights disadvantages of older applicants on the labour market, which was an objective justification.²⁴⁴ The ECJ opposed to this point of view, because the balancing advantages of the older employees could not be proven.²⁴⁵ Anyhow, such debates can be made in every case when the ECJ evaluates the justification of restrictions on fundamental freedoms. This evaluation was therefore not the main novelty of the judgement.

The most remarkable peculiarity of the case was that the implementation period for the respective directive (2000/78) was not yet over by the time of the judgement. Directives can be enforced, according to ECJ jurisdiction²⁴⁶, when it is unconditional, sufficiently precise and the implementation period has run out.²⁴⁷ The ECJ held the directive as sufficiently precise and unconditional. But its implementation period had not yet run out. The ECJ has nevertheless applied the Directive already.²⁴⁸ This problem was overcome by stating that the lowering of the age threshold from 58 to 52 violated the principle that during an implementation period no counter-productive legislative measures must be taken and thereby measuring the directive on primary law was legal exceptionally.²⁴⁹

²⁴⁰ NVwZ 2010, 803, 805

²⁴¹ NZA 2011, 258, 258, 263

²⁴² Forscher, ZJS 2011, 456, 460

²⁴³ ECJ C-144/94, Rn.74

²⁴⁴ German Law Journal Vol.7, 505, 512

²⁴⁵ NJW 2006, 6, 8

²⁴⁶ ECJ 152/84 (Marshall, 1986)

²⁴⁷ Forscher, ZJS 2011, 456, 460; NVwZ 2010, 803, 805

²⁴⁸ NJW 2006, 6, 6; NVwZ 2010, 803, 805

²⁴⁹ Forscher, ZJS 2011, 456, 462

In other fields, like the "social selection" in German unfair dismissal law, age groups are common. To the extent they exist today, they were not contested and seem to be justified.²⁵⁰

b) ECJ C-411/05 (Palacios de la Villa, 2007)

Despite all critique the ECJ confirmed its jurisdiction concerning the newly discovered existence of a fundamental right of age non-discrimination.²⁵¹ In this case it objected a breach, though: It held the provision of a collective agreement, which forced employees into retirement by the age of 65, as a proportionate mean to protect the labour market.²⁵²

c) ECJ C-300/06 (Voß, 2007)

In this judgement, the ECJ stated that part-time workers and full-time workers must receive the same hourly overtime-wage. Otherwise, the law in question was a discrimination of women, because significantly more women work part-time. The judgement goes very far, I think. Because the criterion that decides if there is a discrimination is not a static (for example caused by physical traits of women), but a fluent one, namely purely statistical: The high percentage of women in part-time work. That means, that if the percentage of part-time-working women decreases, at some point – an undefined point - the judgement would lose effect and differing hourly wages would become legal again.

d) ECJ C-88/08 (Hütter, 2009)

In "Hütter", the ECJ considered an Austrian law invalid that defined that, for employees in the public service, working years before the 18th year of age must not be considered when it comes to the account of salary levels. Work experience, but not age itself must be the link to salary groups.

e) ECJ C-341/08 (Petersen, 2010)

In "Petersen", the ECJ held a German provision that a dentist must not be older than 68 years of age as invalid due to an age discrimination, in case the goal of this provision is the protection of patients. In this case, the provision is not necessary, because health assessments work just as well. Only, if the provision has the aim of a functioning labour market for dentists, the discrimination can be justified. The aim of the provision is up to the national courts to ascertain.

f) ECJ C-555/07 (Küçükdeveci, 2010)

In "Küçükdeveci" the ECJ had to decide, whether a national provision that ignored working times before the 25th year of age when it comes to the calculation of employment termination periods was justified, and neglected

²⁵⁰ NJW 2006, 6, 11

²⁵¹ NVwZ 2010, 803, 807

²⁵² Chalmers, Davies, Monti, European Union Law, p.566

this question. The ECJ saw an age discrimination²⁵³ in this provision.²⁵⁴ In its reasoning, it has clarified parts of the confusion that derived from "Mangold". It has stated – clearly this time – the existence of an independent prohibition of age discrimination as a principle of primary EU law.²⁵⁵ The mentioned Directive 2000/78 was merely a concretion of this principle.²⁵⁶²⁵⁷ In other words, the direct applicability of the Directive against the clear wording of § 622II 2 BGB did not derive from the Directive itself, but from the primary law principle of non-discrimination "behind" the directive.²⁵⁸²⁵⁹

It also clarified that it sticks to its traditional jurisdiction that there is **no pre-applicability** of Directives before the expiration of the implementation period (despite the debate that derived from "Mangold").²⁶⁰

g) ECJ C-250/09 (Georgiev, 2010)

In this case, the ECJ rejected the complaint about age discrimination by a Bulgarian Professor, who was retired by the age of 68 by law, but against his will.²⁶¹ The ECJ held this discrimination as justified, because it proportionally served the legitimate aim of regulating the employment market, namely the distribution of Professor-positions in all generations.

h) ECJ C-45/09 (Rosenblatt, 2010)

A similar case and judgement was "Rosenblatt". Mrs. Rosenblatt was forced into retirement by the age of 65 due to a collective agreement. The speciality of this case was that the retirement pension of Mrs. Rosenblatt amounted up to only 250 €, obviously not enough to make a living. The ECJ stuck to its Palacios-jurisdiction anyway.

i) ECJ C-159/10 and C-160/10 (Fuchs,2011)

In "Fuchs" the ECJ declared an age limit of 65 for national prosecutors as in accordance with the principle of non-discrimination with reference to its argumentation in "Palacios" and "Rosenblatt".

j) ECJ C-499/08 (Andersen, 2010)

Danish dismissal protection law foresaw that, in case of mass dismissals, employees that receive a national or company pension receive a lower pay-off. The ECJ considered that a discrimination on grounds of age, because employees that, despite their right to receive a pension, want to remain working, must not be underprivileged because of that.

²⁵³ ECJ C-555/05 Rn.22

²⁵⁴ EuZW 2010, 687, 688

²⁵⁵ NVwZ 2010, 803

²⁵⁶ NVwZ 2010, 803, 809; ECJ Kücüdeveci Rd.21

²⁵⁷ EuZW 2010, 687, 689

²⁵⁸ EuZW 2010, 687, 689

²⁵⁹ EuZW 2010, 687, 689

²⁶⁰ NVwZ 2010, 803; EuZW 2010, 687, 689

²⁶¹ NZA 2011, 950, 953

k) ECJ C-447/09 (Prigge/Lufthansa, 2011)

In *Prigge v. Lufthansa*, though, a strict age limit of 60 for pilots due to a collective agreement was a breach of the principle of non-discrimination. The difference to the preceding cases was that the goal of this age limit was not the protection of the labour market, but air traffic security. The ECJ held that, for this purpose, a strict age limit was not necessary, because physical assessments were sufficient as long as the pilots are in perfect health (same as in the "Petersen"-judgement).

l) ECJ C-297/10 and C 298/10 (Hennings, 2011)

In "Hennings", the ECJ held a collective agreement invalid, which determined the salary according to age-groups in the public sector. It explicitly stated that, with regards to equal treatments, tariff parties should have a wide discretion, which was, in this case, nevertheless exceeded.

m) ECJ C-132/11 (Tyrolean Airways, 2012)

Tyrolean Airways had a collective agreement that defined a raise of salary after the third year of work in this company.²⁶² Work years in the same concern were not considered. The ECJ did not see a discrimination on grounds of age in that, because working times for another company in the same concern do affect the date when an employee was hired, but independently from his age. The clause does not have any relation to age, so that there was no discrimination. The judgement shows that the ECJ was serious with its expressed intention to give tariff parties a wide discretion.

n) ECJ C-152/11, (Odar, 2012)

After "Andersen", there was irritation about the question whether the right to receive early retirement pensions for older employees shortly before their retirement could still be considered when it comes to the calculation of pay-offs in social plans, as it is habit in many countries. The ECJ declared that this was still possible, only an early retirement due to a disability must not be considered.²⁶³ Otherwise the social advantage of early retirement, which is a mean to balance out disadvantages due to disability, would be circumvented and taken away again by a lowered pay-off..

o) ECJ C-141/11 (Hörnfeldt, 2012)

In "Hörnfeldt", the ECJ judged that the right to be dismissed by the age of 67 was a proportionate mean to protect the labour market and thereby can justify a restriction of the principle of non-discrimination. The novelty of this judgement was the following: Mr. Hörnfeldt argued that in his case, his pension would (due to several personal circumstances with and their treatment by Swedish retirement laws), rise significantly if he could work for only two more years. The ECJ rejected this argument, though. This

²⁶² EuGH, Urt. v. 7. 6. 2012 – C-132/11

²⁶³ ECJ C-152/11

stands in accordance with the Rosenblatt-judgement, which shows that the ECJ does not seem to consider economic circumstances of the employee when it evaluates a breach of the principle of non-discrimination. I agree with the ECJ on this, because the goal of the principle of non-discrimination is equality, and not to set minimum social or economic standards.

17 Summary: How to deal with cross-border employment situations

At last, I want to sum up the results of this analysis in all the at the beginning presented situations.

- If an employer sends an employee abroad temporarily, the domestic implementations of the PWD regulate, which laws from the home country and which from the host country will be applied. In this assessment, the presented ECJ jurisdiction must be considered, generally there is a tendency to restrict the power of host countries by the ECJ.
- If an employer sends an employee abroad permanently, this can either be interpreted as an implicitly agreed new employment contract, with the result that the laws of the new country are applicable on the new contract²⁶⁴, otherwise Rome I Art. 8 and 9 are applicable, with the result that generally (with possible exceptions) the laws of the new country is applicable as the „lex loci laboris“.
- If an employee occasionally crosses the border to work abroad, that is in every possible way irrelevant for the applicability of the laws of the home country.
- If an employee permanently works in two (or more) countries, it must still be assessed according to Rome I Art.8, if there is a „habitual“ place of work. Only if that is truly impossible, the place of the employing branch is decisive.
- For cross-border commuters, the „lex loci laboris“ is applicable, with possible exceptions only in social and tax law.
- If an employer leases out an employee cross-border, the laws of the host country are generally applicable (Rome I Art.8).
- If a contract is suspended and a new contract abroad is concluded, onto the new contract the laws of the host state are applicable without any problem.
- In case of „split contract“ situations, two legislations are applicable on the respective employment contract that they govern.
- An employee works, lives and is employed **in the same country**, domestic law decides to which extent **foreign circumstances** might play a role in the application of domestic laws.
- In cases of takeovers or mergers across the border without an actual change of the place of work, nothing changes.

²⁶⁴ Spieler, EuZA 2012, 169, 177

- In case of a transfer of an undertaking with an actual replacement of the place of work across a border, the national laws of the home country decide whether the employment contract is transferred across the border or not in the sense of the TUD. In case it is, it becomes subject to the new legislation after the transfer due to Rome I.

Bibliography

- Münchener Handbuch zum Arbeitsrecht
3rd edition
Munich 2009
- Arnold, Christian;
Bauer, Jobst-Hubertus Auf „Junk“ folgt „Mangold“ - Europarecht verdrängt
deutsches Arbeitsrecht
In: Neue Juristische Wochenschrift (NJW) 2006, 6
- Ascheid/Preis/Schmidt Kündigungsrecht
4. edition
Munich 2012
- Blanke, Thomas Die Entscheidungen des EuGH in den Fällen Viking, Laval
und Rueffert – Domesticizierung des Streikrechts und
europaweite Nivellierung der industriellen Beziehungen,
Oldenburg 2008
- Chalmers, Damian;
Davies, Gareth;
Monti, Giorgio European Union Law: Cases and Materials
2nd ed.
Cambridge, 2010
- Craig, Paul;
De Burca, Grainne EU Law: Text, Cases, and Materials
5th edition
Oxford 2011
- Däubler, Wolfgang Instruments of EC Labour Law,
In: European Community Labour Law: Principles and
Perspectives, p.151 ff.
1996
- Davies, Anne One Step Forward, Two Steps Back? The Viking and Laval
Cases in the ECJ,
In: Industrial Law Journal, Vol 37, No. 2, p. 140
2008
- Deinert, Olaf Neues Internationales Arbeitsvertragsrecht
In: Recht der Arbeit (RdA) 1996, 339
- Drummonds, Henry H. Global employment law for the practicing lawyer
In: Lewis & Clark Law School Legal Research Paper 2010,
20
- European Labour Law
Network Thematic Report 2008: Challenges of Cross-Border
mobility

- Feudner, Bernd W. Grenzüberschreitende Anwendung des § 613a BGB?
In: Neue Zeitschrift für Arbeitsrecht (NZA) 1999, 1184
- Forschner, Benedikt Europarecht und nationale Rechtsordnung: "Mangold" in
geklärtem dogmatischem Kontext,
in: Zeitschrift für das Juristische Studium (ZJS) 2011, 456
- Franzen, Martin Niederlassungsfreiheit, internationales
Gesellschaftsrecht und Unternehmensmitbestimmung
In: Recht der Arbeit (RdA) 2004, 257
- Fuchs, Maximilian;
Marhold, Franz Europäisches Arbeitsrecht
2. Aufl.
Vienna 2006
- Fuhlrott, Michael Die Entwicklung des europäischen Arbeitsrechts
2011/2012
Arbeitsrecht Aktuell (ArbA) 2012, 337
- Gravenhorst, Caroline Kündigungsschutz bei Arbeitsverhältnissen mit
Auslandsbezug,
In: Recht der Arbeit (RdA) 2007, 283
- Hofmann, Alexander Noch einmal: Die Auswirkungen von „Rüffert“
In: Recht der Arbeit (RdA) 2010, 351
- Junker, Abbo Rechtsfragen grenzüberschreitender Betriebsverlagerung
In: Neue Zeitschrift für Arbeitsrecht (NZA) Beil. 2012, 8
- Junker, Abbo Auswirkungen der neueren EuGH-Rechtsprechung auf das
deutsche Arbeitsrecht
In: Neue Zeitschrift für Arbeitsrecht (NZA) 2011, 950
- Körner, Marita EU-Dienstleistungsrichtlinie und Arbeitsrecht,
In: Neue Zeitschrift für Arbeitsrecht (NZA) 2011, 258, 258
- Körner, Marita EU-Dienstleistungsrichtlinie und Arbeitsrecht,
In: Neue Zeitschrift für Arbeitsrecht (NZA) 2007, 233, 234
- Krebber, Sebastian Die Bedeutung der Grundrechtecharta und der EMRK für
das deutsche Individualarbeitsrecht
In: Europäische Zeitschrift für Arbeitsrecht (EuZA) 2013,
188
- Plagemann, Hermann Müncher Anwaltshandbuch Sozialrecht
4. ed.
Munich 2013
- Löwisch, Manfred Labour Law in Europe
In: Ritsumeikan Law Review No. 20, 2003, 101

- Lüttringhaus, Jan;
Schmidt-Westphal,
Oliver Neues zur „Einstellenden Niederlassung“ im europäischen internationalen Arbeitsrecht
In: Europäische Zeitschrift für Arbeitsrecht (EuZA) 2012, 139
- Moll, Wilhelm (publ.) Münchener Anwaltshandbuch Arbeitsrecht
3. Auflage
Munich 2012
- Nielsen, Ruth European Labour Law
Copenhagen 2001
- Raif, Alexander;
Ginal, Jens Betriebsübergang bei Verlagerung ins Ausland nach der BAG-Rechtsprechung
In: Gesellschafts- und Wirtschaftsrecht (GWR) 2013, 217
- Riesenhuber, Karl Europäisches Arbeitsrecht,
Heidelberg 2009
- Rönmar, Mia Laval returns to Sweden: The Final Judgment of the Swedish Labour Court and Swedish Legislative Reforms
In: Industrial Law Journal, Vol. 39, No. 3, 2010, 280
- Schiek, Dagmar Europäisches Arbeitsrecht
3.ed.
Baden-Baden 2007
- Schmidt, Marlene The Principle of Non-discrimination in Respect of Age: Dimensions of the ECJ's Mangold Judgment
In: German Law Journal Vol.7, 505
- Schneider, Gero Einfluss der Rom I-VO auf die Arbeitsvertragsgestaltung mit Auslandsbezug
In: Neue Zeitschrift für Arbeitsrecht (NZA) 2010, 1380
- Schubert, Jens;
Jerchel, Kerstin Das europäische Arbeitsrecht (2009/2010),
in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2010, 687
- Schubert, Jens;
Jerchel, Kerstin Die Entwicklung des europäischen Arbeitsrechts 2011/2012
in: Europäische Zeitschrift für Wirtschaftsrecht (EuZW) 2012, 926
- Thüsing, Gregor Europäisches Arbeitsrecht
2nd ed.
Munich 2011

- Thüsing, Gregor Noch einmal: Was folgt aus „Rüffert“?
In: Neue Zeitschrift für Arbeitsrecht (NZA) 2009, 183
- Sagan, Adam;
Willemsen, Heinz Josef Die Auswirkungen der europäischen Grundrechtecharta auf
das deutsche Arbeitsrecht
In: Neue Zeitschrift für Arbeitsrecht (NZA) 2011, 258
- Zelfel, Anja Der Internationale Arbeitskampf nach Art. 9 Rom II-
Verordnung,
Frankfurt a.M. 2011
- Ziegenhorn, Gero Kontrolle von mitgliedstaatlichen Gesetzen „im
Anwendungsbereich des Unionsrechts“ am Maßstab der
Unionsgrundrechte
In: Neue Zeitschrift für Verwaltungsrecht (NVwZ) 2010,
803