European Public Services Briefings 5

EU Reform of transnational Posted Workers law and the place of working rights and collective agreements within the Single European Market

The Posted Workers Enforcement Directive and the 'Monti II' Regulation

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Introduction

The use of posted workers[1] represents a mere fraction of the European labour market. Nonetheless, the issues arising from their use and regulation has been central to debates concerning the relationship between the European Social Model and the Single European Market. In the 1990s, EU posted workers law - that regulates the temporary 'posting' of workers working outside their member state of origin - was laced by the intention to balance the EU's social and economic goals. Thus, it was framed by the concept of 'fair competition'. Come the new Millennium and EU institutions decide on a change of course. Led by the European Court of Justice (ECJ), EU law in this area was no longer defined by a principle of balance and was radically altered courtesy of the application of the 'country-of-origin-principle' to posted workers. This change reversed the essential logic of the 1996 Posted Workers Directive and, in effect, annulled a core feature of it. This seriously undermined the role of collective action and collectively bargained wage agreements in EU internal market law. Threats of social dumping through 'regulatory competition' prompted a response from EU policy-makers. This response — provided by a new Regulation authored by Mario Monti[2] (dropped in September 2012) and Commission proposals for a Posted Workers Enforcement Directive are examined below in the European context.

1. Posting of Workers in a Single European Market: an introduction

The temporary posting of workers to a member state other than that to which they are based has brought together a complex set of social, economic and regulatory issues within EU law. The phenomenon of the cross-border *services* sector firm – the usual vehicle for a posted workers' posting – is not a common one in the EU. Part of the reason for this stems from the inherent immobile nature of services in comparison to goods, the latter tending to be of a tangible nature and able to be transported across borders to be consumed. Services, however, are usually consumed

[1] 'Posted Workers' are externally contracted workers employed temporarily to for a period no longer than 90
[2] Author of the 2010 Single Market Act that outlines the EU's long-term agenda for the Single Market

where they are provided. This creates inherent obstacles for the trade in services when approaching the issue of a Single European *Services* Market (Höpner and Schäfer 2007).

Attempts to extend the free movement of services in legal and economic terms have had limited success. The development of the Single Market has been marked primarily by the creation of a single European market in goods, courtesy of the activism of the European Court of Justice[3] over many decades, with modest gains in the fields of capital and persons[4]. In recent years however the trade in services has been the subject of increased regulatory activity at the European level. The 2006 Services Directive is the notable example of the EU's intention to create a highly liberal model for a Single Market in Services[5]; an agenda mirrored ECJ's own judicial activism in posted workers and cross-border healthcare law[6].

Posted workers law was first placed under the Treaty's free movement of services provisions in the 1990s. Free movement of persons provisions are in the background, but are displaced by EU services law as the applied provisions. This is due, in part, to the role of a cross-border firm as vehicle for a posted worker's mobility or 'posting'[7]. Despite the use of contracted posted workers not forming a significant part of the European economy, this use of temporary, externally sourced labour has, however, seen a marked increase. With this knock-on effects to national regulation, through labour and procurement and company law, are unclear.

The extended use of subcontracting and contracting out practices in a greater variety of sectors has aided this. The construction industry is the sectoral venue where these practices have flourished the most, although greater use of such practices in hospitality, manufacturing and utilities sectors has also emerged, with the spectre of migrant labour being at the forefront in most of these cases. Heated policy debate emerged in this area after the eastward enlargement of the EU. As twelve new countries joined between 2004 and 2007, the socioeconomic balance of the EU changed markedly. The significant, albeit variegated, migration from east to west was classified under EU free movement of *persons* provisions in the Treaty, but some controversial examples of posted workers moving from the new EU-12 to the old EU-15 to work on construction projects have presented new issues.

Pre-enlargement EU law was not ill-equipped to deal with these problems, but the Commission and the Court, instead following the balanced approach of 'fair competition' adopted in the 1990s, took a new and harder-line pro-market approach that attempted to apply a country-of-origin (COO) rule instead of the host-state rule that framed the 1996 Posted Workers Directive (PW96').

[3] See the famous *Dassonville* and *Cassis de Dijon* cases

[4] The four freedoms of the Single European Market provide the free movement rights in fields of goods, services, capital and persons with the right of establishment an adjunct right connecting services and persons provisions.

[5] Post Lisbon Treaty (TFEU) Free Movement of Services is provided by article 56. Pre-TFEU this was article 49 and is referred to as such in much of the current literature and recent legal cases.

[6] A. Morton (2011). 'European Public Services Briefing 3: A Single European Market in Healthcare: The impact of European Union policy on national healthcare provision'. *The European Services Strategy Unit* Research Report.

[7] In light of what's elaborated upon below, this placing of posted workers law squarely under free movement of services law creates a conflict with the guiding principle - non-discrimination - of EU free movement of *persons* law (J-E Dølvik and J. Visser 2009)

This shift presented a 'choice of laws' scenario that took the decision of choice away from national regulators, to apply their own rules to mobile firms[8], to the mobile firm who could choose which national set of regulations to observe. This also presented raft of further issues including the use of 'letter box' companies. This entails a firm with its company registration set in a new member state, with a (perceived) lighter regulatory burden, and returning to its member state of origin through reemploying its staff under new rules.

This 'social dumping'[9] scenario has been contested by business who deny this scenario bears any resemblance to the real world. The answer is in reality a very complex one and there can be little doubt that a company's incentive to re-base it's formal registration depends on numerous factors such as the nature of the firm, its sector, its reliance on certain skills sources of capital. For firms that plough the public procurement and privatised industry markets however, the above scenario is entirely feasible, particularly if posting and re-posting workers within consecutive periods is itself viable.

The ECJ decisions in the *Viking* and *Centros* cases demonstrate that EU institutions are willing to use EU free movement law to make this 'letter box' practice legal, clearly citing this as a potential area to create competition in a European corporate ownership market, and through this, to liberalise services and labour markets. This was also the explicit agenda of the Commission in 2004, when it introducing its proposed Directive for Corporate Takeover Bids—only to have in watered down heavily. In one of many examples of incongruence, the proposals for the reform of the Posted Workers Directive do not seek expressly to promote this practice and in fact many rhetorical points are made throughout indicating the undesirable nature of such practices.

At a time when the future of the Single Market is being debated, the posted workers controversy has perhaps done more to frame the debate concerning its future path than anything else.

The European Commission has offered a two-pronged solution: **A Regulation authored by Mario Monti and a new 'Enforcement Directive' governing posted workers law**. The tone contrasts with the harder line neo-liberal approach that marked the 2004 draft of the Services Directive (and the Takoever Directive draft mentioned above) and the ECJ's new *Laval-Viking* line of case law. Together they claim to reconcile the conflict between national industrial relations practice and the Single Market crafted by the Court. Not getting off to a good start on this front, the Monti II Regulation bizarrely failed to recognise this conflict. The failure of the Regulation led to it being dropped in September 2012, leaving the EU's two-fold response to posted workers law reform missing one of its two fundamental components.

In a period that also brings the reform of the EU public procurement law – which has a direct bearing on questions of posted workers – it is important that these numerous issues above are mapped in a coherent European regulatory regime that national bodies and stakeholders can work with. At the time of writing it is not.

[8] As envisaged by the Rome Convention of 1980 from which the principles of national and European laws regulating posted workers was based

[9] Synonymous with references such as 'race-to-the-bottom' and identified as part of a 'regulatory competition' argument that has gained credence in recent times.

2. *'Fair competition' in the 1990s - Reconciling free movement principles with social rights*

The conflict between the social and economic dimensions expressed within the EU Treaty have presented themselves at several points in European integration's history. This has emerged over acquired rights (TUPE in the UK) and by a series of posted workers cases put before the ECJ in the early 1990s. The European Court of Justice (ECJ) delivered three key decisions, spearheaded by the *Rush Portuguesa* case[10] that later framed the 1996 Posted Workers Directive.

In reconciling free movement of services law with social policy concerns centring upon principles of worker protection the Commission placed the PW96' under the normative banner of 'fair competition'. Legal principles the ECJ laid down in its *Rush Portuguesa* line of case law[11] centred upon an obligation for mobile firms to adhere to the rules and norms of the country they are operating *in* rather than the state that they were established and coming *from*. This *host* rather than *home*-state rules logic included demands to adhere to both national labour law and national practices concerning collective agreements as laid down in national practice.

This mix of formal and informal rules makes the application of national 'rules' very complex. The ECJ's 1990s *Rush Portuguesa* line of cases presented facts involving firms pursuing contracts in France – a country with strong legal traditions in wage-setting. The formal nature of French employment regulation makes the determining of norms concerning employment conditions much simpler than the less formal and more complex bargaining-based regimes in operation elsewhere in the EU.

The PW96' provides an exhaustive list of those areas of employment rights that must be adhered to. This includes national rules providing maximum work periods, minimum holiday pay, minimum rates of pay, conditions of hiring out workers, health and safety, terms for pregnant women and maternity leave and respect for gender equality. Article 3(8) of PW96' addresses the crux issue of how a firm determines minimum rates of pay by providing means for it to determine a 'hard nucleus' of national rules that firms must apply, of which collective agreements formed part of my many EU countries.

In recognition of the considerable diversity of industrial relations systems in the EU, the ECJ provided the guidelines found in the PW96', for cross-border firms to cite and identify these legal *and* bargaining sources of regulation. This approach of the Court fits within a long-standing position that EU law must respect the role of collective agreements—a position underlined by the ECJ in 1998 in its *Albany*[12] decision where the Court dramatically ruled that the EU's four economic freedoms must not undermine institutions of collective bargaining that hold such totemic significance within the European Social Model.

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[10] *Rush Portuguesa C-113/89 (1990),* C-62 *Evi and Seco 1982),* C-43/93 *Van der Elst (1994)*

[11] This case laid down the essential principle that mobile firms must respect national labour laws *and* collectively agreed wage agreements and apply these to posted workers.

[12] C-67/96 *Albany (1999)*

This issue of transposition[13] is critical. The purpose of EU Directives – as supposed to Regulations – is to offer member states some discretion in shaping the demands of EU law according to national practice and norms. This was the purpose of article 3(8) above; to allow member states with differently organised industrial relations systems to transpose the Directive according to national quirks, norms and standards. The subject of transposition in particular was a sensitive one in Sweden in the aftermath of ECJ's *Laval* decision—a decision that took aim at the fundamental collective bargaining component of Sweden's industrial relations system and the role of collective action in providing this.

In the UK, no new legislation was introduced to implement the PW96'. Instead, a rearranging of some regulatory furniture was undertaken in recognition of the UK's comparatively limited means of non-legal wage-setting. In effect, the UK's national minimum wage – which is much lower than collectively agreement set wage levels – formed the hard nucleus after 1998. Controversial issues of the *Laval*-type seen in Sweden were to make an appearance in Britain in 2009 at oil and energy depots throughout the country. Although there was no direct EU involvement at Lindsey[14] or elsewhere, the spectre of EU law's neo-liberal turn in this area loomed large, with many making direct comparisons to *Laval* and *Rüffert.*

Despite the apparent intentions of EU institutions to create a fair balance between the economic goals of EU free movement law and social policy goals in the 1990s, the end result was a variegated and patchy outcome with national transposition taking different paths. The situation was to become much the murkier after the year 2000 and in particular after eastward enlargement in 2004.

3. Posted Workers and EU free movement of services law in an Enlarged EU: the European Court of Justice and the introduction of the country-of-origin principle

In 2004 the European Commission caused consternation with two new proposals for directives in the field of Services and Corporate Takeovers[15]. Both of these were indicative of a Commission agenda that was laced by an increasing bias toward neo-liberal, free market thinking, in stark contrast to the approach taken in previous eras where its liberalisation ambitions were tempered by other considerations. The first draft of the Services Directive in particular angered the European trade union movement, which galvanised its allies throughout EU member states and the European Parliament to gut the draft directive of its offending provisions.

[13] Transposition is the technical term used when European legislation is absorbed into national law

[14] At Lindsey in Lincolnshire, an Italian firm took up an ancillary contract the oil refinery. Agreed to abide by the 'Blue Book' collective agreement that covered the construction industry in the UK. Was found to have breached several parts of the agreement and was accused of doing so on the crux issue of pay. Despite denying this, the evidence was fairly conclusive despite an ACAS report not willing to confirm this. The issue of hiring of local workers before posted workers also hung over the "British Jobs for British Workers" scandal that ensued.

[15] Directive 123/2006 and 2004/25

These provisions, spearheaded by the country-of-origin principle, entailed that a *home* country rules (country-of-origin) logic would determine EU law in a Single European Services Market and not the *host* country rules logic that framed the PW96. This draft directive also did not have an exemption for posted workers. This omission was remedied by an explicit exemption in the final 2006 directive as passed, reinstating the PW96s' role.

This was not the end of the matter. As described already, the ECJ – using free movement law providing the freedom to provide services and freedom of establishment[16] – reinstated the country-of-origin principle into EU Services law in its *Laval, Viking, Rüffert and Luxembourg* decisions. Although this shocked the European trade union movement and numerous academic lawyers, the ECJ did provide some prior indication of this coming *volte face*. In its *Wolff Muller* and *Mazzoleni*[17] decisions, the ECJ made clear its intent to rigourously apply justifications and proportionality principles in a manner it hadn't previously to national wage-setting norms that could restrict free movement.

The position of primacy the ECJ afforded to these principles, placing them above social considerations, did not however result in the undermining of any member states' labour relations system in the way the *Laval* line of decisions did. They did however, in hindsight, demonstrate a new ECJ approach that was not influenced by its 1990s jurisprudence; an approach that inform the *Laval, Viking, Rüffert* and *Luxembourg* decisions that were to come and *would* impact national regimes of industrial relations.

In December 2007 the Court delivered its *Laval* and *Viking* Decisions. The *Laval* case concerned the posting of workers by a Latvian company to a construction project in Vaxholm, Sweden. The *Viking* case was not a posted workers case, but brought with it an inherently mobile firm – a ferry company that plied international routes – that re-registered its vessel in a new member state (Estonia) to avoid labour regulations in Finland. The dismissal of *The Rosella's* Finnish crew was challenged by the transnational trade union, the International Transport Workers Federation (ITF), which ordered a series of primary and secondary strike action to force Viking Line to return the vessel to Finnish status and re-apply Finnish labour law and re-hire the Finnish crew.

In *Laval,* similar strike action seen in the *Viking* case was ordered by Swedish construction sector unions to force the Latvian company to either apply an existing sectoral collective agreement or enter into negotiation. Laval – and its subsidiary, *Baltic* – refused to comply with either demand, proceeding to pay its posted workers 40% less than the Swedish norm as determined by the existing collective agreement covering the construction sector in Sweden. Because the Court found that the demand to adhere to a pre-existing collective agreement was in breach of EU free movement law, the collective action brought to enforce it was found to be in breach of EU law as well.

The details of the *Laval* case would have been dealt with perfectly suitably by the ECJ's 1990s approach to posted workers law; balancing the integrity of national collective bargaining institutions with internal market law. Instead, the ECJ essentially determined the Swedish

[16] At the time Article 43, now article 49. Free movement to provide Services rights, again, was 49 now 56)
[17] *C-165/98, Mazzoleni, (2001) and 60/03 Wolff & Muller (2004)*

collective bargaining system – and the right to industrial action to enforce it – as an unacceptable hindrance of European free movement rights (Malmberg and Sigeman 2008).

The 2008 *Rüffert* case extended the *Laval* logic a step further. Laval (Baltic) was not an original signatory to a collective agreement in that it refused to adhere to one already in existence. In *Rüffert,* a subcontractor took up part of a procurement contract, a contract that mandated the honouring of an existing collective agreement as agreed by a primary contractor. Honouring its new *Laval* logic, the ECJ decided that the forced observation of pre-determined wage levels constituted an illegal breach of free movement of services law and could not form part of a publicly procured contract as regulated by EU public procurement law.

The implications of *Rüffert* are potentially more serious than *Laval* and beg the following question*:* If a procurement contract is signed, what in legal terms is that document worth if other parties caught by it (like a subcontractor picking up ancillary contract) can so easily avoid honouring it? This creates considerable uncertainty not just for labour law and labour relations, but also for that increasingly entangled interface between labour law, contract law public procurement and - in light of the company *Centros* case - company law. Moreover, developments such as these at the European level have only served to further complicate an already complex regulatory nexus between the national and European levels.

Given the overlap, the above applies to the current proposals for EU public procurement law reform and its relationship with Posted Workers reform. The two should be congruent, especially concerning issues of supply chains within procurement contracts. This is perhaps as important as reaffirming the legal right to strike and the role of collective bargaining, or at least providing sufficient legal remedies for regulators and stakeholders.

It is important for reforms to address the 'letter box' issue (*Viking* case), whereby firms reregister in another European jurisdiction to avoid adhering to regulations they deem burdensome in their country-of-origin. In combination with previous ECJ case law – spearheaded by the aforementioned *Centros* case – there is concern such practices could shape the future direction of the Single Market.

4. The EU response: The Posted Workers Enforcement Directive and the Monti II Directive

One conundrum presented the ECJ's above post-enlargement case law was its stark contrast with the PW96 that its own earlier case law helped shape. The Court's jurisprudence in effect constituted the virtual annulment of the directive, or at least in terms of the directives article 3(8). This provides the following preliminary conclusion: if the Court can simply (in effect) overturn a directive what is the purpose of producing more regulatory text to 'reform' EU law in this area?

The response has been **a new Regulation and a new 'Enforcement' Directive**. The questions of legal certainty raised could be remedied, at least in part, by providing the tighter regulatory definition that a Regulation is designed to bring and avoid patchy adherence of a Directive at the national level. **The 'Monti II Regulation' sought to address the issue of**

industrial action presented by the *Laval* and *Viking* cases and reconcile these with EU free movement law. As indicated above, it failed to do this and has been withdrawn by the Commission following the use of the new 'yellow card procedure' employed by national parliaments through the Committee of the Regions (CoR) under the subsidiarity provisions on the Treaty.

The Enforcement Directive (thereafter **PWE12**'), contrary to prior concerns that the Commission was to embody the ECJ's recent controversial approach, is framed by a rhetorical tone reminiscent of the original PW96'. Plus, it provides several new innovations that claim to address many of the issues presented by procurement supply chains and collective agreements.

The PWE12' uses **access to information and administrative assistance** rules to provide for the 'enforcement' of those legal principles enshrined in both the old and new Posted Workers Directives. Access to information for cross-border firms is to be made available through the Internal Market Information system (IMI) and places new demands on member states to ensure that requisite information is forthcoming. Crucially, the responsibility is placed upon member states to ensure that article 3(8) is drafted properly in national law.

This presents, as it did with the PW96, the critical issue of how member states absorb a piece of EU law. This was powerfully presented in the *Laval* case, where the implications for Sweden's autonomous collective bargaining system were serious (Malmberg and Sigeman 2008). Article 3(8) of the PW96' exhaustively spelt out those means in which national authorities could define their national rules for foreign countries to observe. By implication, it appears to be the Commission's view that Sweden did not make full use of these provisions in the PW96'.

Whether inadequate transposition as it issue or not, and any aggressive intervention by the ECJ in these questions notwithstanding, *Laval* did prompt some observers and academics to place part of the blame at Sweden's own door for the problems . It should be recalled that the ECJ applied a similar *Laval*-like logic in *Rüffert,* where there is little ambiguity about the legal standing of the relevant collective agreement and its extension no such related concerns with the German transposition of the PW96'. In short — these problems mostly are ECJ-made, so targeting reform efforts at the national level misses a major part of the problem.

The heavy onus the Commission has placed on national level enforcement points to a Commission view that the either the ECJ was not culpable, member states need to do better to mitigate against the effects of ECJ oversight and better enforce the spirit of PW96', or simply that they are on their own in trying to do so. This might even appear to be a tacit admission on the part of the Commission that it cannot shield its own interpretation of EU posted workers laws from the ECJ's activism in this area; therefore member states must do their upmost to do this themselves.

The issue of national level enforcement is much clearer on collective *action* than it is with of collective *bargaining* in regards to the Monti II Regulation's drafting within PWE12'. It states that collective action shall not be assumed to constitute a breach of free movement law; either regarding services or the freedom of establishment. However, the previous paragraph also

raised the pivotal questions as to how 'ECJ proof' new EU legislation will be. Although Regulations do have an advantage over Directives in terms of legal certainty, it would nonetheless have been interesting to see how the ECJ views the principles of a Regulation when embedded within a directive—particular in light of the dismissive regard it treated PW96'. Given the withdrawal of the former; we will now not know.

The new PWE12' does appear to offer substantive provisions concerning **supply chains in procurement** contracts and 'letter-boxing' practices. The Directive demands extended liability along procurement supply chains so that ancillary contracts are covered by the same employment conditions as the primary contractor. It does this principally by making the latter liable in the event of a breach. This would appear to overturn the ECJ *Rüffert* decision and reassert the German rules this decision had overturned.

This does need to be viewed against a double backdrop. Firstly, the responsibility is once again upon member states to articulate this within their transposing legislation. Second, there is an alarming lack of reference to these supply chain in the Commission's own 2011 proposals for EU public procurement law reform; and lastly, nothing *explicitly* contradicts the essential logic of the ECJ's *Rüffert* decision on the issue on enforceable social standards.

Given that EU public procurement regulates so many of these types of public contract, it is imperative to make these two pieces of European legislation congruent. In terms of underlying ethos, and to those specific points like these concerning social considerations in public contracts, these two proposed reforms suffer from a poor degree of mutual fit. This is a critical flaw in approaching reform in both posted workers and procurement.

Although the inclusion of a specific provision outlawing 'letter-box' practices is welcome, a similar problem of compatibility and congruence emerged when looking into other areas of EU law. Mention has already been given to the *Centros* and *Viking* cases where companies re-registered themselves in a new member state to circumvent national regulations deemed burdensome. The new proposals do not clarify if the principles applied in these cases are thereby null and void, perhaps it should be viewed as given in light of the clear statement of letter-boxing's illegality within the PWE12'. This has not been addressed in the proposals or its supporting documents. Nor has the question as to how procurement practices could be employed in conjuncture with letter-boxing to embark on a strategy of jurisdictional exit-in-order-to-re-enter—commonly understood as definitional of 'social dumping'. Commission policy as published, is rather vague.

These are crucial omissions given the ambiguity of current EU procurement law. This could be seen as a deliberate attempt to leave loopholes on the part of the Commission, hoping that cross-border firms exploit such regulatory gaps to foster their mobility in the name of the Single Market. It cannot be denied that incentives are present in, for example, the construction sector for firms that pick up regular temporary contracts to base themselves legally elsewhere and reduce labour costs to make their bidding for contracts more competitive.

5. Conclusions

There can be little doubt that the ECJ's interpretative turn on the issue of posted workers is the principal rationale for reform. The reforms attempt to square a desire to placate long held political allies of the European project, like the trade union movement, with the decisions of the ECJ. The Commission has failed to square this circle, as evidenced by the rejection of the Monti II regulation by national parliaments by virtue of the "yellow card" procedure[18].

In rejecting the proposal, national parliaments have offered a sharp rebuke to a Commission Single Market agenda as well as its EU posted workers reform. Given that much of the PWE12' was premised on Monti II, it will have to be revised. This must be seen as an opportunity to correct several problems. Namely:

- *To reject firmly the notion that respecting national practice (in terms of norms or laws) can be balanced against the ECJ's new jurisprudence. It can't. The ECJ's case law must be de facto overturned and the country of origin principle with it.*
- *A greater congruence between Posted Workers and EU Public Procurement reform must be an explicit goal. It currently is not. Given the role of procurement contracts in posted workers — as controversially demonstrated by the* Rüffert *case — it is important this is achieved.*
- *Following on from the recent use of the 'yellow card' procedure, whose introduction has enabled for the first time the bonafide role of subsidiarity in EU law, the subsidiarity principle must be one of the legal bases for both posted workers and public procurement reform. Engendering greater flexibility at the national level and respecting greatly different norms and traditions in the sphere of national industrial relations is essential.*

Returning to the 1980 Rome convention, International Labour Organisation (ILO) conventions — on core labour standards in procurement, collective bargaining and industrial action[19] would be a good start to embarking upon the above.

Glossary

EU – European Union
ECJ – European Court of Justice
ILO – International Labour Organisation

[18] A new innovation created by the Lisbon Treaty whereby national parliaments can respond to Commission proposals collectively through the Committee of the Regions

[19] ILO convention number 87, 98 and 94 respectively

TUPE – Transfer of Undertakings and Protection of Employment
PW96' - Posted Workers Directive 1996
PWE12' - Posted Workers Enforcement Proposed Directive 2012

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26. ***Portugaia Construções c-164/99*** *(2002)*
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28. ***Laval c-341/05*** *(2007)*
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