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The freedom to *receive* trade union services: an additional stepping stone for enhancing worker protection within the EU internal market?

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Abstract

This article examines the extent to which the fundamental freedom of the internal market to receive trade union services in a different Member State could be relied on to enhance labour protection within the European Union. Arguing that Article 56 TFEU and the 2006 Services Directive in theory can at least play a basic role in this regard, the article offers an overview of the scope and limits of the freedom to receive services in this context. The analysis also assesses the extent to which the cross-border receiving of trade union services could be exploited further as an additional means further to contribute to the realisation of a more social Europe

Keywords

Trade unions, workers, EU internal market, freedom to provide and receive services, social policy

Introduction[1]

The question of the extent to which EU law can empower workers or their trade union representatives to use the fundamental freedoms of the internal market to their advantage seems to have

1. I am grateful for comments from Dr. Ewan McGaughey (King's College, London) and Zoe Adams (University of Cambridge) on an earlier draft of this article.

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been neglected largely in ongoing debates on the need for a more social Europe.[2] In the wake of the Court of Justice of the European Union's controversial *Viking*[3] and *Laval*[4] judgments, an impressive amount of literature[5] has indeed and above all projected the EU internal market generally as giving way to social dumping and to setting aside the action and collective bargaining powers of trade unions.[6] The current European Commission also seems to have taken on that rhetoric, highlighting the dangers a pure free cross-border movement of workers would bring to a social Europe.[7]

Despite the veracity of these claims, this article also respectfully submits that focusing exclusively on the negative consequences fails to take into account other features of EU internal market law that have the potential more directly to empower the workforce. In that context, the possibility granted by EU law to workers (or their representatives) to look for and *receive* better organised or more developed assistance services from a trade union established in another Member State may constitute an additional starting point for further reflections on how EU law could contribute to a more social Europe.

On the basis of that starting point, this article examines the extent to which the freedom to receive cross-border services as recognised by Article 56 TFEU creates opportunities for workers to solicit cross-border worker protection from trade unions in another Member State. The article will examine the extent to which the EU internal market law allows a trade union established in France to provide assistance or counsel to a Polish trade union representing Polish workers intending to strike or whether Irish workers may solicit the help of a Belgian trade union to take part in collective bargaining negotiations. In doing so and in contrast with the dangers of a free movement approach highlighted generally, the article will take the well-known features of EU free movement law as a starting point, not to abandon social protection regimes of the Member States but rather to reinforce them throughout the EU internal market. Although one's first hunch may be to consider those situations rather improbable, given the generally perceived national embedding of both labour law and trade unions' interests, it will be shown that EU internal market law does not

2. For an example in that respect, D. Schiek, L. Oliver, C. Forde and G. Alberti, 'EU Social and Labour Rights and EU Internal Market Law', Report prepared for the European Parliament, September 2015, available at http://www.europarl.europa.eu/RegData/etudes/STUD/2015/563457/IPOL_STU%282015%29563457_EN.pdf.
3. Case C-438/05, International Transport Workers' Federation and Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti, EU: C:2007:772.
4. Case C-341/05, Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avdelning 1, Byggettan and Svenska Elektrikerförbundet, EU: C:2007:809. See on those judgments, F. Hendrickx, 'Trade union rights in a free market area: the EU experience in Laval and Viking' in R. Blanpain, W. Bromwich, O. Rymkevich and S. Spattini, *The modernisation of labour law and industrial relations in a comparative perspective,* Alphen a/d Rijn, Kluwer, 2009, 66-71.
5. For an overview of relevant literature, see M. Freedland and J. Prassl (eds.), *Viking, Laval and Beyond, Oxford, Hart*, 2015, 390 p.; as well as A. Defossez, *Le Dumping Sociale dans l'Union européenne*, Brussels, Larcier, 2014, 660 p. and references included therein. In the context of the posting of workers, see M. Rocca*, Posting of workers and collective labour law. There and back again*, Antwerp, Intersentia, 2015, 388 pp.
6. See on that imbalance, F. De Witte, 'The architecture of a "social market economy' in P. Koutrakos and J. Snell (eds.), *Research Handbook on the Law of the EU's Internal Market*, Cheltenham, Edward Elgar, 2017, 117-138.
7. The Commission currently envisages that further extending free movement possibilities for workers to move and for businesses to expand abroad may have a negative impact on the social protection regimes in place; it therefore seems to favour more directly some kind of harmonisation. See Commission, the 26 April 2017 Reflection paper on the social dimension of Europe, available at https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-social-dimension-europe_en.pdf, 26.

exclude this possibility automatically and entirely. As a result, the freedom to receive trade union services could be considered a useful additional starting point for a European Commission further seeking to contribute to the realisation of a more social Europe.[8]

Section 2 of this article will first of all revisit the freedom to receive cross-border services case law, setting the scene for an analysis of its relevance to trade union services. Although attractive in theory, section 3 will establish that the scope of the freedom to provide services only allows for limited openings to be made in cross-border trade union services reception, most notably because it remains difficult to 'receive' certain trade union services delivered in another Member State. However, given the uncharted potential of this freedom to receive, section 4 dares to look forward as to how this freedom could be relied on nevertheless as a way to unlock the European Commission's aim to also take cross-border social protection more seriously. Although this approach is not currently envisaged explicitly in the more social Europe strategy of the Commission, its potential deserves at the very least to be considered. In doing so, the article above all hopes to plant a seed that will steer debates on this topic in a clearer direction.

At the outset, the rather narrow focus of this article deserves to be emphasised, if only to avoid any misunderstandings on how its argument would like to contribute to the on-going debates on the social dimension of EU internal market law. The article is not claiming that enhancing the freedom to receive services is the only and therefore necessary way forward for a Union aiming to combat instances of social dumping that arise from the inherent imbalances in the current internal market setup. It only seeks to analyse the extent to which that freedom – traditionally associated with an approach only aimed at destroying labour protection regimes – could also be conceptualised as a vehicle for workers to take matters into their own hands and choose a trade union from another Member State to offer its services, benefiting from more extensive services or labour protection tools of that union. Asking that question at the very least opens up a debate on whether such a possibility to receive trade union services could add another layer to reconcile the need for a more social Europe and the free movement approach on which EU internal market law has been built.

The freedom to receive services in EU internal market law

The freedom to provide services is guaranteed by Article 56 TFEU. According to the Treaty, any restriction on the free provision of services is to be prohibited, unless those restrictions are justified by overriding reasons in the general interest or Treaty derogations that are invoked in a necessary and appropriate fashion.[9] The 2006 Services Directive refined that framework, restricting the ability of Member States to impose authorisation or other obligations on providers established in another Member State.[10] The Directive in principle is also applicable in relation to trade union services.[11]

8. See for an overview of initiatives already taken by the current Commission in that respect, https://ec.europa.eu/commission/sites/beta-political/files/social_dimension_of_europe_overview_of_initiatives_en.pdf.
9. See also C. Barnard, *The Substantive Law of the European Union. The Four Freedoms*, Oxford, Oxford University Press, fifth edition, 2016, 291.
10. Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the Internal Market, [2006] O.J. L376/36 (hereinafter referred to as the Services Directive).
11. Article 2 of the Directive only excludes services of temporary work agencies (e) and (j) social services relating to social housing, childcare and support of families and persons permanently or temporarily in need which are provided by the State, by providers mandated by the State or by charities recognised as such by the State. Trade union assistance services do not fall in those categories.

As a matter of EU internal market law, anyone offering a service should have access to the recipients established in another Member State by actively moving to another Member State.[12] Expounding on that basic starting point, the Court of Justice of the European Union's case law focused on what should be considered a service. According to the case law status quo, any service that can be provided as a professional activity and which is offered for a small fee, even when paid for indirectly by a third party to the service provider, will constitute a service within the meaning of the TFEU.[13] As a result, State-reimbursed or 'directly paid for' hospital services have been considered services, as have private education services.[14] In the same way, semi-professional sporting games have been considered as enabling the provision of services.[15] More related to the theme of this article, the posting of workers in a different Member State, in return for remuneration, also falls within the scope of EU law's definition of services.[16] The absence of any kind of remuneration, however small, means a service is not being offered according to the Court of Justice.[17] As a result, services offered to the general public and paid for by the public purse – most notably public education – have continued to be excluded from the scope of EU free movement law.[18] It is against this background that one could envisage the freedom also to provide trade union services normally provided for remuneration.

Articles 56 TFEU does not refer explicitly to the freedom to receive cross-border services by actively soliciting a service provider in another Member State. The Court nevertheless considered the existence of a more 'passive' freedom to provide services, i.e. having to accept service recipients coming from another Member State. In *Watson,* it held that Article 56 provides 'that restrictions on [. . .] the freedom to provide services within the Community shall be abolished by progressive stages which shall be completed by the end of the transitional period. [That provision], which may be construed as prohibiting Member States from setting up restrictions or obstacles to the entry into their territory of nationals of other Member States, [has] the effect of conferring rights directly on all persons falling within [its ambit]'.[19] Referring to obstacles to the entry into their territory of nationals of other Member States, the Court did not seem to exclude that service recipients would travel to another Member State in order to receive a service there.

The Court indeed confirmed this more explicitly in its *Luisi & Carbone* judgment: '[i]n order to enable services to be provided, the person providing the service may go to the Member State where the person for whom it is provided, is established or else the latter may go to the State in which the person providing the service is established. [This second situation] is the necessary corollary thereof, which fulfils the objective of liberalizing all gainful activity not covered by the free movement of goods, persons and capital'.[20] In that case, individuals wanted to travel abroad to

12. Case 33/74, *Van Binsbergen*, EU: C:1974:131, para 14.
13. S. Enchelmaier, 'Always at your service (within limits): the ECJ's case law on article 56 TFEU (2006-11)', 36 *European Law Review* (2011), 615.
14. See Case C-159/90, *The Society for the Protection of Unborn Children Ireland Ltd v Stephen Grogan and others*, EU: C:1991:378, para 20.
15. Joined Cases C-51/96 and C-191/97, *Christelle Deliège v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo* (C-51/96) and *François Pacquée* (C-191/97), EU: C:2000:199, para. 56.
16. Joined Cases 286/82 and 26/83, Luisi and Carbone v Ministero del Tesoro, EU: C:1984:35, para 16.
17. Case C-281/06, *Hans-Dieter Jundt and Hedwig Jundt v Finanzamt Offenburg*, EU: C:2007:816, para. 33.
18. Case 263/86, *Belgian State v René Humbel and Marie-Thérèse Edel*, EU: C:1988:451.
19. Case 118/75, *Lynne Watson and Alessandro Belmann*, EU: C:1976:106, para. 12.
20. *Luisi and Carbone*, para. 10.

receive medical treatment and other services there. The Court confirmed that this situation sufficed to bring those individuals' actions within the scope of the EU free movement of services provisions.[21]

In its subsequent case law, the Court has acknowledged the existence of specific situations in which the freedom to receive services could be invoked. Those cases have focused essentially on medical treatment, broadcasting and non-medical tourism.[22] The categories of cases in which the freedom to receive services has been invoked demonstrate the key features of this 'corollary' free movement right. The Court makes clear that one has the right *temporarily* to move to another Member State to go and receive services there. Actions falling outside the scope of this freedom are situations in which a person moves to another Member State to establish residency there in order to receive services for an indefinite period.[23] The Court's tourism cases show that the specific nature of the service to be offered in the other Member State is not in itself important. Indeed, the freedom can be invoked whenever individuals travel abroad to receive a bundle of services related to their tourist activities.[24] In relation to medical services, the Court confirmed that the freedom to receive services also covered cross-border travel to receive hospital treatment, even when those services are paid for normally by national social security or public health institutions.[25] Beyond tourism cases, the Court confirmed that the freedom to receive services encompasses all services that do not require the recipient to actually move to another Member State temporarily, yet consist in receiving a service through an online intermediate platform or by any other electronic means.[26] The Court agreed that, in order to receive such a service, individuals may have to obtain decoding or other devices enabling them to receive the service in another Member State. Member States' rules making the importation of such devices on their territory illegal are deemed incompatible with the freedom to receive services acknowledged in Article 56 TFEU.[27]

The Services Directive further acknowledges the existence of the freedom to receive cross-border services. First of all, Article 19 of the Directive maintains that Member States may not impose on a recipient requirements which restrict the use of a service supplied by a provider established in another Member State, in particular an obligation to obtain authorisation from or to make a declaration to their competent authorities and discriminatory limits on the grant of financial assistance by reason of the fact that the provider is established in another Member State or by reason of the location of the place at which the service is provided.[28] It thus follows that a service provider authorised to offer certain services in a Member State, may not be restricted to offer those services in accordance with the law of its establishment state to any recipient residing in another

21. *Luisi and Carbone*, para. 16.
22. Tourism (*Luisi & Carbone*, para; Case 186/87, *Ian William Cowan v Trésor public*, EU: C:1989:47); broadcasting (e.g. Case C-403/08, *Football Association Premier League*, EU: C:2011:631); medical tourism (see e.g. Case C-372/04, *The Queen*, on the application of *Yvonne Watts v Bedford Primary Care Trust and Secretary of State for Health*, EU: C:2006:325)
23. Case 196/87, *Udo Steymann v Staatssecretaris van Justitie*, EU: C:1980:84, para. 16.
24. Case 186/87, *Cowan*, para. 15.
25. Case C-372/04, *Watts*, para. 104 and references to earlier case law included therein.
26. See already Case 69/72, *SA Compagnie générale pour la diffusion de la télévision, Coditel, and others v Ciné Vog Films and others*, EU: C:1980:84.
27. Case C-403/08, *Football Association Premier League*, EU: C:2011:631, para. 125.
28. See also Recital 108, confirming that cross-border provision of services should include cases where services are provided at a distance and where the recipient travels to the Member State of establishment of the provider in order to receive services.

Member State yet travelling to that Member State. Article 20 further confirms this, imposing an obligation not to discriminate against the services recipient on the basis of his nationality or residence. The Directive does not exclude any services provided by trade unions from its scope of application, implying that the provisions and advantages of that Directive would in principle be invocable in the context of trade union services as well.

It follows from the foregoing that, despite the freedom to receive services having been conceptualised generally in terms of individuals travelling or shopping abroad, nothing would seem to impede, as a matter of principle, a workforce or a group of workers also relying on it actively to seek out a trade union established in another Member State. It could even be argued that this freedom could be invoked, at least in theory, following relocation to another EU Member State, to maintain specific or tailor-made trade union services offered by the trade union established in the Member State which the enterprise concerned had previously left. As a result, the freedom to receive services would enable workers to shop for unions and worker protection and the collective bargaining services provided by them.

Freedom to receive trade union services within the internal market?

It is clear from the previous section that EU internal market law allows individuals to travel to other Member States to receive services offered by a service provider established there or to receive services from that provider that do not require cross-border travel. It follows from the case law on Article 56 TFEU – and from the setup of the Services Directive – that a recipient coming from a 'host' state can travel to or require intervention from a service provider established in their own 'home' state and benefit from the services offered by the provider in that 'home state' and, in principle, in accordance with the regulatory requirements imposed on the provider in that 'home' state.[29] To the extent that trade unions provide services within the scope of Article 56 TFEU, it would seemingly be possible for workers or their trade union representatives in another Member State (their home Member State) to solicit and receive legal representation, counselling and industrial action assistance from trade unions established in another Member State (the host service provider).

The mere theoretical applicability of this freedom to labour-related situations does nevertheless raise four questions, the answer to which will determine the practical viability of relying more intensively on the freedom to receive cross-border services in this context. Those questions relate to the scope of the notion of the 'trade union service', the temporary nature of trade union services, to the ability to 'receive' specific trade union services, and the applicability of the law of the host Member State to received trade union services.

Trade union 'services'

In order to be able to rely on the freedom to receive cross-border union services, it has to be clarified whether trade union activities qualify as a service under EU internal market law. It can be

29. See H. Badinger and N. Maydell, 'Legal and Economic Issues in Completing the EU Internal Market for Services: An Interdisciplinary Perspective', 47 *Journal of Common Market Studies* (2009), 693-717, outlining why this principle did not make it to its fullest extent in the Services Directive. See also M. Ortino, 'The Role and Functioning of Mutual Recognition in the European Market of Financial Services', 56 *International and Comparative Law Quarterly* (2007), 322 for its application in relation to a particular type of services.

questioned, at least at first sight, the extent to which trade union activities are economic in nature and are normally provided for remuneration.

The main role of trade unions is to offer assistance to workers. At the same time, however, the nature and extent of such assistance services differs significantly among Member States, as does the legal status of those trade unions.[30] The significant diversity of trade union statuses and powers notwithstanding, trade union activities generally always comprise representation of the workforce and individual workers within the enterprise, offering guidance and training, intervening in disputes by offering legal assistance and offering specific counselling or ancillary services targeted at its members and/or their families.[31] Whilst some ancillary services may not necessarily be classified as economic, the core activities of representation and assistance generally comprise activities that could be classified as 'economic' in terms of EU law. An activity is 'economic' when it is not provided as a matter of public service, but when it is operated in market-like circumstances and when the provider of the service wants to profit from its activities.[32] It could be argued that the activities of trade unions are not aimed at making a profit for their shareholders in a way that the activities of a business entity would. Whilst that observation is indeed correct, the activity comes at a cost and is offered in a more or less competitive environment. If displeased with a certain trade union, workers can in principle opt for representation by another trade union. In addition, the Court in the past clearly has held that assistance activities performed by employment agencies could be considered a service as could hospital activities.[33] Whilst different from employment agencies or medical services, trade union activities also reflect the same indirect 'activities for remuneration' characteristics that seem to suffice for the Court to qualify an activity as a service.[34]

In addition, trade union representation activities are not provided free of charge, yet require the payment of a fee or some other form of compensation. Such a fee can either be paid directly by individual workers' contributions or indirectly through public funding or compensation schemes aimed at guaranteeing specific trade union activities, as long as it is paid in return for the particular service delivered. On the basis of these observations, nothing would seem to impede the qualification of the above activities as 'services' provided in the sense of an economy activity normally provided for remuneration.

One caveat would have to be introduced, however. In some Member States, trade unions have decision-making prerogatives, participating in the conclusion of sector- or nation-wide collective agreements or even the adoption of labour laws.[35] These activities are not aimed at providing a specific service to individual workers or the workforce in general, yet relate to participating in one specific feature of public authority. In fact, Article 62 *jo.* Article 51 TFEU excludes activities related to the exercise of official authority from the services scope. Despite a narrow interpretation

30. For a comparative overview of the status of trade unions in industrial relations law, see the volumes of the International Encyclopaedia of Laws on that subject; for an overview, see http://www.kluwerlawonline.com/toc.php?pubcode=IELL.
31. See e.g. https://www.nibusinessinfo.co.uk/content/role-trade-unions-and-their-representatives for a summary of the role of trade unions in the United Kingdom.
32. On the notion of economic activity, see N. Dunne, 'Knowing when to see it: state activities, economic activities, and the concept of undertaking', 16 *Columbia Journal of European Law* (2010), 427-463.
33. See Case 279/80, *Criminal proceedings against Alfred John Webb*, EU: C:1981:314.
34. For an analogy in the field of competition law, Case C-67/96, *Albany*, EU: C:1999:430, paras 79-87.
35. See, among others, in Belgium, where trade unions also have been institutionalised as decision-making bodies in labour law, C. Devos, M. Mus and P. Humblet, *De toekomst van het sociaal overleg*, Ghent, Academia Press, 2015, 170 pp.

of that notion by the Court,[36] it could be argued that policymaking activities or responsibilities in general decision-making, if engaged in by specific trade unions, relate to such official authority. Trade unions acting in such a capacity do indeed and effectively act as legislators of some kind and not as the providers of one or a bundle of economically structured services. As a result, participation in negotiations relating to such collective agreements would not necessarily amount to services that can be provided or received cross-border in accordance with Article 56 TFEU.

The temporary nature of trade union services

The freedoms to provide and receive services relate explicitly to situations where one party temporarily moves to another Member State, without obtaining permanent residency there, in order to provide or receive a service. In addition, services that can be provided at a distance do not necessarily require the movement of either provider or recipient. It can be questioned to what extent trade union services can be provided, as a matter of course, in a temporary way.

In terms of representation, trade unions generally play a rather permanent role in participating in salary and collective labour negotiations, which take place, if not on a permanent, at least on a recurring basis. In practice, however, their presence on site is only required for the negotiations, even though they can be contacted by the workforce at all times for advice. It could therefore be maintained that the organisation and negotiation activities engaged in by trade unions indeed fall within the temporary activities definition. They do not require a permanent residency by the trade union on-site but an availability whenever negotiations take place and union services are particularly required in this regard.

The same argument can be made for other assistance services – such as legal assistance, counselling and training, e.g. counselling on the inclusion of certain clauses in labour agreements. These services also constitute activities engaged in by trade unions that are completed on an on-demand and ad hoc basis.[37] As a result, they constitute particular services that are temporarily offered and therefore do not require a fully-fledged establishment. With the advent of e-services, many of those activities can also or additionally be performed using modern communication technologies.

It could be argued, however, that the 'package' of services offered by a trade union requires a more permanent presence or at least a permanent representation on-site. Although this argument is true, it does not prevent a member of the workforce from playing this role. Actual trade union employees – negotiators or counsellors – only come to the business premises when their intervention is required by the workforce. From that perspective, a trade union indeed offers a bundle of temporary services when providing its particular negotiation and assistance services to workers. The temporary element could thus in principle be fulfilled, as no permanent union residency is – in theory – required to deliver the union services to the workforce.

36. For a recent example, Case C-168/14, Itevelesa, EU: C:2015:685, para. 60.
37. One could argue indeed that the provision of counselling and training services always has to be the subject of either specific contracts or a framework contract that allows for the provision of specific services in specific circumstances. From that perspective, services provided always relate to activities workers asked for to be provided to them.

'Receivable' services?

In order to answer the original question (can workers be empowered to use the EU's internal market law to their advantage by soliciting the services of trade unions established in another Member State?) in an affirmative way, it is important to determine the extent to which trade union services can indeed be received in that other Member State. The case law on the free reception of services presupposes that a recipient travels to another Member State to receive a service from a provider there, without the latter moving to the home Member State of that recipient. Services requiring the provider to move are 'provided' rather than received, which will have an impact on the law applicable to those service transactions. The problem with the distinction between 'received' and 'provided' services is that both notions are difficult to define in general terms. Three examples can illustrate this.

Firstly, to the extent that negotiations on a collective labour agreement or salary scheme are not progressing, the workforce of a business unit established in Germany would like to go on strike. It seeks advice as to whether this is possible from a French trade union, which offers not only advice but also assistance in the practical and financial organisation of the strike. Even though the union itself will not be there, it has offered the amenities and instruments necessary for the workforce to e.g. block parts of the business unit. The provision of those amenities and instruments is not as such requiring a cross-border action from the trade union as they can be picked up by the workforce, yet it does generate some kind of 'presence', if only in terms of material, of a non-Member State trade union on the territory of the Member State concerned. The provision of this service does presuppose 'assistance' received but results in certain strike-related actions on the territory of another Member State. Questions can therefore be asked regarding where this service is offered and whether one can truly receive such services in another Member State.

Secondly, salary negotiations may take place between representatives of the workforce and management, the former being assisted by a trade union established in another Member State. To the extent that this trade union coaches or prepares the workforce for negotiation rounds, perhaps even by electronic means such as Skype, itself taking a passive and supportive role during those negotiations, it could be considered only to provide assistance from within its own Member State. At the same time, however, the trade union could also play a more active role in the negotiations, delegating one of its representatives to take part in negotiations with management on the territory of the State where the workers are employed. Could it do so on the basis of the negotiation mandate and features it has been granted by its Member State of establishment law (which may be more generous in terms of trade union negotiation powers)? It could be argued quite convincingly that such services are difficult to receive, without having the service provider move temporarily to another Member State.[38]

Thirdly, trade unions may have powers to represent workers or groups of workers in labour courts or disputes within a given Member State. A Finnish trade union would thus be able to represent workers and claim advantages for them in Finnish labour courts. In the same way, the Court of Justice confirmed in its *Sähköalojen ammattiliitto* judgment that a Finnish trade union could act on behalf of Polish workers posted in Finland, reclaiming advantages under Finnish

38. The Court of Justice appears to have alluded to that argument in a dicta to *Viking*. In para. 89 of that judgment; there it seems to confirm that the policy only to have trade unions established in one Member State to participate in collective negotiations in that State seems to be a justifiable restriction of the free movement rights recognised by EU law. As a result Member States could require trade unions to be established there to negotiate on their territories.

law.[39] What remains unclear in the wake of that judgment, however, is to what extent the Finnish trade union could offer the same services to Polish workers in Poland, the latter effectively receiving services from the Finnish trade union. A Finnish trade union may have special representation powers before Finnish labour courts or tribunals, powers which it may not have before Polish courts. In the absence of case law on the matter, it is not clear to what extent trade unions from other Member States may be able to exercise similar powers in another Member State and whether the freedom to *receive* services could be invoked in that context.

On the basis of the foregoing examples, it can be submitted that not all services offered by a trade union in terms of representation are easily receivable in another Member State. In order to negotiate with management and to make sure salary negotiations are running smoothly, a representative of the trade union will likely have to assist the workforce, by providing explicitly this representation service in the territory of the Member State concerned. The same goes for legal assistance in court proceedings. In those 'representation' situations, the trade union concerned would have to send an agent to the other Member State and thus have to provide the service itself on that territory. However, it could be speculated that the rise of new technologies may give rise to situations where such assistance could take place in a virtual setting. To the extent that the presence of foreign trade unions only requires devices enabling online meetings and negotiations, the EU freedom to receive services may come more directly into play. At this stage, it remains to be seen to what extent those developments will become a reality in the framework of trade union activities.

Other, and perhaps less intrusive, trade union assistance services would, on the contrary, appear to be more easily 'receivable' in a trade union's Member State of establishment. Trade unions established in one Member State (e.g. France) could indeed accommodate requests of workers to provide counselling services, to give advice on worker representation or to organise training sessions, all of which can take place on the territory of the Member State where the trade union is established, or can be organised by electronic means. Those services can actually be sought, to the extent that they are not offered sufficiently at the level of the Member State of establishment. They may even be sought by workers' trade union representatives calling upon the special expertise of colleagues from other Member States. As a result, those services are 'receivable' and can thus be enjoyed by workers actively looking for them and having set up devices to receive the services in their home Member State.[40]

The law applicable under EU free movement law when 'receiving' trade union services

Although it is clear that most trade union activities would constitute 'services' in the realm of EU law, which can be solicited from, or performed in, a different Member State, the rules on the applicable legal framework differ depending on whether the service is received in another Member State or provided in the workers' home Member State.[41]

A distinction needs to be made again between provided and received services. In cases where movement to the recipient's home State takes place, the services provider is actually actively providing the service in another Member State. In that case, his actions fall within the ambit of

39. Case C-396/13, *Sähköalojen ammattiliitto*, EU: C:2015:86, para. 26.
40. Case C-403/08, *Football Association Premier League*, EU: C:2011:631, para. 132.
41. In contrast with individual labour agreements, where private international law instruments determine the appropriate jurisdiction and applicable law, see for a recent example, joined cases C-168/16 and C-169/16, *Nogueira et al. v. Crewlink and Ryanair*, EU: C:2017:688.

Article 16 rather than Article 19 of the Services Directive. Article 16 allows the Member States to impose additional checks and conditions, although to a rather limited extent. Indeed, Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the principles of non-discrimination and proportionality and which are not justified by reasons of public policy, public security, public health or the protection of the environment.[42] In practice, this would mean that those services can be provided relatively easily, unless public policy reasons would dictate otherwise.[43] Given that the negotiation and implementation of collective bargaining of salary agreements could be considered – at least to some extent still[44] – a matter of public policy or public interest, Member States would retain a weapon with which to contest the active provision of those 'organisation' services on their territory. As a result, the provider may be subjected to other – and often more cumbersome – regulatory requirements, such as additional authorisations or declarations, that could be imposed by the workers' Member State in the public interest and in compliance with the Services Directive.[45]

Article 19 of the Directive confirms that individuals going abroad to receive services cannot be subjected to such requirements.[46] As a result, a workforce receiving those services in a home state or from a home state by electronic means will fall under the scope of that home state's legislation. To the extent that this legislation imposes or grants wider consultation and assistance powers to workers represented by trade unions established or licensed in that Member State, the workforce receiving those services in that trade union's Member State would be able equally to enjoy services received formally in the territory of another Member State.

It follows from the Services Directive that, whenever services are truly being received in a different Member State, the laws of the establishment state of the trade union will be applicable. This creates opportunities for a workforce looking to obtain better organised or greater assistance from a trade union. At the same time, the difficulties in determining when or whether a service would be received rather than provided may wipe out the advantage of more generous home state legislation when the workforce's Member State justifies limits on foreign trade union's powers on their territory in the public interest.

Room for the freedom to receive trade union services?

In principle, Member States may not impose restrictions on the cross-border reception of trade union services. From that perspective, it could be maintained that workers can indeed rely on the freedom to receive trade union services in another Member State, at least in order to obtain assistance offered by such trade unions. In doing so, they can also benefit from more far-reaching or beneficial social protection legislative schemes that would result in better counselling,

42. Article 16(1) Services Directive.
43. Specifically, Article 16(1)(b) Directive.
44. In Case C-319/06, *Commission v Luxembourg*, EU: C:2008:350, para. 65, the Court seems to confirm that Member States can no longer maintain that provisions concerning collective agreements, namely provisions which encompass their drawing up and implementation, should per se and without more be considered a matter of public policy for the purposes of that notion in the context of the posted workers Directive. A similar reasoning could be applicable also in the context of the Services Directive.
45. Article 16 Services Directive.
46. Article 19(1) Services Directive.

guidance or assistance opportunities for workers, as long as those activities can be considered a 'service' for the purposes of the Directive and Article 56 TFEU.

Our analysis nevertheless allows us to conclude that the theoretical possibility of receiving more generous services is rather limited in practice. The services offered by trade unions being plentiful, their traditional bread and butter representation activities generally require a presence in the Member State concerned. For more ancillary services, such as the offering of counselling, worker reintegration training or other supplementary worker guidance services, cross-border reception seems more likely to be a possibility. In those circumstances, it can be imagined that foreign trade unions have more expertise or experience in delivering such training, have developed specific modules or have been granted more extensive mandates to provide such training on their territory. EU internal market law would then allow workers – or their representatives – established in another Member State to solicit those training services in an attempt to improve the possibilities available to their workforce. Banking on the expertise built up in another Member State, workers from another Member State could receive training in that Member State or by online means.

Although some cross-border reception of trade union training or counselling services would thus be possible, it remains unclear, in the absence of any judicial clarification on the location of where trade union services are being performed, how flexible the freedom to directly receive cross-border trade union services is to be interpreted in the context of other services requiring a temporary physical or virtual presence in the territory of the workers' Member State. It is at this stage uncertain whether the application of the trade union's establishment state legislation would always be ensured, as Article 16 Services Directive allows Member States more directly to invoke public interest reasons for bringing such services under stricter Member State legislation. In fields as sensitive as collective bargaining or legal representation before labour courts or employment tribunals, this is likely to be the case. It is also not entirely impossible that trade unions are not truly keen on extending their operations into other Member States, given the roles they already (have to) play within their Member States of establishment.[47] Taking the reality of national labour and industrial relations law into account, it may indeed very well be that the free movement of trade union services remains limited in scope and scale.

What can therefore be inferred, at the very least, is that the freedom to receive services case law provides for some possibilities to receive, in a host Member State, more extensive or protective trade union assistance services that require no active physical presence in the workers' Member State. When facing a relocation of the business unit, a workforce could thus appeal to a trade union established in another Member State potentially with more experience or resources in this matter or capable of offering better guidance or counselling on what actions to take. Beyond counselling, however, the scope for receiving services is rather limited, given the territorial embedding of both labour law and trade unions themselves.

From freedom to receive to a more empowered workforce?

As previously concluded, workers or their representatives, albeit to a very limited extent, are entitled, under Article 56 TFEU and Article 19 of the Services Directive, to receive specific

47. For an interesting perspective, see M. Flynn, C. Brewster, R. Smith and M. Rigby, 'Trade union democracy: the dynamics of different forms' in M. Harcourt and G. Wood (eds.), *Trade Unions and democracy: strategies and perspectives*, Manchester, Manchester University Press, 2004, 319.

counselling or assistance services from a trade union established in a different Member State. In light of this possibility, it would not seem entirely impossible that the European Commission, looking for further ways to strengthen both cross-border mobility and social protection within the European Union and to embed it in the free movement possibilities existing within EU internal market law, would also be keen on building upon this freedom in an attempt to facilitate the cross-border provision or reception of trade union services.

Relying on the well-known basic principles of free movement having characterised the European integration process since its earliest beginnings, the Commission or other EU institutions could, if wanting to proceed this way, turn the rather marginal possibility of free reception of services into a policy tool to further enhance cross-border labour protection. Doing so would allow them to build upon the principles of EU internal market law, not only in an attempt further to mobilise workers at the expense of existing labour protection frameworks, but also to deliver certain labour protection guarantees to be offered in a cross-border setting. Should the institutions choose this path, two different ways forward could be considered.

Firstly, in order truly to enable the reception of cross-border trade union services, workers would have to be informed about the services offered by trade unions established in another Member State and operating in conformity with other regulatory obligations. To that extent, the creation of an EU-wide directory of trade unions and trade union services in the different legal regimes would seem imperative. Given that a workforce can already receive services in a cross-border context, the presence of the directory would truly generate more cross-border interactions between trade unions and workers across the entire European Union. In addition, such a directory would increase transparency regarding the different frameworks and options underlying trade union services. Doing so would permit workers to shop around for trade unions that offer services better tailored to the needs of a workforce. In order to make cross-border trade union services a reality, assembling and rendering public such information would probably constitute a first and most important step, even prior to any legislative steps being taken. Without appropriate information accessible to workers, new legislation would indeed immediately risk remaining a dead letter.

Secondly, a European Union committed to enhancing labour protection across the European Union and combating social dumping[48] could use the existence of a freedom to receive (some) trade union services to further strengthen its legislative or regulatory framework, provided that clarity existed as to what services were available across different legal regimes and how workers could effectively shop around for those services. Given the limited scope for free reception of trade union services, more direct regulatory intervention may be envisaged to establish more clearly defined trade union services provision opportunities. It will be maintained that the opportunity found in the freedom to ‘receive’ trade union services could be used as a starting point to design and expand a pro-trade union services framework compatible with – rather than deviating from – the main logic of EU internal market law.

In that context, a way forward would be to adopt a ‘Trade Union Services’ Directive or Regulation, thus directly enabling trade unions to provide cross-border services. In doing so, and maybe at first sight somewhat contradictorily, the EU would be invited to adopt a regulatory

48. See, for a confirmation of such commitment, the Statement made by Marianne Thyssen, member of the European Commission, on 1 October 2015, Speech at Roundtable with Civil Society organisations: Forging common action to achieve the Social Triple A for Europe, available at http://www.politiekemonitor.nl.

strategy aimed at home country regulation of and country-of-origin applicable law to trade unions, allowing unions to offer directly, and the workforce effectively, to shop around for the best union services across the European Union and triggering a 'race to the social law top' in so doing. Such a proposal is nevertheless unlikely to materialise in that shape in practice, for at least two reasons. Firstly, the country-of-origin principle has proven controversial in the realm of economic regulation and its mere transposition into labour law might awaken fears from the past. Secondly, it has never been proven that the adoption of a trade union services legal instrument will actually result in better social protection. The lack of clarity on the matter will result in probable hesitation among EU policymakers to turn this option into a reality. At the same time, however, the EU is continuously adopting or proposing sector-specific or transaction-specific legal instruments, so the adoption of a trade union legislative instrument would not be impossible and definitely remains an option under Article 114 TFEU.[49]

The adoption of a new legislative instrument being marred with difficulties, softer policy steps could nevertheless be envisaged at first. In that regard, the Commission could issue guidance on how trade unions can avail themselves of 'their' free movement rights, using EU economic law to the advantage of pursuing worker protection ends. That in itself would be an interesting take on the matter, but as long as no workforce or trade union is willing or able to take action in this respect, all guidance would remain a dead letter from the outset. Active promotion of this existing avenue would therefore also be required in order for the freedom to receive trade union services across the EU to become a stepping stone for enhanced social protection within and beyond one's own Member State. Such active promotion may in itself stimulate and justify the need for a more developed EU legal instrument at a later stage.

The proposals outlined here do not present a clear or definitive blueprint for a way forward in this debate. If taken seriously, they would contribute directly to reconciling the realities of free movement within the EU internal market and the continued attention to the social protection of workers. In the absence of such proposals, and given that the possibility exists to receive cross-border trade union services, an alternative following step in this regard would be to also acknowledge and extend that possibility by allowing for, in more clear terms, the freedom to provide and/or receive cross-border trade union services as a necessary corollary to the existing right to receive such services. Rather than the European Commission, the Court of Justice could be called upon to take a first step in this regard, ruling on the extent to which a 'country-of-origin' principle applies in trade union services and to what extent the services Directive is to be interpreted in this regard. In promoting country-of-origin approaches in this domain, it could invite at least more cross-border trade union practices and potentially more specific EU legislation on the matter. As long as no case to that extent is brought before the Court, however, it is unlikely that such judicial steps will be taken in the near future.

Conclusion

This article submitted that the freedom to receive cross-border services can be extended to 'assistance' services provided by trade unions established in another Member State where labour law protection guarantees are structured differently or more in favour of workers. Seeking out the

49. See S. Weatherill, 'The competence to harmonise and its limits' in P. Koutrakos and J. Snell, *Research Handbook on the Law of the EU's Internal Market*, Cheltenham, Edward Elgar, 2017, 82.

'assistance' services of those trade unions would perfectly fit the philosophy of EU internal market law. From that perspective, online training courses or guidance or counselling services could be delivered rather easily within a different Member State. At the same time, however, collective bargaining negotiation or legal representation services also performed by trade unions require, by virtue of their inherent attachment to a Member State's territory, the provider to move across the border and to temporarily provide the service on another Member State's territory.

The mere possibility of receiving some kinds of cross-border trade union assistance services does not in itself guarantee fully-fledged labour law protection in accordance with the more socially protective laws of another Member State. In the absence of clear case law guidelines or more legislation, it remains difficult to imagine how cross-border union services could be developed in a legally certain and predictable fashion. Despite legal uncertainty regarding the extent of receivable trade union assistance services, it was submitted that recognising more explicitly the freedom to receive – and potentially, to provide – trade union services at the very least invites more focused debates on how to shape regulatory initiatives that would enable the provision of cross-border trade union services and workforce protection. Debates such as these would offer the EU institutions a complementary tool better to embed their strategies for a social Europe into the realities of the EU internal market, taking trade unions seriously as providers of social services across the different EU Member States.

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