

**GERMAN AND BRITISH LABOUR LAW IN A EUROPEAN CONTEXT
FOLLOWING EUROPEAN UNION ENLARGEMENT**

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ABSTRACT

This thesis examines and compares German and British trade union responses in a European context following the recent European enlargements which are unprecedented in the history of the European Union. In terms of labour law, a majority of the ten Central and Eastern European countries which acceded in 2004 and 2007 combine weak domestic labour protection systems with a high proportion of workers and enterprises keen to take advantage of their free movement rights under the European Treaty. This has created a climate of fear amongst workers and trade unions in old Member States that their economic and social position is being threatened by those workers and enterprises who may avail themselves of their rights under the Treaty in order to engage in 'social dumping'. Historically, the European Union has sought to counteract these fears by 'europeanising' certain aspects of national legal systems in order to alleviate competition. However, the 'europeanisation' of different labour law systems has always proved problematic due to the socio-cultural context within which national labour laws have developed. Following the recent European enlargements, the debate on the role of the EU in 'europeanising' national social and legal practices has been revived. In particular, European enlargement has thrown up changed regulatory and opportunity structures for the social partners. These structural changes at a European level have occurred primarily as a consequence of an increase in the free movement of workers, services and establishment. Against this background, the purpose of this thesis is to undertake a comparison of the responses of German and British trade unions to the challenges posed by the recent European enlargements. A successful comparison and analysis of the responses of trade unions enables a determination of the impact that trade union responses may have on new Member State workers availing themselves of their free movement rights under the EU Treaty. There is an intense debate as to how, and if, social partners at a national and European level may be able to contribute to, or hinder, the protection of new Member State workers in Germany and the UK. Depending on how trade unions respond their contribution may be viewed as positive or negative. However, this thesis yields suggestions as to how trade unions could respond in order to facilitate the integration of new Member State workers into the host labour markets and proposes a new model for studying aspects of europeanisation.

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DECLARATION

I declare that the contents of this thesis have been composed by me and they have not been submitted for any other degree or professional qualification.

Rebecca Lisa Zahn: _____

CHAPTER ONE

INTRODUCTION

This thesis examines and compares German and British trade union responses in a European context following the recent European enlargements which are unprecedented in the history of the European Union. In terms of labour law, a majority of the ten Central and Eastern European countries which acceded in 2004 and 2007 combine weak domestic labour protection systems with a high proportion of workers and enterprises keen to take advantage of their free movement rights under the European Treaty. In addition, they have attracted large amounts of foreign direct investment which is mainly due to two characteristics: on the one hand, favourable industrialisation legacies, skill structures and a stable institutional environment¹; and, on the other hand, low wage levels and collective agreement coverage as compared to Western Europe². The Central and Eastern European labour law systems have undergone a process of enormous change since the end of the Cold War. Bronstein explains that “at the downfall of communism labour laws in all of these countries shared a number of patterns that related closely to the nature of the political and economic system.”³ Thus, labour law was structured around “the assumption that the overwhelming pattern of employment was based on a subordinated, permanent and full-time employment relationship, and that the work was mainly organised within the framework of large production units or large administration.”⁴ However, by far the biggest difference between the labour law systems of Central and Eastern Europe and those of Western Europe could be seen in the field of collective labour relations. Thus, “the shared pattern in Central Europe was the single-union structure. Union membership was quasi-compulsory, indeed necessary, for workers, given that unions were entrusted with the administration of a very large share of the welfare system.”⁵ As a result, unions were meant to “act primarily as a mechanism for transmitting and implementing policies and decisions taken by the state-party structure.”⁶

¹ D. Bohle & B. Greskovits, ‘The state, internationalization, and capitalist diversity in Eastern Europe’ (2007) *Competition and Change* 89.

² C. Crouch & S. Avdagic, ‘Organized economic interests: diversity and change in an enlarged Europe’ in P. Heywood, E. Jones, M. Rhodes & U. Sedelmeier, *Developments in European Politics*, Palgrave, Basingstoke, 2006.

³ R. Bronstein, ‘Trends and challenges of labour law in Central Europe’ in J.D.R. Craig & S.M. Lynk (eds.), *Globalization and the Future of Labour Law*, Cambridge University Press, Cambridge, 2006 at p. 194.

⁴ *Ibid* at p. 194.

⁵ *Ibid* at p. 194.

⁶ *Ibid* at p. 194.

Since then the Central and Eastern European labour law systems have undertaken a wave of reforms to enrich the content of labour law and to liberalise industrial relations⁷ so as to establish:

collective representation and collective bargaining structures [which reflect] the prevailing industry-based patterns in Western Europe. [...] It should be observed, however, that such an approach has not yet been confirmed in practice, as in most Central European countries industry-based collective labour relations are insufficiently developed.⁸

As a result, there are large discrepancies in labour protection between old and new Member States in the European Union (EU).

The Central and Eastern European enlargements have created a climate of fear amongst workers and trade unions in old Member States that their economic and social position is being threatened by those workers and enterprises who may avail themselves of their rights under the Treaty in order to engage in ‘social dumping’. Due to the characteristics of the Central and Eastern European labour law systems, it was feared and expected that their economic integration following the enlargements would lead to an intensification of competition that had not occurred after the previous⁹ enlargements.¹⁰ Kvist argues that “comparatively less wealth in acceding countries is seen as a push factor for migration, and the higher wealth of older member states as a pull factor.”¹¹ These fears were intensified by the fact that EU citizens have the right to move freely across borders. As a result, following the recent European enlargements in 2004 and 2007¹², most Member States of the EU¹³ restricted the right to free movement for workers from the new Member States with the exception of Cyprus and Malta. The legal basis for the restriction can be found in the

⁷ *Ibid* at p. 195.

⁸ *Ibid* at p. 199.

⁹ For example, during the ‘southern’ accessions: Greece (1981), Spain and Portugal (1986). Member States at the time feared an influx of Greek, Spanish and Portuguese workers and, as a result, imposed transitional measures. However, these fears were unfounded. It should be noted that income differences between old and new Member States during the ‘southern’ accessions were not as great as during the 2004 and 2007 enlargements (K. Tamas & R. Münz, ‘Labour Migration and Transitional Regimes in the European Union’, paper presented at the COMPAS International Conference *International Labour Migration: In Whose Interests?*, University of Oxford, 5 – 6 July 2006).

¹⁰ D. Vaughan-Whitehead, *EU Enlargement versus Social Europe? The uncertain future of the European Social Model*, Edward Elgar, Cheltenham, 2003.

¹¹ J. Kvist, ‘Does EU Enlargement Start a Race to the Bottom? Strategic Interaction among EU Member States in Social Policy’ (2004) *Journal of European Social Policy* 301 at p. 305.

¹² The following countries acceded in 2004: the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia. Romania and Bulgaria joined the EU in 2007. Workers from the countries that joined in 2004 with the exception of Cyprus and Malta are referred to as “EU8” workers, and Romanian and Bulgarian workers are described as “EU2” workers throughout this thesis.

¹³ For a list of reactions by all Member States see European Commission, Employment, Social Affairs and Equal Opportunities DG, *The Transitional Arrangements for the Free Movement of Workers from the New Member States following Enlargement of the European Union on 1 May 2004*.

transitional arrangements in the Accession Treaties of 16 April 2003 regarding the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and of 25 April 2005 regarding the accession of Bulgaria and Romania which allowed ‘old’ Member States to enact national measures which restricted access to their labour markets for the first two years following accession. The Treaty of Accession of Cyprus contained no restrictions on free movement of workers. With regard to Malta, there was only the possibility of invoking a safeguard clause.¹⁴ In practical terms, this means that a worker from one of the Member States that acceded (apart from Cyprus and Malta) needed a work permit to work in all old Member States with the exception of Sweden, Ireland and the UK.¹⁵ Sweden and Ireland did not restrict entry to the labour market; the UK implemented a Worker Registration Scheme. The Accession Treaties further allowed the extension of these national measures for an additional period of three years. After that, an EU Member State that applied national measures could continue to do so for a further two years if it notified the Commission of serious disturbances in its labour market. For the 2004 enlargements only Germany and Austria took advantage of this option. The UK decided to maintain its Worker Registration Scheme. All other Member States lifted their restrictions between 1 May 2006 and 1 May 2009.¹⁶ Altogether, the national measures restricting access to the labour market cannot extend beyond an absolute maximum of seven years.¹⁷

Individuals moving as service providers are not affected by these provisions. They may avail themselves of their rights under EU law from the date of accession of their home country. Equally, ‘posted workers’, i.e. workers who are sent from one Member State to another for a limited period of time, may avail of their rights under EU law. Posted workers are granted minimum labour rights in the host country under Directive 96/71 on the posting of workers. Despite the transitional arrangements for workers, all EU citizens moving across borders benefit from the right to non-discrimination granted to EU citizens under article 18 TFEU (ex

¹⁴ European Commission, Employment, Social Affairs and Equal Opportunities DG, *Enlargement – transitional provisions* available at <http://ec.europa.eu/social/main.jsp?catId=466&langId=en>.

¹⁵ European Commission Communication, Report on the Functioning of the Transitional Arrangements set out in the 2003 Accession Treaty (period 1 May 2004–30 April 2006), COM (2006) 48 at p. 4.

¹⁶ For more information see European Commission, Employment, Social Affairs and Equal Opportunities DG *Summary table of Member States policies* available at <http://ec.europa.eu/social/main.jsp?catId=466&langId=en>.

¹⁷ For more information see European Commission note 13 above.

article 12 EC)¹⁸. Moreover, they are entitled to the same rights of residence as EU citizens from ‘old’ Member States.¹⁹

The recent European enlargements come at a time when old Member State governments are attempting to ‘modernise’ their labour and social security systems in order to combat the effects of an enlarged Europe within a globalised world economy and its associated phenomena such as ‘social dumping’. The problems of changing economic and labour market conditions in an increasingly globalised world have been present in the European Union for some time. However, the increase in the free movement of workers and enterprise following the European enlargements has exacerbated these problems. Historically, the European Union has sought to counteract these fears by ‘europeanising’ certain aspects of national legal systems in order to alleviate competition. However, the ‘europeanisation’ of different labour law systems has always proved problematic due to the socio-cultural context within which national labour laws have developed and it is not clear to what extent ‘European Labour Law’ as a category of law has actually developed. Following the recent European enlargements, the debate on the role of the EU in ‘europeanising’ national social and legal practices has been revived, particularly, as the absence of strong labour protection in the new Member States has exacerbated the problems facing old Member States. Trade unions in both Germany and the UK have long, if not always, been in favour of the European Union. However, it must be recognised that the recent European enlargements have added an extra layer of complexity to the framework within which trade unions must act. Trade union attitudes to the European Union have therefore become more difficult.

In particular, European enlargement has thrown up changed regulatory and opportunity structures for the social partners. These structural changes at a European level have occurred primarily as a consequence of an increase in the free movement of workers, services and establishment.

Trade unions in Germany and the UK have a long history of responding to migrant workers. They have been particularly challenged by the recruitment of migrant labour following the

¹⁸ All references to EU Treaty articles are to the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) as amended by the Lisbon Treaty. Where relevant former article numbers are given in brackets.

¹⁹ Residence rights for EU citizens are contained in Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

end of the Second World War as “the importation of workers is perceived as a potential threat to jobs and working conditions, and may lead to a downward pressure on wage levels.”²⁰ In the UK, trade unions were initially slow to react to racist sentiments within the union movement towards migrant workers, the large majority of whom came from former colonies. However, once the problem was officially recognised, the trade unions started adopting special policies against racism in order to secure equal treatment of all workers. In particular, British trade unions traditionally follow a policy of ‘self-organisation’, giving migrant workers the opportunity to create special groups at all levels in the union in order to ensure that their voice is heard. ‘Self-organisation’ was successful in securing representation for migrant workers through so-called ‘black members committees’. However, for various reasons which are elaborated in this thesis, this policy is no longer attractive to migrant workers from the new Member States of the European Union. British trade unions are therefore struggling to adapt their traditional organisational structures so as to appeal to new Member State workers. German trade unions adopted a different attitude to migrant workers following the end of the Second World War. The large majority of migrant workers arrived as guest workers under bilateral agreements between Germany and the workers’ home states. The bilateral agreements ensured that the guest workers would respect standards set out in collective agreements. As the workers were meant to be recruited on a temporary basis, it was not expected that they would stay in Germany. Instead of focusing on ‘self-organisation’ in order to combat racism and to give migrant workers a voice within the union, German unions sought to achieve equality between migrant and indigenous workers in order to ensure adherence to the applicable collective agreements. Trade union policy did not focus on integrating migrant workers. Again, this traditional policy is under strain as new Member State workers are likely to work in sectors not covered by collective agreements. Trade unions are therefore unable to prevent wage-undercutting by new Member State workers.

Against this background, the purpose of this thesis is to undertake a comparison of the responses of German and British trade unions to the challenges posed by the recent European enlargements. Germany and the UK were chosen primarily for the reason that their trade unions are facing similar problems following the recent European enlargements. They are both suffering from a decline in membership and a loss of influence in collective relations. In

²⁰ G. Avci and C. McDonald, ‘Chipping Away at the Fortress: Unions, Immigration and the Transnational Labour Market’ (2000) *International Migration* 191 at p. 198 citing H. A. Adelman et al., *Immigration and Refugee Policy: Australia and Canada Compared*, University of Toronto Press, Toronto, 1994 at p. 114, and C. M. Schmidt et al., ‘Mass migration, unions and government interventions’ (1994) *Journal of Public Economics* 185.

addition, trade unions in the two countries are adopting similar roles within their respective national labour law systems, as they respond to the problems which they are facing. Unions in both Germany and the UK are struggling to find ways to deal with the consequences of the recent European enlargements and, in particular, the arrival of new Member State workers. Their responses to these problems are producing different outcomes and it is argued that, given the similar problems which trade unions in both countries are facing, they could learn from each other's experiences and would benefit from a comparison.

Another ground for selecting Germany and the UK is that trade unions in the two countries have begun to cooperate on a number of issues such as the recruitment of migrant workers and there is an interest in further research into areas where they could learn from each other. While it is recognised that the underlying labour law systems in Germany and the UK are very different to each other, they nevertheless possess a number of characteristics which make them suitable for a comparison. One example is the lack of codification of the collective labour law systems.²¹ In addition, trade unions are beginning to adopt similar roles in their national systems in their responses to the recent European enlargements. The increasing similarities between the two national labour law systems and the trade unions operating therein facilitate the exchange of information between trade unions on their responses to changes brought about by enlargement. As mentioned above, these changes are exacerbated by the increased free movement of workers and enterprise under the free movement rules contained in the Treaty on the Functioning of the European Union (TFEU) which sit uneasily with the changing regulatory and opportunity structures that trade unions are experiencing at a European and national level.

This thesis, therefore, proposes to analyse the manner in which trade unions are reacting to the changing economic and labour market conditions in Germany and the UK following the enlargements. This involves looking at the way in which trade unions operate inside, around and across the national and EU legal frameworks which regulate them. As trade unions are operating in increasingly similar legal and political environments and are facing similar problems following the enlargements, a comparison of trade unions in the two countries allows the author of this thesis to consider whether there is anything that trade unions can learn from each other in responding to the changing regulatory and opportunity structures that have arisen following the enlargements.

²¹ The influence of the European Union has also led to an approximation of labour law standards between the two countries. The similarities between the two systems are further elaborated upon in chapter two of this thesis.

A successful comparison and analysis of the responses of trade unions will enable a determination of the impact that trade union responses may have on new Member State workers availing themselves of their free movement rights under the TFEU. Under the different transitional provisions in Germany and the UK, new Member State workers are granted limited free movement rights, coupled with some protection from discrimination as EU citizens. However, the frequent occurrence of unfair employment practices show that those rights are often not adhered to in practice. There is an intense debate as to how, and if, social partners at a national and European level may be able to contribute to, or hinder, the protection of new Member State workers in Germany and the UK. Depending on how trade unions respond their contribution may be viewed as positive or negative. However, this thesis yields suggestions as to how trade unions could respond in order to facilitate the integration of new Member State workers into the host labour markets.

In order to achieve this purpose the thesis focuses on two main research questions: firstly, how have trade unions responded to the challenges of European enlargement? Following on from this, secondly, how have trade unions responded to, and what impact has their responses had, on the new Member State workers?

The thesis looks at a number of strands in answering the research questions. It focuses on the law that regulates trade unions at a national level; it examines the influence of the European Union on national trade unions; it explores historic trade union attitudes to migrant workers and the European Union in order to assess the problems currently facing national trade unions; and, it analyses specific trade unions acting in their respective labour markets so as to better understand the impact of the recent enlargements on trade unions.

The research questions are answered by comparing the behaviour of German and British trade unions within the complex framework inside, across and around which they operate. The literature on comparative labour law serves as a context for that comparison. A large body of theoretical literature has developed on the proper application of the comparative method to labour law as well as an ever-increasing amount of literature comparing aspects of different legal systems.²² The purpose of the comparison in this thesis is to analyse the responses of

²² A good overview is provided in D. Ziskind, 'Labor Law Comparison in Perspective' (1977) *Comparative Labor Law* 209. On labour law see also O. Kahn-Freund, *Labour Relations: Heritage and Adjustment*, Oxford University Press, Oxford, 1979.

trade unions in Germany and the UK to the recent European enlargements and, within this, to the new Member State workers in order to observe how trade unions are responding and whether there are any differences or similarities in their responses. Suggestions are made, on the basis of this comparison and analysis, as to whether German and British trade unions can learn anything from each other in their responses. In order to achieve this objective a comparison of trade unions in the two systems must be thorough.²³

In order to aid the thorough comparison, a number of elements are borrowed from the literature on comparative labour law. First, Hepple advocates a radical distancing from the national legal systems to be compared. For Hepple “the development of a legal system, and in particular of labour law, is the product of a variety of historical factors”²⁴ specific to each country which can neither be easily separated from one another nor ignored.

Zweigert points out the second essential element of a comparison when he requires a thorough consideration of a legal system’s socio-political context in any study of comparative labour law. As he points out:

²³ Writings on comparative labour law are often classified according to the type of comparison that they undertake. Finkin (M. Finkin, ‘Comparative Labour Law’ in M. Reimann & R. Zimmermann (eds.), *Oxford Handbook of Comparative Law*, Oxford University Press, Oxford, 2006) provides an overview of different types of comparison. He categorises writings on comparative labour law into five genres which are often overlapping: descriptive, purposive, predictive, theoretical and profound. Authors who fall into his categories include B. Aaron et al. (ed.), *Labor Courts and Grievance Settlement in Western Europe*, University of California Press, Berkeley, 1971; B. Aaron & K. W. Wedderburn (eds.), *Industrial Conflict: A Comparative Legal Survey*, Longman, London, 1971; F. Schmidt (ed.), *Discrimination in Employment*, Almqvist & Wiksell, Stockholm, 1978; R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations*, 8th ed., Kluwer, Deventer, 2004. These authors describe the relevant rules and principles within the socio-historical context of the systems to be compared and then systematically apply the comparative technique to these rules and principles in order to achieve the objective set out by the comparativist. Valticos (N. Valticos, ‘Comparative Law and the ILO’ (1977) *Comparative Labour Law* 274) suggests a number of steps for a comparison: first, an analysis of law and practice side by side, in order to clarify the similarities and the differences; second, an attempt to explain those similarities and differences; and third, an attempt to predict future trends and overall developments operating across national boundaries. The purposive genre of comparative law has been used by, for example, C. Whelan, ‘On Uses and Misuses of Comparative Labour Law: A Case Study’ (1982) *Modern Law Review* 285; R. Blanpain, ‘Comparativism in Labour Law and Industrial Relations’ in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations*, 8th ed., Kluwer, Deventer, 2004. The topics of legal borrowing and transplantation of labour laws are seen as the theoretical genre of comparative labour law. Literature includes O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) *Modern Law Review* 1; A. Watson, *Legal Transplants: an approach to comparative law*, Scottish Academic Press, Edinburgh, 1974; P. Legrand, ‘The impossibility of legal transplants’ (1997) *Maastricht Journal of European and Comparative Law* 111.

²⁴ B. Hepple (ed.) *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*, Mansell Publishing, London, 1986 at p. 4. In Hepple’s work on comparative labour law, the contributing authors use deductive models so as to distance themselves from national prejudices in order to successfully explain the nature of collective self-regulation and workers’ participation in various countries and within different social settings. In the sequel to *The Making of Labour Law in Europe* by B. Hepple & B. Veneziani (eds.), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945 – 2004*, Hart, Oxford, 2009, the contributors consider a number of factors including socio-economic developments and policies, the changing nature of the state, the character of workers’ movements and civil society and ideology in order to explain transformations in labour law systems (pp. 21 – 22).

One must take account not only of legislative rules, judicial decisions, the ‘law in books’, and also of general conditions of business, customs, and practices, but in fact of everything whatever which helps to mould human conduct in the situation under consideration.²⁵

Kahn-Freund takes this even further by requiring the comparison of two or more legal systems not only in a legal sense as espoused by Hepple, but also within a framework of, and by reference to, ancillary social science disciplines. In the context of a comparison of trade union responses to the challenges and pressures of European enlargements, reference to, for example, politics or industrial relations literature is an obvious source of ancillary social science disciplines.²⁶ However, as the theoretical framework of this thesis examines how trade unions operate within and across national and European legal systems, the comparison must be contextualised within law. Ancillary social disciplines can serve as a secondary reference. The comparison thus implies a thorough understanding of the socio-historical context of trade unions as well as of the way in which trade unions operate within the legal systems to be compared.

Another aspect that must be taken into account when undertaking a comparison of trade union responses to the recent European enlargements is the increasing influence of the European Union on national labour law systems which is due to the Union’s attempts at ‘europeanising’ national labour law systems in order to provide for common minimum standards across the European Union.²⁷ The literature on comparative labour law has been struggling with the accommodation of the idea of the ‘europeanisation’ of national systems into its method.

Despite a long history of academic writings on comparative labour law, the main focus of labour and comparative law remains at a national level.²⁸ This seems to suggest that

²⁵ K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, Clarendon Press, Oxford, 1998 at pp. 10 – 11. See also I. Szabo & Z. Peteri (eds.), *A Socialist Approach to Comparative Law*, Sijthoff, Leyden, 1977.

²⁶ See, for example, D. Marsh & G. Stoker, *Theory and Methods in Political Science*, 2nd ed., Palgrave, Basingstoke, 2002.

²⁷ In the past, the law of the European Union was highly influential in advancing comparative labour law through a number of different mechanisms. Comparative labour law has been used to create minimum standards for application by all Member States of the EU. This has led to an approximation of laws rather than harmonisation originating from a transnational level. For literature discussing the uses of comparative labour law within a European context see, for example, J. Pipkorn, ‘Comparative Labor Law in the Harmonisation of Social Standards in the European Community’ (1977) *Comparative Labor Law* 260; S. Edlund (ed.), *Labour Law Research in Twelve Countries*, Arbetarskyddsfonden & Arbetslivscentrum, Stockholm, 1986; B. Hepple (ed.), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*, Mansell Publishing, London, 1986; B. Hepple & B. Veneziani (eds.), *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945 – 2004*, Hart, Oxford, 2009; M. Weiss, ‘The Future of Comparative Labour Law as an Academic Discipline and as a Practical Tool’ (2003-2004) *Comparative Labor Law and Policy* 169.

²⁸ According to Finkin (note 23 above at p. 1159) “in resolving the contemporary problems of, *inter alia*, flexibilisation and individualisation facing trade unions in Europe comparativism can be expected to play much

comparative labour law has to develop in order to effectively contribute to the debate that is surrounding the nature and function of labour law and collective relations within Europe in recent years. Finkin argues that it does not seem sufficient for comparativists to “evidence the intrinsic intellectual worth of the comparative enterprise.”²⁹ Following on from this position, Zweigert maintains that the only way comparative law can contribute to solving the challenges facing labour law is if comparative law is “europeanised”³⁰. Zweigert and Kötz interpret this to mean that the way “lawyers think, write, and learn” must be altered so as to “unify the whole of European law.”³¹ This in turn presents comparative law with a challenge:

No longer can it confine itself to making proposals for the reform of national law. [...] Comparative law must now go beyond national systems and provide a comparative basis on which to develop a system of law for all Europe; [...] What is needed is a body of legal literature which presents the different areas of law from a European perspective, not focusing on any particular legal system or its systematics and not addressed to readers of any particular nation. ... [In doing so] they must take account of the powerful social policies which have influenced private law throughout Europe.³²

This approach differs substantially from a large majority of comparative labour law research completed by individual scholars. In its proposed results it also goes much further than the sporadic ‘approximation of laws’³³ hitherto undertaken by the European Union. Yet due to the lack of unification of different labour law systems in the European Union, the type of ‘europeanised’ comparative labour law in the sense of Zweigert and Kötz seems a highly ambitious project that comparativists may not be capable of achieving. The debate on the ‘europeanisation’ of comparative labour law indicates that, when explaining how trade unions in Germany and the UK are responding to the European enlargements and new Member State workers, one must take account of domestic change that can be attributed to European integration.

To summarise, the purpose of using a comparative method in this thesis is two-fold: firstly, to compare and analyse the responses of trade unions in Germany and the UK to the European enlargements and the new Member State workers; and secondly, leading on from this, to develop a better understanding of the role of trade unions and their functions in reacting to the pressures and challenges of enlargement. In order to achieve this purpose, one must have

the [same] role it played [so far]: to instigate thought outside one’s accepted legal frame of reference; to present and dissect arguable alternatives; to examine the interplay of law and culture; where necessary [...] persuasively to legitimate the law’s role.”

²⁹ Finkin note 23 above at p. 1159.

³⁰ Zweigert & Kötz note 25 above at p. 28.

³¹ *Ibid* at p. 28.

³² *Ibid* at pp. 28 – 30.

³³ See note 27 above.

regard to the socio-historical context of the labour law systems within which trade unions operate. The national systems must in turn be seen in their European context. One must also consider the role of trade unions within those systems, in order to effectively analyse the responses of trade unions to the pressures and challenges that have arisen. A comprehensive understanding of the broader industrial relations context – both in a legal and in a historical and social context – of German and British labour law is thus vital for an effective comparison of the responses of trade unions in the respective legal systems. Industrial relations systems are often perceived as a mirror of the society in which they operate. For that reason they cannot be understood without comprehending the way in which rules are established and implemented, and decisions are made in the society concerned.³⁴ Therefore, as Kahn-Freund noted, the comparative study of labour relations is a prerequisite for any comparative study of collective labour law.³⁵

In order to provide an answer to the research questions, the thesis is split into two main sections. The first in chapters two, three and four sets out a theoretical framework drawing on the relevant literature and case law. The theoretical framework clarifies the national and EU legal context within which trade unions operate. It also pulls together different aspects of law and policy. In terms of law, chapters two and three examine (i) the EU free movement rules; and (ii) the German and British labour law systems and the trade unions situated therein. In terms of policy, the chapters look at (i) the EU's enlargement and the policies connected therewith; and (ii) the contested emergence of a European social and labour policy. Each one of these areas carry with them an extensive body of literature not all of which can be mentioned in this thesis due to space constraints. Finally, chapter four provides an overview of historical trade union attitudes to migrant workers and the European Union so as to provide a background understanding of trade union responses to migrant workers. Without this overview, the second half of the thesis cannot be fully understood. Altogether, this framework raises certain expectations which are set out in chapter four as to how trade unions could be responding to the recent European enlargements. The purpose of these initial chapters is to elaborate a framework which enables the author to understand and explain the behaviour of trade unions in their responses to the European enlargements and the new Member State workers.

³⁴ J. Schregle, 'Comparative Industrial Relations: pitfalls and potential' (1981) *International Labour Review* 15.

³⁵ O. Kahn-Freund, *Labour Relations: Heritage and Adjustment*, Oxford University Press, Oxford, 1979.

The second half of the thesis bridges the gap between theory and practice by setting out the results of two case studies conducted in Germany and in the UK. The case studies examined the trade unions themselves, initially in their individual settings. A final chapter draws on the theoretical framework in order to assess how trade unions are operating inside, around and across the national and EU legal frameworks which regulate them. The final chapter also compares and analyses the results of the case studies with a view to determining the impact that trade union responses are having on new Member State workers availing themselves of their free movement rights under the TFEU. It then makes suggestions as to how trade unions could respond to the challenges and pressures that they are experiencing following the recent European enlargements.

This thesis first provides substantive answers to the research questions which it poses. Thus, trade unions are struggling to adapt to the changing opportunity and regulatory structures which prevail following the recent European enlargements. The roles that they adopt in their national legal systems pre-determine their reactions to the new Member State workers and the enlargements. As a result, they are finding it difficult to respond to the European Union's policy of 'europeanising' national labour law systems and they are often unable to avail themselves of the opportunities that 'europeanisation' offers them. 'Europeanisation' is a complex process which is difficult to define. The effects of it on national legal systems lead to tensions that trade unions struggle to deal with. The results of this thesis illustrate that trade unions in Germany and the UK could benefit from each other as they are facing similar problems and have started to look for solutions in different ways. However, cross-border dialogue does not regularly take place even though there are positive signs that trade unions are becoming more aware of the benefits of cooperation. Apart from answering the research questions, the structure of the thesis provides a novel approach to understanding how trade unions are responding to developments at a national and a European level. In particular, the combination of looking at law and policy in theory and in practice through an examination of the literature and a focus on specific trade unions through the case studies provides a thorough examination of how trade unions are responding inside, across and around national and European legal frameworks. This enables the author to understand the responses of trade unions to the European enlargements and the new Member State workers and to derive suggestions from the analysis of the responses as to what trade unions could improve so as to facilitate the integration of new Member State workers into their host labour markets in Germany and the UK. In order to examine how trade unions act inside, around and across the

national and European legal frameworks within which they operate, the thesis is structured in the following way.

Chapter two explains the national framework in Germany and the UK within which trade unions operate. This is done by setting out their historical, social, cultural and economic background and context as well as the current legal framework. The chapter illustrates the changing national regulatory and opportunity structures and touches upon recent responses of trade unions to these changes. It also briefly introduces the role that the European Union has played in influencing the German and British legal systems. This is then examined in more detail in chapter three. The purpose of chapter two is to clarify the national legal system for trade unions in Germany and the UK and to illustrate how trade unions operate within and across this system. It is used as a background for the case studies set out in subsequent chapters and forms part of the theoretical framework (together with chapter three) upon which the analysis of the research questions is based. A clear understanding of the national framework within which trade unions operate in Germany and the UK is vital if the pitfalls of a comparison of trade union responses are to be avoided. In order to gather sufficient material on German labour law, the author of this thesis spent three months in Germany at the Martin-Luther-Universität Halle-Wittenberg and at the Universität Hamburg. In addition to using the library, the author obtained an insight into the German labour law system through private communications with Professor M. Weiss of the Goethe Universität Frankfurt am Main and Professor W. Kohte of the Martin-Luther-Universität Halle-Wittenberg.

Chapter three ties in the European influence on national labour law systems to complete the law and policy context within which trade unions operate. More broadly, in order to effectively gauge the responses of trade unions to the challenges of European enlargement, the national comparison must be seen in its wider European context. This is, moreover, supported by the increasing influence of European regulation on national labour law systems through the European Union's policy of 'europeanising' national social and legal systems. In the case of trade unions, one must also look at the influence of European regulation and policy on these non-state actors. This yields an understanding of the challenges that trade unions are facing in acting within a changing national labour market which is also heavily influenced by European requirements for increasing flexibility and the approximation of labour standards across the EU.

It is ineffective to compare two European labour law systems without taking full account of the European influence. There has been an ongoing debate as to whether, and if, the EU's attempts at the approximation of labour law systems through the establishment of a 'European Social Model' have been successful. Following the European enlargements this debate was reignited due to the differences in labour law systems in old and new Member States. This phenomenon obviously poses problems for trade unions at a national level as illustrated by recent case law of the European Court of Justice discussed in chapter three. However, the establishment of a European social and labour policy does not only create difficulties for trade unions but also opens up opportunities for them to engage in transnational cooperation in order to find solutions to common problems. In the past, initiatives have been slow to develop. Nonetheless, this is a potential method of response for trade unions that has to be borne in mind. Clarity on the debate surrounding the 'europeanisation' of national social and legal practices is therefore essential when comparing German and British trade union responses to the challenges of European enlargements. Chapter three provides this clarity by focusing on a number of issues that arise in this context: (i) the existence of a category of 'European Labour Law'; (ii) the increased movement towards soft law mechanisms to europeanise national labour law systems; and, (iii) the role of the European Court of Justice and its recent problematic case law. Finally, the role played by the recent European enlargements is placed in this context. Together with chapter two, chapter three provides the legal context at a national and a European level across and within which trade unions operate and respond to the recent European enlargements and the new Member State workers. The chapters thus provide the background to the case studies and their analysis in chapters five and six.

Chapter four completes the theoretical framework by examining the literature on trade union responses to migrant workers and the European Union in order to provide a background to their current reactions. The characteristics of the new Member State workers are also examined at this stage to illustrate how these migrant workers differ from those described in the literature on trade unions and migrants. Based on this theoretical framework, suggestions are then made as to how one would expect trade unions to respond to the European enlargements and the new Member State workers. These suggestions are compared with actual trade union responses so as to provide a comparator for analysis of trade union responses to the European enlargements and the new Member State workers.

Chapter five sets out the results of the case studies conducted in two trade unions in Germany and the UK in the course of 2008 and 2009. The purpose of the case studies was to clarify the responses of two national trade unions to the challenges of European enlargement and how their responses impact on new Member State workers. In order to delimit the scope of the case studies, purposive sampling was seen as an effective method to gather the appropriate data.³⁶ In the case of trade unions this meant looking at those trade unions which can be expected to contribute most to the topic of research. By looking at, for example, the responses of trade unions within the Trades Union Congress (TUC) in the UK and the Deutscher Gewerkschaftsbund (DGB) in Germany, one can gather qualitative data from within the two largest national trade union confederations which, moreover, have a history of cooperation both within the European Trade Union Confederation (ETUC) and at a national level through the British-German Trade Union Forum.

Research into the affiliated unions within the national confederations led to the conclusion that the two unions upon which it would be most appropriate to focus in order to gather the relevant data are the Vereinte Dienstleistungsgewerkschaft (ver.di) in Germany and UNISON, the UK public service union. This selection can be justified in a number of different ways: for example, both trade unions represent large numbers of public service workers across a wide range of professions in their respective countries; and, both unions consciously adopted a political role to react to new Member State workers following the enlargement. Moreover, both trade unions belong to national confederations that are members of the ETUC and thus cooperate at a European level. This element of cooperation must be taken into account throughout the research as, without an understanding of the level of cooperation, a successful analysis would not be possible. Thus, in terms of the objectives that ver.di and UNISON may set for themselves, it is necessary to establish whether these objectives are influenced by either a ‘top-down’ approach from the ETUC, TUC or DGB or policies set out in their cooperation agreement. Finally, the respective policy papers of ver.di and UNISON indicate that their objectives and priorities are of a similar nature therefore making them ideal candidates for comparable case studies. In 2004, ver.di and UNISON signed a Memorandum of Understanding which will enable them to work more closely together “on a range of policy issues, particularly at the European level and [...] to undertake joint action in a number of

³⁶ A. Bryman, *Social Research Methods*, 3rd ed., Oxford University Press, Oxford, 2008 at pp. 435 – 471: Purposive sampling involves strategic decisions as to the number of interviews and the persons who are to be interviewed in order to establish a good correspondence between research questions and sampling. It is the recommended sampling technique for qualitative research.

transnational companies engaged in the provision of public services where the two unions have members.”³⁷ In addition to the documents mentioned above it is also necessary to gather information on any common policies and objectives of ver.di and UNISON by accessing, for example, the Memorandum of Understanding as well as protocols and decisions of subsequent meetings held between the two unions. By comparing similar trade unions, suggestions can be made as to whether there is anything that the two unions could learn from each other in responding to the recent European enlargements and the new Member State workers.

One possible shortcoming is that data gathered from these two large trade unions may not accurately reflect the responses of all trade unions to the challenges of European enlargement, especially not those responses of the smaller, ‘a-typical’ and more aggressive unions³⁸ that have recently sprung up in Germany. Nonetheless, it is submitted that the data gathered provides a useful insight into the way in which the traditional trade unions which represent large numbers of workers in both old Member States are responding to the challenges of enlargement for two reasons: first, ver.di and UNISON are amongst the biggest trade unions in their respective countries and within the European Union as a whole, their responses therefore affect a larger number of workers; and, second, they both have leading and influential roles in the development of policies and strategies at a national and European level.

The case studies provide a response to the research questions, i.e. what trade union responses to European enlargement and the challenges surrounding it are, and how trade unions are responding to the new Member State workers. In order to effectively gauge the responses of trade unions, chapter five first clarifies the objectives set by the trade unions for themselves, taking into account whether trade unions have changed and/or reassessed their objectives following the recent enlargements. The objectives are drawn from *inter alia* press releases, position papers and handbooks issued by trade unions. They are then used as a benchmark against which to measure actual trade union responses for the purposes of answering the research questions. Second, therefore, the chapter looks in more detail at the actual reactions of the trade unions which will yield an understanding of how trade unions are responding and whether they are fulfilling the objectives set for themselves. The actual reactions of trade

³⁷ UNISON, *Europe* available at <http://www.unison.org.uk/international/europe.asp>.

³⁸ There have been a number of cases brought by ‘traditional’ unions such as ver.di and the IGMetall on whether these ‘a-typical’ trade unions have standing to negotiate collective agreements. See Bundesarbeitsgericht (BAG), Beschluss vom 28.03.2006 – 1 ABR 58/04; Landesarbeitsgericht (LAG) Hamm, Beschluss vom 13.03.2009 – 10 TaBV 89/08; Landesarbeitsgericht (LAG) Köln, Beschluss vom 20.05.2009 – 9 TABV 105/08.

unions are gathered both from documents such as newsletters and updates issued by trade unions as well as from interviews conducted with trade union officials as part of the case studies. Eight interviews were conducted in total: three at UNISON; three at ver.di; and two in Brussels, one at the ETUC and one with an official involved in the formulation of European social policy. The subject-matter of the interviews drew upon the information gathered from trade union documents. Due to the comparative nature of the thesis, the same questions were asked of both parties in interviews in order to then analyse and compare the responses on the same basis. In conducting the interviews one had to, however, be aware of the gap between the official position taken by trade unions and the oft-concealed policy issues underlying this position. As the purpose of the interviews was to gather information which is not necessarily predictable, there was no need for control over the behaviour of the interviewee. On the contrary, this would have been counter-productive as it would not have allowed the interviewer to gain a real appreciation of the trade union and the matters in which it is engaged. Questions asked were semi-structured in order to facilitate a comparison while, at the same time, leaving sufficient scope for development of an answer by the interviewee. After setting out the results of the interviews, the chapter assesses which responses yield benefits and why certain responses are more successful than others in terms of the objectives set by the unions.

Chapter six draws together the theoretical framework of chapters two, three and four with the case studies set out in chapter five in order to critically analyse the responses of trade unions to the pressures and challenges of European enlargement and to the new Member State workers. This is done against the background of the expectations set for trade unions in chapter four. Thus, the responses of trade unions to, and their impact upon, new Member State workers will no doubt differ in Germany and the UK. However, upon careful consideration of all criteria and against the background of a clear understanding of the role of trade unions in both systems it is hoped that clarity regarding the effects of the European enlargements, and the challenges surrounding them, upon non-state actors within the German and British labour law systems can be achieved. Obviously, this comparison must be seen in its European context, taking into account the influence of the EU in terms of policy and law following the European enlargements. It is hoped that this rigorous approach of first setting out the responses of trade unions in individual protocols and then critically comparing the results in both systems within their European context will provide a real understanding of the responses of trade unions to the challenges of the recent European enlargements. Finally,

depending on how successful trade unions have been in responding in light of their own objectives, suggestions are made as to the range of responses available to trade unions who are struggling to adapt to the changing opportunity and regulatory structures in Germany and the UK coupled with the pressures of an enlarged European Union.

By adopting this structure this thesis not only answers the research questions posed at the outset, it also makes a number of other contributions. First, it adds to the general literature on trade unions and migrant workers by placing new Member State workers within the context of that literature. Furthermore, this thesis provides clarity on trade union behaviour and on the different roles that trade unions adopt when they respond to changing regulatory and opportunity structures. Particularly following the European enlargements many of the problems facing trade unions have their origin in European developments. The tensions that exist in the area of collective labour law between national and European systems of regulation due to the European Union's policy of europeanisation are often simplified. In order to understand the consequences and effects of europeanisation on national trade unions this thesis develops a new model for studying aspects of europeanisation. The model systematically breaks down the concept of europeanisation in order to achieve clarity on its content and effects. This allows for an assessment as to the opportunities that europeanisation may offer trade unions in their responses to the effects of the recent European enlargements. The usefulness of this new method is not just limited to the subject-matter of this thesis; it can be used more widely to understand the effects of europeanisation on non-state actors. Apart from looking at how trade unions respond to the challenges of European enlargement and the new Member State workers this thesis therefore also contributes to the general literature on trade unions and europeanisation in the field of collective labour law.

CHAPTER TWO

THE ROLE OF TRADE UNIONS IN GERMANY AND THE UK

German and British trade unions have played a role in their national systems since the middle of the 19th century. The purpose of this chapter is to clarify the national legal system for trade unions in Germany and the UK, and to illustrate how trade unions operate within and across this system. This chapter shows that despite the historical, social, cultural, and economic differences between the two systems, there is an increasing convergence in terms of the types of problems that trade unions face as well as of the types of roles they adopt in response to these problems in their respective system. This is used as a basis for analysis in chapter six when the responses of two specific trade unions to European enlargement and the new Member State workers are examined.

A. Introduction

The foundations of the modern labour law systems in Germany and the UK were laid down in the middle of the 19th century. The era of industrialisation played a large role in pressing for the liberalisation of legal relations. Much of modern German labour law can be traced back to Hugo Sinzheimer, who was in large part responsible for the theorisation of German labour law during the Weimar Republic. Though the Weimar legislation was repealed by the Nazis during the 1930s, his ideas were resurrected following the Second World War.¹ Sinzheimer considered labour law as a tool to be manipulated to correct the injustices inherent in the capitalist mode of production. As a result, in Germany:

the labour relationship was no longer viewed as based on the personal relationship which had arisen in the days of lord and serf and continued in the institution of master and servant, but under the influence of the civil law it adopted an individual approach. Thus the legal fiction of contractual equality between parties also applied to employment relationships.²

Modern German labour law can be broadly divided into two subject matters: individual and collective labour regulation. Collective labour regulation, the main focus of this chapter, treats the worker as part of a collective entity normally organised within a trade union. German law

¹ W. Herschel, 'Der Betriebsrat – damals & heute' and T. Ramm, 'Die Arbeitsverfassung der Weimarer Republik' both in F. Gamillscheg et al. (ed.), *In Memoriam Sir Otto Kahn-Freund*, Beck, München, 1980.

² N.G. Foster & S. Sule, *German Legal System and Laws*, Oxford University Press, Oxford, 2002 at p. 523.

lacks a codified system of labour regulation. Collective labour law is thus made up of a variety of laws scattered throughout the legal system, as well as customary norms and precedents set out by the Labour Courts, in particular the Federal Labour Court (Bundesarbeitsgericht – BAG).³ Although judicial precedent does not establish binding legal norms, it has contributed significantly to the development of the law on industrial action and non-discrimination at work.

In the UK, the concept of ‘labour law’ has its genesis in the idea of “the subordination of the individual worker to the capitalist enterprise”⁴. It is concerned primarily with the constitution and regulation of the relationship between worker and employer. In the UK, a primary role is accorded to the law of contract in determining the constitution of this relationship; regulation of that relationship is overseen by the common law and social legislation, as well as by ‘extra-legal’ sources such as collective bargaining. This form of labour law characterised traditionally by the absence of legal regulation was first clearly enunciated and commended by Otto Kahn-Freund, a German national and one-time student of Sinzheimer, who came to London as a political refugee in 1933. For Kahn-Freund, the paucity of regulation of collective labour relations ensured the independence of British trade unions from the state.⁵ The scope of labour law thus ranges from “the individual to the collective, from the contract of employment to relations between the institutions of organised labour and capital, and to the conduct and resolution of conflicts between them.”⁶

The purpose of this chapter is to examine the historical, social, economic and cultural context within which trade unions in Germany and the UK have developed, in order to contextualise the legal environments within which they operate, as well as the role which they adopt within these environments. This could range from a traditional bargaining role to quasi-regulatory functions. This is then used as a basis for analysis in later chapters. It is argued that the responses of trade unions to European enlargement as well as to new Member State workers in Germany and the UK may differ depending on the role that they perceive for themselves in their national contexts. Thus, for example, a shift towards a political role in the UK would allow trade unions to adopt an active negotiating role between the government and migrant

³ R. Wörlen & A. Kokemoor, *Arbeitsrecht*, 7th ed, Carl Heymanns Verlag, München, 2005 at p. 194.

⁴ B. Hepple (ed.), ‘Introduction’ in *The Making of Labour Law in Europe – A Comparative Study of Nine Countries up to 1945*, Mansell Publishing, London, 1986 at p.11.

⁵ R. Dukes, ‘Constitutionalising Employment Relations: Sinzheimer, Kahn-Freund, and the Role of Labour Law’ (2008) *Journal of Law and Society* 341.

⁶ S. Deakin & G. Morris, *Labour Law*, 5th ed., Hart Publishing, Oxford, 2009 at p. 1.

workers. Similarly, a shift towards greater involvement of trade unions in the legislative process in Germany would enable them to influence policy regarding migrant workers from the bottom up. These roles for trade unions would have been unheard of in previous decades. The responses of trade unions are therefore undoubtedly influenced by the historical, social, economic and cultural context within which the unions have developed and within which they operate. Therefore, in order to analyse the responses of German and British trade unions in a comparative context one must be clear as to the legal environments within which they operate as well as the role which they adopt within these environments.

In order to understand the role of trade unions in the German and British labour law systems, it is proposed, firstly, to briefly outline a spectrum of different systems of labour law within which the regulation of German and British trade unions can then be located. This is intended to aid in the clarification of the specific legal context within which trade unions operate in Germany and the UK. Secondly, the specific historical, social, economic and cultural context within which trade unions operate in Germany and the UK is examined. This yields an understanding of the roles adopted by trade unions in the individual labour law systems. Finally, due to the increasing influence of the European Union on national legal systems, this chapter provides a cursory introduction to the effects of the ‘europeanisation’ of national labour markets and systems on trade unions. This is explored in greater detail in chapter three.

The introduction to the ‘europeanisation’ of the German and British labour markets and systems is intended to illustrate initial trade union responses to the influence of law and policy originating at an EU level. Trade unions operate within, across and through the national and European regulatory systems of labour law. This chapter illustrates how trade unions operate within, across and through national labour law systems. However, with the increasing influence of the EU on national labour law systems trade unions have had to adapt their role at a domestic level to take account of and to use law and policy originating from the EU. It is argued in chapter six that the europeanisation of national labour law systems or lack thereof has played a significant role in determining the roles that trade unions adopt at a national level. It is therefore also influential on their responses to enlargement and new Member State workers. The brief introduction contained in this chapter is merely intended to lay the foundations and pave the way for an in-depth analysis of the influence of European law and policy upon national labour law systems at a later stage.

B. Spectrum of legal systems

Many attempts have been made to divide and classify the different national European legal systems according to legal traditions or legal families. Of these, the methodologies established by Zweigert and Kötz⁷ and then David⁸ are still the most widespread. Both adopt complex styles to classify the world's legal systems. Yet, the main distinction drawn for the purposes of this chapter has been borrowed from Merryman who distinguished broadly between the civil and common law traditions. The use of Merryman's simple classification is not intended to derogate from the importance of Zweigert and Kötz and David's work. Rather, this simple distinction, focusing only on the civil and common law, is adopted to reflect the fact that in the countries of Western civilisation, on which this chapter focuses, the common and civil law traditions are the most prevalent. It is therefore not necessary to enter into more complex distinctions.

Within the European Union, one finds the civil law tradition predominant in continental Europe, while the British Isles have adopted the common law tradition. For the purposes of accuracy it must be mentioned at this stage that Scotland is considered to have a mixed legal system. In terms of labour law, however, there are very few differences between Scotland and England and to classify the UK as a whole as being part of the common law does not intend to disregard the peculiarities of the Scottish system. The legal systems contained within the civil and common law traditions possess characteristics that are predominantly identified with either tradition. However, as Merryman points out, "it is inaccurate to suggest that they have identical legal institutions, processes, and rules. On the contrary, there is great diversity among them, not only in their substantive rules of law, but also in their institutions and processes."⁹

Moreover, one should not take this classification of the legal traditions as meaning that there is no overlap between the two traditions. On the contrary, one of the weaknesses of the classification of different legal systems into broader traditions is its narrow cultural focus. The 'europeanisation' process of the European Union has added an extra layer of complexity to

⁷ K. Zweigert & H. Kötz, *An Introduction to Comparative Law*, 3rd ed., Oxford University Press, Oxford, 1998

⁸ R. David & J. Brierley, *Major Legal Systems in the World Today*, 3rd ed., Stevens, London, 1985.

⁹ J.H. Merryman & R. Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, Stanford University Press, Stanford, 2007 at p. 1.

this identification process. Attempts at harmonisation of the different legal systems which make up the European Union have introduced concepts from both legal traditions into each other. Thus, “in the twenty-first century, there is no consensus [...] in finding a suitable criterion for division of the world’s legal systems.”¹⁰ Weiss supports this view when he argues that one should focus on the specific national context of legal systems rather than on broad classifications.¹¹ This argument becomes relevant when one looks in more detail at the German and British labour law systems. It is argued that trade unions in both countries are much more similar and have therefore much more to learn from each other than previously realised. This is based on a notion that the regulatory environments surrounding them have more in common than often assumed. Moreover, the problems facing the unions in both countries are strikingly similar. It is therefore argued that their responses, based on the context within which they are taken, should be if not similar then at least influenced by each other. However, to date, there is a lack of communication between the unions in both Member States. This analysis of the background of the trade union systems in both countries serves as a framework within which an effective comparison and analysis can take place.

As regards labour law, the different European legal systems have often been grouped together under four different headings¹² of which the Anglo-Saxon and Continental models are relevant to this chapter. The Anglo-Saxon model is characterised by limited collective provision of social protection and relatively weak unions. The Continental model, on the other hand, accords a limited role to the market in the provision of social assistance and, although membership is in decline, is characterised by strong unions. Within each of these broad classifications, there are obviously also differences specific to each of the individual national systems. It is, therefore, difficult to neatly place each individual labour law system within a particular system of classification.

As far as Germany and the UK are concerned, there may be stark differences within their social models in terms of social protection, levels of unemployment and overall strength of the unions. Furthermore, in relation to the systems belonging to the civil and common law tradition, there will inevitably be fundamental differences in their structures, in their methods

¹⁰ P. De Cruz, *Comparative Law in a Changing World*, 3rd ed., Routledge-Cavendish, Oxon, 2007 at p. 33.

¹¹ Private communication Prof. M. Weiss, Goethe Universität Frankfurt, 18/12/2008.

¹² A. Sapir, ‘Globalization and the Reform of European Social Models’, (2006) *Journal of Common Market Studies* 369: Anglo-Saxon, Continental, Nordic, and Mediterranean.

of thought and in their attitudes towards the law as a legal system.¹³ However, it must also be recognised that there are similarities between the two systems, despite the fact that the two systems nominally belong to different legal traditions, as well as to different social models. These similarities, which are further explored in the course of this chapter, are due, in part, to a convergence of the systems at various points throughout history. Moreover, at a European level there have been attempts to unite the different social models under the banner of a 'European Social Model'. As regards trade unions, there is evidence that cooperation on the part of unions is steadily growing across Europe, in effect ignoring the academic classifications. However, empirical evidence shows that this cooperation is often not passed down through all levels.¹⁴

It is therefore difficult to pinpoint the German and British labour law systems on the spectrum. Historically, the Continental and Anglo-Saxon social models were rooted in the civil and common law traditions. However, in contemporary analysis, it would be inaccurate to ignore the similarities which exist between the two systems and traditions. The classification of legal tradition and social model is thus useful in order to gain an understanding of the historical, social, economic and cultural context of the legal system within which trade unions have developed, but it should not be seen as an inflexible categorisation.

C. Historical, economic, social and cultural context of British trade unions

The rise of workers' associations in Britain dates back to the 18th century. Their utility was formally recognised in 1824 with the repeal of the criminal sanctions against combinations, and, from then on, tolerated by the common law which epitomised the 'laissez-faire' attitude of liberal capitalism to both business and labour.¹⁵

The first modern-day trade union, characterised by its size, efficiency and concentration of power in the hands of full-time officials, was conceived around 1850 with the foundation of

¹³ J. Dainow, 'The civil law and the common law: some points of comparison' (1966-1967) *American Journal of Comparative Law* 419.

¹⁴ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

¹⁵ B. Hepple & S. Fredman, *Labour Law and Industrial Relations in Great Britain*, Kluwer, Deventer, 1986 at p. 17.

the Amalgamated Society of Engineers.¹⁶ During the 1860s, Trades Councils were established to coordinate union activity. This led to the creation of the Trades Union Congress (TUC) in 1868 to facilitate national activities of trade unions.¹⁷ However, trade unions as associations were not fully legalised until the Trade Union Act 1871. Yet the Act, in keeping with the British tradition of 'laissez-faire', did not introduce state control (apart from limited requirements to deter fraud and negligence), but instead set up a system of purely voluntary registration of trade unions. This approach, which remained the legal basis of trade union freedom for a century, embodied the typical British approach to labour law: it was based on the granting of immunities from judge-made common law doctrines, for example, restraint of trade, but did not "confer positive rights with corresponding positive state controls over unions."¹⁸ As Otto Kahn-Freund pointed out, "there is perhaps, no major country in the world in which the law has played a less significant role in the shaping of [labour-management] relations than in Great Britain."¹⁹ This dichotomy is also recognised by Robson who noted that "England is the home of trade unionism; it was on her soil that the practice of combined bargaining first arose; yet here alone is the collective contract still denied the elementary right of legal enforcement in the courts of law."²⁰ By virtue of the non-intervention of the state in collective affairs, a lacuna was created in which collective bargaining could develop autonomously from the state. Kahn-Freund described this result as 'collective laissez-faire'.²¹

However, Kahn-Freund's approach to British labour law has also been criticised, notably by Ewing. For Ewing, reducing the description of the British labour law system to 'collective laissez-faire':

provides an incomplete picture of the relationship between the state and industrial relations. The evidence suggests that the state has been a much more active player in the building of collective bargaining and other institutions than a concentration on legal regulation would tend to indicate, thereby reflecting the fact that legal regulation is only one method of intervention.²²

¹⁶ Hepple note 4 above at p. 216.

¹⁷ B. Ebbinghaus & J. Waddington, 'United Kingdom/Great Britain' in B. Ebbinghaus & J. Visser, *The Societies of Western Europe*, Macmillan, Oxford, 2000 at pp. 713 – 715: The TUC remained largely a weak federation until 1918 when it reformed its organisational structure to set up a General Council, with members elected annually by its affiliated trade groups. An increasing number of unions joined the TUC. According to the TUC (http://www.tuc.org.uk/the_tuc/index.cfm) it currently has 58 affiliates representing over 7 million members.

¹⁸ Hepple note 4 above at p. 208.

¹⁹ O. Kahn-Freund in A. Flanders & H.A. Clegg (eds.), *The System of Industrial Relations of Great Britain*, Blackwell, Oxford, 1954 at p. 47.

²⁰ W.A. Robson, 'Industrial Law' (1935) *Law Quarterly Review* 195.

²¹ O. Kahn-Freund, 'Labour Law' in M. Ginsberg (ed.), *Law and Opinion in England in the 20th Century*, Stevens, London, 1959 reprinted in O. Kahn-Freund, *Selected Writings*, Stevens, London, 1978 at p. 9.

²² K.D. Ewing, 'The State and Industrial Relations: 'Collective Laissez-Faire' Revisited' (1998) *Historical Studies in Industrial Relations* 1 at p. 2.

While there has, therefore, historically been a clear lack of formal legal structures that usually point to state intervention, Ewing argues that “there have been other forms of intervention by bureaucratic means in which the state has sought actively and radically to regulate the institutional framework of industrial relations.”²³ While this does not deny the existence of a system of ‘collective laissez-faire’, it paints a multi-faceted picture of British industrial relations. On the one hand, the state intervened through legislative or bureaucratic means to promote an effective industrial relations system. On the other hand, the state did not want to be seen to be involved in this promotion by traditional means such as legislation. Ewing therefore rightly points out that:

[W]hat is significant about labour relations in Britain then is not the absence of state intervention in industrial relations, but the nature and form of that intervention, though it is a point which should not be exaggerated for there were industries in which the state did intervene in the traditional way by resort to legislation.²⁴

This does not contradict Kahn-Freund’s well-established position on the absence of state regulation in the UK. Instead, it proposes a more nuanced analysis of the level of state interference. In comparison to many other countries the UK stands out as having a labour law system characterised by little state interference. Moreover, Ewing himself points out that “it remains the case that central tenets of the principle of ‘collective laissez-faire’ cannot readily be gainsaid.”²⁵ However, Ewing does make it clear that one needs to look past the legal surface to practical examples drawn from the history of British labour relations which illustrate that the state did play a greater role than hitherto assumed.²⁶ Ewing thus suggests that state intervention in industrial relations took the form of ‘administrative regulation’ which was demanded and supported by trade unions reaching its climax after the First World War. This is defined by other authors as ‘auxiliary regulation’ which was necessary to support and promote collective bargaining.²⁷ Ewing argues that these steps were necessary to encourage what Kahn-Freund calls “the regulatory function of collective forces in society”²⁸. The regulation by the state was therefore a necessary pre-condition for ‘collective laissez-faire’ to function effectively. In order to distinguish the British system from the German

²³ *Ibid* at p. 8.

²⁴ *Ibid* at p. 11.

²⁵ *Ibid* at p. 31.

²⁶ For examples see Ewing note 22 above at pp. 11 – 16.

²⁷ Examples include minimum wage-fixing machinery established in selected trades where collective bargaining was non-existent or the successive Fair Wages Resolutions originating in 1891, which obliged government contractors to pay fair wages (B. Hepple & S. Fredman, *Labour Law and Industrial Relations in Great Britain*, Kluwer, Deventer, 1986; Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law*, Lawrence and Wishart, London, 1995).

²⁸ Kahn-Freund note 21 above at p. 223.

system of collective bargaining which does not share such a high degree of voluntarism whether state-influenced or not, this chapter will continue to borrow Kahn-Freund's terminology. This is not meant to preclude the recognition that the state played an important role in shaping the British industrial relations system.

British trade unions thus initially won minimum labour standards up until the end of the First World War largely without the aid of legislation, relying instead on their industrial strength which helped them in gaining important state concessions which were usually evidenced by other means than legislation.²⁹ Moreover, both World Wars and the corresponding policies adopted by successive governments to cooperate with trade unions in the face of the need for an efficient war economy, served to consolidate the traditional voluntary system.³⁰ Nonetheless, according to Ewing,

[T]he period from 1922 to 1934 is perhaps the nearest the UK came to the voluntarist paradigm. The state retreated in terms of its role as institution builder, with the result that the parties were left largely to their own devices, albeit in some cases within a framework which had been created with the help of the state.³¹

One of the clear benefits recognised by both trade unions and employers' associations in the so-called abstentionist British system of collective relations was the flexibility it offered to the social partners in negotiating collective agreements, which could thus evolve dynamically to meet changing economic and social conditions. The absence of legal sanctions was perceived to be evidence of the "maturity of collective industrial relations in Britain."³² Lewis writes that:

The priority of collective bargaining over legal enactment was, during the 1940s and 1950s, finally elevated to an ideological belief common to both sides of industry. To collective parties who had grown accustomed to industrial self-government too much law meant undesirable interference in industrial relations by the State and by the legal profession.³³

However, as early as the 1950s there were signs that "the social consensus which had sustained the traditional voluntarist framework was under strain."³⁴ With the increasing inability of collective bargaining alone to regulate the terms and conditions of employment,

²⁹ *Ibid.*

³⁰ Hepple & Fredman note 27 above at p. 41.

³¹ Ewing note 22 above at p. 24.

³² O. Kahn-Freund, 'Intergroup Conflicts and their Settlement' (1954) *British Journal of Sociology* 193 at p. 212.

³³ R Lewis, 'The Historical Development of Labour Law' (1976) *British Journal of Industrial Relations* 1 at p. 9 citing A. Flanders, 'The Tradition of Voluntarism' (1974) *British Journal of Industrial Relations* 352 at p. 352.

³⁴ Hepple & Fredman note 27 above at p. 57.

successive government in the 1960s and 1970s enacted a number of statutes which provided workers with minimum protection. As Lewis writes:

This intervention was not the result of union pressure but was intended to achieve the Government's objectives including the promotion of social justice for individuals, the efficient use of manpower and the encouragement of industrial peace by removing some of the causes of conflict.³⁵

Successive governments thus adopted various laws, most notably on incomes policies, to attempt to influence the conduct of industrial relations.³⁶ It is therefore from this period onwards that a clear involvement of the state becomes apparent in contrast to intervention by other means during the previous decades. However, while these policies encroached “very directly upon the autonomy of collective bargaining”³⁷, they did not reshape labour law itself³⁸ and eventually all ended in failure.

Legislation was also introduced by successive governments, in an attempt to reform collective labour relations more widely. The Donovan Commission hoped that order could be achieved “if possible, without destroying the British tradition of keeping industrial relations out of the courts.”³⁹ The subsequent Conservative government similarly introduced legislation in the form of the Industrial Relations Act 1971 in an attempt to reform, amongst other things, union rules and bargaining structures. However, these provisions also failed to bring about change. Thus, despite attempts at reform, “unionisation increased considerably until the 1970s due to collectivist occupational traditions, organisational sectionalism, closed shop practices, high wage growth, and a large public sector and welfare state.”⁴⁰ The Labour government which came to power in 1974 returned to the path of reform in a less drastic, albeit equally unsuccessful, way. The Employment Protection Act 1975 (EPA 1975) re-enacted a provision which allowed the Advisory, Conciliation and Arbitration Service (ACAS) and the Central Arbitration Committee (CAC) to extend collectively bargained terms and conditions to a so-called ‘black-sheep’ employer, i.e. an employer observing less favourable terms and conditions than the industry standard.⁴¹ The statute did not challenge the principle of

³⁵ Lewis note 33 above at p. 10.

³⁶ Statutes adopted include the Contracts of Employment Act 1963, the Redundancy Payments Act 1965, the Race Relations Act 1968 and the Equal Pay Act 1970. For an overview see Lewis note 33 above at pp. 10 – 11.

³⁷ P. Davies & M. Freedland, ‘Editors Introduction’ to *Kahn-Freund's Labour and the Law*, Stevens, London, 1983 at p. 7.

³⁸ Lord Wedderburn, ‘Labour Law Now – A Nudge and a Hold’ (1984) *Industrial Law Journal* 73 at p. 73.

³⁹ Report of the Royal Commission on Trade Unions and Employers’ Associations, Cmnd. 3623 (1968) at para. 190.

⁴⁰ Ebbinghaus & Waddington note 17 above at pp. 705 – 706.

⁴¹ K.W. Wedderburn, ‘The Employment Protection Act 1975 – Collective Aspects’ (1976) *Modern Law Review* 169.

‘collective laissez-faire’ inherent in the UK system of collective bargaining but instead sought to support unions in their efforts to agree industry-wide minimum terms and conditions. The provision in the EPA 1975 had originally been introduced during the First World War in the Munitions of War Act 1915⁴² and then by the Conditions of Employment and National Arbitration Order 1305/1940⁴³ during the Second World War. It provided for compulsory arbitration and prohibitions on industrial action during the War in order to ensure for uninterrupted production. The 1940 Order continued to be in force (subject to some amendments) until 1951 when it was revoked and replaced by the Industrial Disputes Order 1376/1951,⁴⁴ which in turn survived until 1958 when it was revoked.⁴⁵ There were attempts to incorporate into the Terms and Conditions of Employment Act 1959 article 8 of Order 1376⁴⁶, which provided for compulsory arbitration in order to assist unions in extending collectively bargained terms and conditions to employers who were not observing them. However, the proposed provision was withdrawn on the insistence of employers.⁴⁷

A renewed attempt to extend the coverage of collective agreements was made in the Employment Protection Act 1975. Schedule 11 to that Act allowed, *inter alia*, an ‘independent’ trade union to bring a claim before ACAS that an employer was observing less favourable terms and conditions “than the general level of those observed for ‘comparable workers’ by employers in that trade, industry or section in the employer’s district whose ‘circumstances are similar to those of the employer in question.’”⁴⁸ Courts, ACAS and the CAC had always taken a liberal view of the provisions on the extension of collective agreements under the 1940 and 1951 Orders and, as a result, trade unions were largely in favour of a reintroduction of the mechanism by the 1975 Act.⁴⁹

⁴² For an overview see I.G. Sharp, *Industrial Conciliation and Arbitration in Great Britain*, Allan & Unwin, London, 1950.

⁴³ S.R. & O. 1940 No. 1305. For an overview see P. Davies & M. Freedland, *Kahn-Freund’s Labour and the Law*, Stevens, London, 1983 at pp. 151 – 152.

⁴⁴ S.I. 1951 No. 1376.

⁴⁵ For an overview of see Lewis note 33 above at p. 6.

⁴⁶ For an overview see G. Latta, ‘The Legal Extension of Collective Bargaining’ (1974) *Industrial Law Journal* 215.

⁴⁷ *Ibid.*

⁴⁸ Sections 1 and 2, Schedule 11, Employment Protection Act 1975 available at http://www.opsi.gov.uk/acts/acts1975/pdf/ukpga_19750071_en.pdf. For a commentary of this section see Wedderburn note 41 above at p. 177.

⁴⁹ For an example of union and Labour Party responses to the abolition of Order 1376/1951 see Latta note 46 above at p. 215. For an overview of the CAC’s approach to Schedule 11 to the 1975 Act, see B. Doyle, ‘A substitute for collective bargaining? – The Central Arbitration Committee’s Approach to Section 16 of the Employment Protection Act 1975’ (1980) *Industrial Law Journal* 154.

A fundamental shift occurred with the introduction of Mrs. Thatcher's programme of economic deregulation and liberalisation, starting in 1979, which was designed to:

promote product-market competition and reduce the size of the public sector. Reform of industrial relations and restructuring of the labour market were central parts of this wider economic programme. [...] What was perhaps most remarkable about this programme of reform was the use of labour law not as a means of achieving distributive goals or embodying a notion of industrial justice, but as part of an economic policy designed to foster competitiveness.⁵⁰

Thus, the right to strike was curbed and trade unions were subjected to an unprecedented amount of external regulation and supervision. Schedule 11 of the EPA 1975 was repealed by the Conservative government in 1980⁵¹ and, as a result, the UK does not have a means by which collective agreements can be extended to cover a whole industry or sector. The repeal of the 1975 Act was part of a wider trend in British labour law to discourage regulation of the labour market through collective bargaining. The Employment Act 1982 also removed the blanket immunity from liability in tort and prohibited certain forms of industrial action. These bans were further extended in the 1988 and 1990 Employment Acts to include a prohibition on taking secondary industrial action. As Deakin and Morris point out, "the nature of the changes introduced [by successive Conservative governments] made it impossible to see the principal rationale of labour law as the support of voluntary collective bargaining."⁵²

The reforms of the Thatcherite government led not only to a considerable reduction in strike activity, but also contributed to a decline in trade union membership. This was due to a rapid deindustrialisation of the economy which meant that unions were deprived of their traditional strongholds. In addition, the number of workers in the service industry, which has always been difficult for unions to access, more than doubled thereby adding to the decline in union membership. In contrast, employment in the public sector expanded between 1980 and 2004 which slowed the fall in membership figures.⁵³ Nonetheless, the proportion of union members in workplaces with more than 25 workers fell from 65% in 1980 to 47% in 1990 and 36% in 1998.⁵⁴ More recent data indicate a further decline in membership to a low point of 28.8% in 2004. Since then, slight increases in membership have been recorded (29% in 2005), due mainly to "new" groups of workers (e.g. women) joining trade unions in their relevant

⁵⁰ Deakin & Morris note 6 above at p. 27.

⁵¹ Davies & Freedland note 43 above at p. 98. Section 19b of the Employment Act 1980 repeals ss 11 – 16 and Schedule 11 to the 1975 Act.

⁵² Deakin & Morris note 6 above at p. 43.

⁵³ J. Bischoff & R. Detje, 'Das Europäische Sozialmodell und die Gewerkschaften', *Supplement der Zeitschrift Sozialismus* 1/2007 at pp. 24 – 25.

⁵⁴ M. Cully et al., *Britain at Work, As depicted by the 1998 Workplace Employment Relations Survey*, Routledge, London, 1999 at p. 235.

sectors.⁵⁵ However, these numbers fluctuate with a new low of 27.4% being reached in 2008.⁵⁶ At this stage, it should be noted that trade union membership is only one measure of union strength. Statistics also record the coverage of collective agreements as a potential indicator of trade union power. While these figures paint a similar picture,⁵⁷ there are some signs that the coverage of collective agreements has increased moderately since 1998, thereby indicating that collective agreements still remain an important source of British labour law.⁵⁸

Other effects of the Conservative reforms, seen by some as positive, must also be briefly mentioned. Deakin and Morris write that:

[B]y making unions formally responsible for a wide range of strikes, and by requiring membership ballots in the case of all strikes which were in law the union's responsibility, the [legislation] strengthened the power of central union organisation over the rank and file, reversing a trend towards fragmentation which had weakened unions in some sectors.⁵⁹

Whether this is a trend that can be viewed as an advantage or disadvantage to trade unionists must be considered in light of the current role of trade unions, which is discussed in more detail at a later stage. There has been a trend in both Germany and the UK of merging smaller unions into large central bodies.⁶⁰ These have a greater influence in terms of bargaining and lobbying power. They have also led to a new understanding of the term 'general union':

The recruitment bases of most large unions now straddle more industries and occupations than ever before. Large unions have tended to spread the membership load to ensure that membership losses concentrated in a specific industry or occupation do not undermine entire organisations and to provide a basis for recruitment gains in areas of employment expansion.⁶¹

Due to the decline in union membership overall coupled with the increasing influence of external regulators (e.g. the European Union – EU) this coordination of union power at a central level has enabled unions to respond to changing economic and social conditions in a

⁵⁵ Department for Trade and Industry, *Employment Market Analysis and Research – Trade Union Membership 2005*, March 2006 available at <http://www.berr.gov.uk/files/file25737.pdf>.

⁵⁶ BERR, *Trade Union Membership 2008*, National Statistics Publication available at <http://stats.berr.gov.uk/UKSA/tu/tum2008.pdf>.

⁵⁷ Cully et al. note 54 above at p. 243; R. Lewis et al. (eds.), *Labour Law in Britain*, Blackwell, Oxford, 1986 at p. 20.

⁵⁸ Department for Trade and Industry note 55 above.

⁵⁹ Deakin & Morris note 6 above at p. 35.

⁶⁰ Ebbinghaus & Waddington note 17 above at p. 716: Recent mergers which have led to the creation of so-called super unions include *inter alia* public sector union UNISON (National and Local Government Officers Association – NALGO, National Union of Public Employees – NUPE, Confederation of Health Service Employees – COHSE) in 1993 and Unite the union (Amicus (which was formed out of mergers between Amalgamated Engineering and Electrical Union – AEEU, Manufacturing, Science and Finance Union – MSF, Union for the finance industry – Unifi, and Graphical, Paper and Media Union – GPMU) and Transport and General Workers Union – TGWU) in 2007.

⁶¹ *Ibid* at p. 716.

number of ways both politically and practically. In later chapters this will become evident when the reactions of trade unions to the European enlargements and the new Member State workers are looked at.

The Labour government, which came to power following the 1997 election, stressed that there would be “no going back”⁶² to the powers held by trade unions pre-1979 and has instead insisted on the need for “partnership at work”⁶³, i.e. cooperation between labour and management to improve economic performance. Thus, while the government has reintroduced a mandatory recognition procedure for trade unions by employers in the Employment Relations Act 1999, it has refused to restore the comprehensive trade union immunities which protected collective rights. Thus, for example, secondary action is still illegal. The 1999 Act also significantly extended the anti-discrimination provisions for union members. This was further strengthened by the Employment Relations Act 2004. However, while there seems to be greater acknowledgement of the legitimacy of collective bargaining by New Labour, its effectiveness is far from assured. Sceptics even go so far as to suggest that “the ‘partnership’ which New Labour seeks to encourage within the employment relationship is not one which necessarily involves trade unions.”⁶⁴ Deakin and Morris take a different approach:

While the idea of partnership is, in many ways, highly diffuse, in the context of collective bargaining it implies a process through which unions achieve a recognised status within the workplace as the means for expressing collective employee ‘voice’, in return for facilitating organisational changes which enhance performance and productivity. [...] What is new is the changed economic environment within which the compromise between labour and management is being forged. Both the effectiveness of union sanctions and the scope for redistribution through collective bargaining have been limited. [...] Under these circumstances, the present partnership agenda is vulnerable to the objection that the role envisaged for unions is, of necessity, a highly constrained one.⁶⁵

The unions have responded to these new challenges in a number of ways. Following the trend away from fragmentation identified by Deakin and Morris above, there has been an increase in mergers amongst trade unions in the same sectors in order to avoid inter-union competition for recognition in the hope of strengthening the union’s position vis-à-vis management. In keeping with New Labour’s emphasis on “partnership at work”, unions have increasingly emphasised their shared commitment to the business interests, thereby indicating their

⁶² *Fairness at Work*, Cmnd 3968 (1998) at p. 4.

⁶³ W. Brown, ‘Putting Partnership into Practice in Britain’ (2000) *British Journal of Industrial Relations* 299.

⁶⁴ T. Novitz & P. Skidmore, *Fairness at Work. A Critical Analysis of the Employment Relations Act 1999 and its Treatment of Collective Rights*, Hart Publishing, Oxford, 2001 at p. 14.

⁶⁵ Deakin & Morris note 6 above at pp. 39 – 40.

willingness to cooperate as partners in introducing greater flexibility, whilst at the same time protecting their members' interests.⁶⁶ There are thus signs that the role of trade unions in British labour law has shifted away from one of an adversarial nature to a role based on cooperation between labour and management. Whereas this obviously does not go as far as the co-determination system prevalent in German enterprises where there is a very strong emphasis on cooperation between management and labour, it nonetheless institutes a dialogue between partners that were hitherto adversaries. As a positive result for unions, this climate of dialogue has led to an increase, in recent years, in voluntary recognition agreements, which have in turn resulted in a rise in the number of collective agreements reached through collective bargaining.

It seems clear that, historically, the regulation and development of British trade unions are firmly rooted in an Anglo-Saxon social model which is located within a common law tradition. However, more recent developments in the labour law system within which trade unions operate have forced the unions to formulate strategies which are not dissimilar to those adopted in the Continental social model, of the civil law tradition. Reactions include the merger of unions within and under strong umbrella organisations as well as an increased emphasis on dialogue and cooperation mentioned above, trends that are also visible in Germany as shown below. It is doubtful that the parallel developments in both systems are conscious reactions. However, it seems that unions in Germany and the UK are facing similar problems which they are reacting to in similar ways. The problems include a fall in membership levels coupled with an increasingly individualised labour market. There is a lot of scope for both to learn from each other as has become evident in the course of the case studies on trade union reactions to new Member State workers, discussed in later chapters. These similar problems and reactions thereto are allowing unions to bridge the gap between the two legal systems which are rooted in very different historical, social and economic contexts. The case studies show that this is done through increased cooperation on common problems. It is hoped that this thesis will contribute to this development by illustrating where unions could learn from each other on the basis of a comparative legal framework.

⁶⁶ TUC Publication, *Partners for Progress: New Unionism at the Workplace*, 1999.

D. Historical, economic, social and cultural context of German trade unions⁶⁷

The first German trade unions date back to the middle of the nineteenth century, when workers, in line with earlier British examples and following the repeal of the Combination Laws in the individual German states (e.g. Saxony 1861, Prussia 1867, North German Confederation 1869)⁶⁸, began to voluntarily organise themselves in order to counteract the economic superiority of employers and employers' associations.

By 1890, in the wake of German unification, the majority of trade unions had joined together under an umbrella organisation to organise all independent trade unions in the General Commission of Trade Unions (Generalkommission der Gewerkschaften Deutschlands), which boasted over 2 million members in 1914. This organisation survived the First World War and the subsequent political upheavals to rename itself as the General German Trade Union Federation (Allgemeiner Deutscher Gewerkschaftsbund) in 1919, whose membership reached a peak of 5 million in 1929. Both the General Commission of Trade Unions and the General German Trade Union Federation were closely linked to the main German socialist party (SPD). Indeed, the main reason behind the establishment of the General Commission in 1890 is said to have been the perceived need to gain support for the SPD.⁶⁹ Since 1894, there have also been a number of non-socialist unions, the biggest of which were the Christian trade unions (Gesamtverband der Christlichen Gewerkschaften) which boasted 673,000 members by 1929. With the rise to power of the National Socialist German Workers' Party (Nationalsozialistische Deutsche Arbeiterpartei) in 1933, all trade unions were dissolved and replaced with an industrial branch (National Socialist Factory Cell Organisation – Nationalsozialistische Betriebszellenorganisation) of the National Socialist Workers Party which often participated in labour disputes,⁷⁰ but due to its ideological foundation cannot be classified as a 'trade union'.

Following the founding of the Federal Republic of Germany in 1949, many of the pre-war trade unions reorganised around the German Trade Union Federation (Deutscher

⁶⁷ This section only intends to provide a cursory introduction to the historical, economic, social and cultural context within which German trade unions operate. For more detail see W. Schroeder & B. Weßels (eds.), *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland – Ein Handbuch*, Westdeutscher Verlag, Wiesbaden, 2003 or H. Grebing, *Geschichte der deutschen Arbeiterbewegung. Von der Revolution 1848 bis ins 21. Jahrhundert*, vorwärts, Berlin, 2007.

⁶⁸ G. Köbler, *Lexikon der europäischen Rechtsgeschichte*, Beck, München, 1997 at p. 199.

⁶⁹ Hepple note 4 above at p. 320.

⁷⁰ *Ibid* at p. 320.

Gewerkschaftsbund - DGB) which, unlike the pre-war trade unions, declared its political independence from the SPD.⁷¹ This was due to the fact that the DGB saw itself as an 'Einheitsgewerkschaft'⁷². It defines such an 'Einheitsgewerkschaft' as:

An association made up of members who have different political, religious, cultural and social views and who must be brought together within one organisation: a trade union.

A coalition of workers with different statuses, qualifications and work patterns within one trade union. This means that all workers are unified within one trade union regardless of their characteristics and regardless of whether they are workers or employees.

It embodies the basic principle of one company, one trade union.⁷³

This implies, for the DGB, that it cannot subscribe to one political party but that it must be politically neutral as far as that is possible. However, despite this declaration there has always been a strong link between the SPD and the DGB the exact nature of which has depended on whether the SPD was in government or not as well as on the political demands of the party. More recently, the relationship between the two partners has come under scrutiny as both try to reform themselves.⁷⁴ Over the years, the DGB also worked closely with the German Federation of Career Public Servants (Deutscher Beamtenbund - DBB), the German White-Collar Workers' Union (Deutsche Angestellten-Gewerkschaft - DAG) and the revived Christian Trade Union Federation (Christlicher Gewerkschaftsbund). Following the Second World War,

the civil law and the individualistic approach and assumptions of the Civil Code were recognized as not particularly apt in labour relations. Thus standard form labour contracts were balanced by the recognition of and guarantee of the freedom of association of Article 9(3) of the Constitution. [...] As an area of civil law, there is no direct intervention by the state in the conduct of industrial relations.⁷⁵

Despite belonging to the civil law tradition, German labour law therefore has a close similarity to the common law. This illustrates how the distinctions between common and civil law often become blurred when one looks at aspects of individual legal systems. In terms of

⁷¹ M. Löwisch, *Arbeitsrecht*, Werner, Düsseldorf, 2002 at p. 53.

⁷² This literally translates as a 'unity trade union'. It refers to a form of industrial trade unionism where all workers in one industry are in the same union.

⁷³ H-U Niedenhoff & W. Pege, *Gewerkschaftshandbuch*, Deutscher Instituts-Verlag, Köln, 1997 at p. 15: "Dabei bedeutet Einheitsgewerkschaft: Die Vereinigung von weltanschaulich und politisch differenzierten Richtungen innerhalb einer Organisation, das heisst Mitglieder der verschiedenen politischen Parteien sowie unterschiedlicher Weltanschauung oder konfessioneller Einstellung innerhalb einer Gewerkschaft; Zusammenschluss von Arbeitnehmern mit unterschiedlichen Statusmerkmalen, Ausbildungsqualifikationen und arbeitsvertraglichen Besonderheiten innerhalb einer Gewerkschaft; Einheitsgewerkschaften werden also nicht unterschieden in Arbeiter- und Angestelltengewerkschaften, sondern beide Berufsgruppen sind in derselben Gewerkschaft vertreten; das Grundprinzip: ein Betrieb – eine Gewerkschaft."

⁷⁴ W. Schroeder, 'SPD und Gewerkschaften: Vom Wandel einer privilegierten Partnerschaft' *WSI Mitbestimmungen* 5/2008.

⁷⁵ Foster & Sule note 2 above at p. 524.

the regulation of labour law, Germany and the UK are therefore more similar than one would initially assume.

As Foster and Sule point out, “although case law is not recognised as a formal source of law in the German legal system, it is nevertheless generally observed in the area of labour law as binding law.”⁷⁶ As a result, labour law is, in important areas, made up of “pure case law”⁷⁷. The lack of codification of German labour law has been an issue in German politics since 1889 when Anton Menger criticised the absence of a “complete codification” of labour law in the German Civil Code (Bürgerliches Gesetzbuch – BGB).⁷⁸ Since then there have been numerous attempts at codification, the most recent of which took place in 2007, which have all ended in failure.⁷⁹ This has been accompanied by a lively debate as to whether there should be codification. It is often argued that codification would foster a “unity of law” (Rechtseinheit) by creating “clear and stable norms” (stabile und berechenbare Normen).⁸⁰ It would also diminish the power of the labour courts, particularly of the strong Federal Labour Court (Bundesarbeitsgericht) which is viewed with suspicion by advocates of codification.⁸¹ However, opponents, for example Herschel, argue that labour law is a “dynamic system” which “grows organically” and should therefore not be “pinned down”.⁸² A new attempt at codification is likely to be undertaken after the parliamentary elections in 2009, however, as Iannone writes, “it is doubtful whether such a project can succeed.”⁸³

In parallel to developments in the Federal Republic, in the German Democratic Republic, the Free German Trade Union Federation (Freier Deutscher Gewerkschaftsbund - FDGB), comprising fifteen individual trade unions, was established to represent workers' interests. However, in reality it was an integral part of the state's power structure.⁸⁴

⁷⁶ *Ibid* at p. 527.

⁷⁷ G. Thüsing, ‘Das Tarifrecht muss sagen, was es will’, *Süddeutsche Zeitung* 13/4/2010: “Arbeitsrecht ist daher in wichtigen Bereichen Richterrecht reinsten Wassers.”

⁷⁸ A. Menger, *Das bürgerliche Recht und die bestizlosen Volksklassen*, Laupp, Tübingen, 1890 at p. 173: He talks of a “umfassende Kodifikation”.

⁷⁹ For a good overview see E. Iannone, ‘Die Kodifizierung des Arbeitsvertragsrechts – ein Jahrhundertprojekt oder eine weitere Fußnote’ *Arbeit und Recht* 6/2008 at p. 197.

⁸⁰ *Ibid* at p. 199.

⁸¹ Arbeitsvertragesgesetz (ArbVG 92), Gutachten D zum 59. DJT 1992.

⁸² W. Herschel, *Gesetzbuch der Arbeit – heute?*, DB 1959 at p. 1444: He argues “dass es sich beim Arbeitsrecht um eine Materie handle, welche ‘organisch’ wachse, mithin ‘dynamisches Recht’ sei und sich ‘zu sehr im Fluss befinde’, was einer grundsätzlichen Fixierung derselben entgegenstehe.”

⁸³ Iannone note 79 above at p. 203: “Es bleiben Zweifel an der Realisierbarkeit des Vorhabens.”

⁸⁴ Grebing note 67 above at p. 200.

Following German reunification in 1990, West German labour laws were adopted by Former East Germany with only minor exceptions in respect of pensions and retirement. The FDGB was dissolved but only relatively few of its members joined the DGB due to a wide-spread disillusionment amongst Eastern German workers with worker representative structures, which continues to the present day. According to Kohte, there is a lack of understanding of workplace rights amongst Eastern German workers.⁸⁵ As a result, trade union membership in Eastern Germany is extremely low. Trade unions also struggle to establish themselves at the workplace in Eastern Germany as a majority of enterprises are small and employers refuse to cooperate.⁸⁶ Overall since reunification, German trade union membership, after a brief peak in the early 1990s, has fallen steadily every year. In addition to high unemployment both in West and to a larger extent in East Germany, unions are facing increasing difficulties in recruiting young workers and employees in the growing private service sector.⁸⁷ Unions also complain of a diminishing sense of solidarity amongst workers. This trend has led some writers to question at what point German trade unions will be unable to sustain corporatist industrial relations.⁸⁸ As Visser points out, “the decline in union representation decreases the industrial power, public legitimacy and political clout that unions need to act as the collective custodians of employee rights in the political and industrial arena.”⁸⁹ This leads him to argue that “given the importance of the German economy in Europe and its ‘model’ character for other ‘co-ordinated market economies’, the future of German labour relations and trade unions has wider implications.”⁹⁰

Keller also observes a double shift in power and influence in the sphere of German industrial relations since the 1980s. First, “there has been a shift in the locus of negotiation and regulation towards the workplace – that is, a decentralisation of collective bargaining.”⁹¹ This

⁸⁵ Private Communication with Prof. W. Kohte, Martin-Luther-Universität Halle-Wittenberg, Halle, 7/1/2009.

⁸⁶ W. Schroeder & B. Weßels (eds.), *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland – Ein Handbuch*, Westdeutscher Verlag, Wiesbaden, 2003.

⁸⁷ European Industrial Relations Observatory, *Trade Union Membership and Density in the 1990s* available at <http://www.eurofound.europa.eu/eiro/1999/08/feature/de9908113f.htm>.

⁸⁸ J.T. Addison, C. Schnabel & J. Wagner, ‘The (Parlous) State of German Unions’ (2007) *Journal of Labor Research* 3.

⁸⁹ J. Visser, ‘Trade Union Decline and What Next’ (2007) *Industrielle Beziehungen* 97 at p. 98.

⁹⁰ *Ibid* at p. 98 citing P. Hall & D. Soskice, ‘An Introduction to Varieties of Capitalism’ in P. Hall & D. Soskice (eds.), *Varieties of Capitalism. The institutional foundations of comparative advantages*, Oxford University Press, Oxford, 2001.

⁹¹ B. Keller, ‘National Industrial Relations and the Prospects for European Collective Bargaining – The view from a German standpoint’ in W. Lecher & H-W. Platzer (eds.), *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, Oxford, 1998 at p. 48.

can be seen in the increased use of so-called ‘opening clauses’ (Öffnungsklauseln).⁹² The insertion of such clauses in central collective agreements enables actors at the enterprise level to negotiate matters that are normally covered in the central collective agreement.⁹³ This kind of delegation to the enterprise level has also been called “regulated decentralisation”⁹⁴ as it enables enterprise-level actors to find specific solutions to problems which they cannot regulate at a central level.⁹⁵ Thus, decentralisation has brought with it “a high degree of flexibility in its various coordinated forms.”⁹⁶ Yet it is a process which “does not inevitably imply a loss of power on the part of trade unions; rather, it could entail unions redirecting their main focus towards providing a greater service role.”⁹⁷ The different roles adopted by unions in Germany are examined in more detail below. Moreover, Keller observes that:

National economies are subject to an increasing degree of internationalisation. [However], compared with Great Britain, discussion of this issue began fairly late in Germany and was pushed into the background in the early 1990s by the overarching subject of German unification. As yet it has been heavily, possibly excessively, focused on the level of the workplace or enterprise, with insufficient attention directed at the problem of higher levels of regulation.⁹⁸

The traditional unions have reacted to all this so far by encouraging the concentration of union power within one organisation.⁹⁹ This led to numerous mergers, culminating in 2001 with the merger of four unions affiliated to the DGB and the DAG into the Vereinte Dienstleistungsgewerkschaft (ver.di), one of the world’s largest trade unions, which marked a slight turning point in the fortunes of German trade unions. This is thus a similar reaction to that of unions in the UK mentioned above. The DBB recently announced an increase in membership density, whereas smaller independent trade unions have been gaining in strength and importance following criticism of ver.di’s inability to counteract increasing calls by employers’ associations and the government to improve labour market flexibility. The growing role played by smaller trade unions¹⁰⁰ in German labour relations illustrates the tensions that have arisen within the trade union movement due not only to dwindling

⁹² For a precise definition see, for example, H. Brox, B. Rütters & M. Henssler, *Arbeitsrecht*, 17th ed., Kohlhammer Verlag, Stuttgart, 2007 at pp. 46, 240 & 370. For a practical example see: DGB, *Fragen und Antworten zur Tarifpolitik* available at http://www.dgb.de/themen/++co++77b87416-365d-11df-5e49-00188b4dc422/@@index.html?search_text=tarifpolitik.

⁹³ A. Hassel, ‘The Erosion of the German System of Industrial Relations’ (1999) *British Journal of Industrial Relations* 483 at 496.

⁹⁴ A. Hassel & T. Schulten, ‘Globalisation and the future of central collective bargaining: the example of the German metal industry’ (1998) *Economy and Society* 527.

⁹⁵ Opening clauses have been used, for example, in the regulation of working time.

⁹⁶ Keller note 91 above at p. 48.

⁹⁷ *Ibid* at p. 48.

⁹⁸ *Ibid* at pp. 48 – 49.

⁹⁹ Löwisch note 71 above at p. 52.

¹⁰⁰ R. Woerlen & A. Kokemoor, *Arbeitsrecht*, Carl Heymanns Verlag, München 2005 at p. 205.

membership figures, but also the differing reactions to the phenomenon of globalisation and the debates surrounding it. Moreover, German unions are faced with a threat of reform of the collective bargaining system which was first proposed in 1996.¹⁰¹ While this reform process was abandoned following the election of the current Chancellor, Angela Merkel, the German unions face the possibility of a future development of a bargaining system similar to that in the UK. It is therefore important to compare both systems of trade union regulation in order to illustrate to the unions themselves how they could learn from each other.

Despite the historical differences between German and British trade unions, even a cursory introduction to the development of the unions throws up many similarities which are largely a result of external factors such as globalisation. While certain fundamental differences remain, due to the historical development of the social models, there are increasing opportunities for trade unions in Germany and the UK to borrow ideas and concepts from each other, in order to find solutions to common problems. As Schroeder points out, trade unions in Germany are struggling with “membership losses, ageing members and a lack of adaptation to economic changes and challenges of an increasingly service- and knowledge-oriented labour market.”¹⁰² The cultural and historical perspective of the legal systems is, however, still necessary in order to understand the role and regulation of trade unions. Yet at the same time the German and British labour law systems illustrate very clearly that “in the twenty-first century, there is no consensus [...] in finding a suitable criterion for division of the world’s legal systems.”¹⁰³

¹⁰¹ There has been an intense debate which started in 1996 as to whether the centralised collective bargaining system prevalent in Germany should be reformed. A number of employers began to question the system and demanded a more decentralised, company-related collective bargaining. This was supported by numerous politicians and taken up for consideration under the Schröder government (in power from 1998 – 2005). No agreement was reached due to the early elections which brought the grand coalition to power in 2005 but there is a possibility of reform in the future. For more information see European Industrial Relations Observatory, *Changes in national collective bargaining systems since 1990*, 17/05/2005 available at <http://www.eurofound.europa.eu/eiro/2005/03/study/TN0503102S.htm>.

¹⁰² Schroeder note 74 above at p. 231: “Aber auch die Gewerkschaften haben an Stärke eingebüßt. Hinzu kommen Mitgliederrückgänge, die Alterung der Mitgliedschaft und eine bis heute nicht gelungene Adaption des wirtschaftlichen Strukturwandels hin zu einer modernen Wissens- und Dienstleistungsökonomie innerhalb der gewerkschaftlichen Mitgliedschaft.”

¹⁰³ P. De Cruz, *Comparative Law in a Changing World*, 3rd ed., Routledge-Cavendish, Oxon, 2007 at p. 33.

E. The role of trade unions in Germany and the UK

In both Germany and the UK, trade unions have adopted different roles at different periods in history. The ‘classic’ role of a trade union was one of involvement in a collective bargaining process. In the UK, this was identified as one of the three methods of trade unionism as early as 1920.¹⁰⁴ In Germany, this element of collective relations was seen as “integral to the establishment of a democratic political order”¹⁰⁵ following the Second World War. However, trade unions have also developed other principal functions which have been growing in importance in recent years. When comparing the responses of trade unions to the European enlargements and to new Member State workers it is necessary to understand the role that trade unions adopt within a legal system. This will be used as a basis both upon which to analyse and compare the responses. When analysing the responses of trade unions, it will be argued that the role that the union adopts in a national system will determine the nature of its responses to new Member State workers. If similar roles are adopted by unions in different legal systems then this will enable cooperation between unions at a national level and within European trade union confederations.

Ewing identifies five principal functions of unions: a service function; a representation function; a regulatory function; a government function; and a public administration function.¹⁰⁶ However, these typologies of functions cannot be seen as stable categories. Rather, they undergo constant change and evolution depending on external political and economic conditions and environments to which trade unions must adapt. It should be noted at this point that the functions that Ewing identifies are based on a British point of view and may, therefore, not be an ideal categorisation of German trade union functions. A German classification may be more suitable. However, even in Germany, there is a lack of clarity as to what functions trade unions adopt. Schönhoven explains that as early as 1906, a trade union leader was encouraging the formulation of a theory on trade union functions. The theorist Eduard Bernstein replied, that such a theory “does not exist or at least only on a very basic level.”¹⁰⁷ Schönhoven comments that the same answer could be given today as “an exact

¹⁰⁴ S. & B. Webb, *Industrial Democracy*, 1920ed..

¹⁰⁵ Deakin & Morris note 6 above at p. 847.

¹⁰⁶ K.D. Ewing, ‘The Function of Trade Unions’ (2005) *Industrial Law Journal* 1.

¹⁰⁷ K. Schönhoven, ‘Geschichte der deutschen Gewerkschaften: Phasen und Probleme’ in W. Schroeder & B. Weßels (eds.), *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland*, Westdeutscher Verlag, Wiesbaden, 2003 at p. 40 citing Eduard Bernstein: “eine entsprechende Theorie existiert überhaupt nicht oder nur in ganz elementären Ansätzen.”

definition of what trade unions are and what they want is difficult to find.”¹⁰⁸ Esser attempts to determine the functions of trade unions, however, his classification is not as broad as that of Ewing.¹⁰⁹ Therefore, Ewing’s approach is employed to classify both British and German trade unions. Moreover, as this thesis adopts a comparative approach a common denominator must be found for an analysis of trade union roles and functions.

The ambit of each of these functions is largely self-evident. According to Ewing, “a service function means a function which involves the provision of services and benefits to members.”¹¹⁰ All trade unions provide services in one sense or another, ranging from benefits such as health and unemployment benefits to legal advice and representation in the case of problems related or unrelated to work. The meaning of the representation function is, again, obvious. All trade unions represent the interests of the worker at his place of work. As Ewing points out, this workplace representation may take three different forms: individual representation, professional support or collective representation. Individual representation is essentially:

an extension of the union’s service function in the sense that the union is providing the service of representation to those who may have a grievance or a disciplinary problem. Representation may also take the form of providing professional support and a lay advocate or companion in any forum for handling individual disputes.¹¹¹

Collective representation, on the other hand, “may take several forms, including consultation and bargaining on behalf of the workforce as a whole, members and non members alike.”¹¹²

The regulatory function “acknowledges that trade unions are involved in a process of rule-making that extends beyond their members or the immediate colleagues of their members.”¹¹³

Finally, the governmental and public administration functions of trade unions have two dimensions: firstly, trade unions represent “the organised political representation of working people, both as a means of restraining the power of the State and a means of harnessing the

¹⁰⁸ *Ibid* at p. 40: “Denn eine exakte Definition dessen, was Gewerkschaften eigentlich sind und was sie wollen, ist nicht leicht zu formulieren.”

¹⁰⁹ J. Esser, ‘Funktion und Funktionswandel der Gewerkschaften in Deutschland’ in W. Schroeder & B. Weßels (eds.), *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland*, Westdeutscher Verlag, Wiesbaden, 2003 at pp. 66 – 67: Esser cites Franz Neumann’s approach to the function of trade unions which distinguishes three functions: a type of service function (“Sie sind Genossenschaften und beruhen auf dem Grundsatz der gegenseitigen Hilfe [...] Sie gewähren Krankheits- und Unfallunterstützung, Arbeitslosenhilfe, ...”), a regulatory function (“Sie sind primär Kampfverbände und zielen auf eine Beherrschung des Arbeitsmarkts ab.”), and a political role (“Sie zielen nicht nur auf die Kontrolle des Arbeitsmarktes ab, sie helfen nicht nur ihren Mitgliedern, sondern sie versuchen zur gleichen Zeit den Staat und den staatlichen Zwangsapparat zu beeinflussen.”).

¹¹⁰ Ewing note 106 above at p. 3.

¹¹¹ *Ibid* at p. 3.

¹¹² *Ibid* at pp. 3 – 4.

¹¹³ *Ibid* at p. 4.

power of the State”¹¹⁴; secondly, trade unions engage “in the process of government in the sense of being involved in the development, implementation and delivery of government policy.”¹¹⁵ These types of functions may take several different forms in Germany and the UK.

To establish clarity on the current role which trade unions are adopting in Germany and the UK, this section examines the functions of German and British trade unions by borrowing Ewing’s categorisation.

1. UK

In order to fully illustrate the current role played by trade unions in British labour law, their involvement in the representation and regulation of the employment relationship is briefly summarised, before turning to the other functions that trade unions may adopt.

Workplace representation is one of the essential functions of British trade unions. It is clearly a prerequisite for collective bargaining. Moreover, in recent years the representation function of trade unions has been strengthened. As has already been noted, the representation function has both:

an individual and collective dimension. So far as the former is concerned, the most visible example of this is the right to be accompanied in grievance and disciplinary matters. But it is important to note here that the statutory right to be accompanied is a limited one, even though strengthened by the Employment Relations Act 2004.¹¹⁶

Individual representation thus plays an important role even though there is no legal obligation for a representative to belong to a union. The role can also be adopted by a work colleague.

The collective dimension of workplace representation can be found in the statutory recognition procedure introduced in 1999. This forms the background to the regulation of the employment relationship by collective bargaining.

Collective bargaining is one of the main extra-legal sources of British labour law. It is the joint regulation by the collective parties, through a collective agreement, of the employment relationship, with the sanction of industrial action or recourse to some form of agreed dispute

¹¹⁴ *Ibid* at p. 5.

¹¹⁵ *Ibid* at p. 5.

¹¹⁶ *Ibid* at pp. 8 – 9.

resolution procedure, such as arbitration, in the event of failure to agree.¹¹⁷ In order for collective bargaining to occur between an employer and a trade union, the employer may elect or, in certain situations,¹¹⁸ may be compelled to “recognise” a trade union. Recognition, according to the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992), means “the recognition of the union by an employer, or two or more associated employers, to any extent, for the purposes of collective bargaining.”¹¹⁹ Recognition bestows significant rights upon the union with regard to the disclosure of information and the right to consultation for collective bargaining purposes. It is important to note that recognition may also occur outside the statutory procedure. The criteria for recognition outside s 178 (3) TULRCA 1992 have developed mainly through case law in the context of redundancy dismissals. The general principles which have emerged indicate that, in order for a union to be recognised outside the statutory procedure, there must be either an express or an implied agreement to negotiate between the employer and the union.¹²⁰ Where a union has been recognised outside the statutory procedure, the employer may generally vary the scope of recognition or withdraw it altogether without statutory constraints.¹²¹ The voluntary nature of non-statutory recognition does not prevent an employer from recognising a trade union which only enjoys minimal support amongst the workforce, thereby making a mockery of the resulting “democratic” process of negotiation over collective agreements.¹²²

Collective agreements thus fulfil a procedural¹²³ and normative¹²⁴ function in the regulation of collective relations in British labour law, despite both their general non-enforceability and their independence from the formal legal system. The regulatory function of trade unions through collective bargaining is, therefore, the most visible, if not the most important function of trade unions in the UK. However, in recent years, collective bargaining has receded, due to dwindling membership figures of trade unions and an increased view by the government that “the role of trade unions in centralised collective bargaining on pay and conditions has declined, reflecting decentralised decision-making in many organisations.”¹²⁵ The trade unions’ function in regulating the employment relationship is increasingly being achieved indirectly through legislation, which the trade unions play a part in securing. There is, thus, an

¹¹⁷ Deakin & Morris note 6 above at p. 755.

¹¹⁸ If 21 or more workers are employed.

¹¹⁹ S 178 (3) Trade Union and Labour Relations (Consolidation) Act 1992.

¹²⁰ *NUGSAT v Albury Bros Ltd* [1978] IRLR 504.

¹²¹ R. Taylor, *The Future of the Trade Unions*, Andre Deutsch, London, 1994 at pp. 48 – 54.

¹²² Deakin & Morris note 6 above at p. 759.

¹²³ Regulation of relations between the employer and the trade union.

¹²⁴ Regulation of the terms of individual contracts of employment.

¹²⁵ *Fairness at Work*, Cm 3968 (1998) at para. 4.6.

overlap between the regulation, governmental and public administration function of British unions. Ewing suggests that:

trade unions need to engage with government in order to secure legislation that will enable them to perform their other functions. They also need to engage with government in order to perform their regulatory function to the extent that the regulatory role of trade unions is fulfilled by regulatory legislation as well as by regulatory collective bargaining.¹²⁶

More recently, the scales have been tipped towards a fulfilment of the trade union role by legislation: “as the direct regulatory role of trade unions by collective bargaining retreats, so the importance of trade union political action increases.”¹²⁷ An increasing emphasis must therefore be placed on the government function of trade unions. Moreover, the growing role accorded to trade unions in the consultation on policy development and on the content of legislation indicates the increasing importance of a public administration function of trade unions. However, to date, trade unions have not been involved to the extent found at, for example, EU level where trade unions are formally incorporated into the legislative process through the social dialogue, or in other EU countries such as Germany. Nonetheless, there has been a clear shift in the functions of trade union, from regulation to government and public administration.

A final emphasis must be placed on the service function. As Ewing points out, “a key motive of both Conservative and Labour governments since 1979 has been to reinforce the service function of trade unionism.”¹²⁸ As a result, trade unions have increasingly expanded the services and benefits they offer, not least as a recruitment incentive.¹²⁹ Trade unions now offer a wide range of services including legal and commercial services unrelated to work. In part, these functions have now taken on an equally, if not more, important role than the regulation function. Trade unions seem to be operating as service providers ensuring that members are offered benefits and services for life rather than just for work. This seems to fit with the government’s expectations of the trade union role.¹³⁰

This leads to the conclusion that there seems to be “a shift in the level of regulation from the collective sphere to that of the individual relationship. This has been accompanied by a

¹²⁶ Ewing note 106 above at pp. 5 – 6.

¹²⁷ *Ibid* at p. 15.

¹²⁸ *Ibid* at p. 5.

¹²⁹ For examples of the range of services offered see UNISON, *Membership benefits* available at <http://www.unison.org.uk/benefits/index.asp>.

¹³⁰ For an example see Tony Blair’s remarks to the TUC Annual Congress in September 2004 where he encouraged unions to stand for “solidarity not only at work, but also through life” available at www.tuc.org.uk.

certain change of emphasis in the role of unions, from co-regulators of terms and conditions of employment, to monitors and enforcers of employees' legal rights.”¹³¹

2. Germany

Trade unions in Germany have a number of different functions to perform in the regulation of the labour market. In terms of Ewing's classification, it is the present author's view that German trade unions perform a service function, a representation function, and a regulatory function. In the broadest sense, they also adopt a governmental and public administration function, however, this is less dominant than in the UK. Schroeder and Weßels explain it in different terms:

The function of trade unions should not be seen one-dimensionally. They are, first and foremost organisations of solidarity and mutual security. They appear as an economic organisation vis-à-vis the employer with a view to representing collective interests. However, due to their high membership numbers, they are also political organisations, despite the clear distinction between them and political parties, who play a powerful role in the political system in Germany.¹³²

First and foremost it is clear that German trade unions offer legal advice and representation on employment matters, as well as a range of benefits ranging from private pension plans to a variety of insurance policies.¹³³ It is, therefore, clear that the unions perform a service function. The remaining functions can be examined under two main headings: the role of trade unions in the collective bargaining process and the process of co-determination in the enterprise.

According to the Federal Constitutional Court (Bundesverfassungsgericht), trade unions have legal standing to conduct collective bargaining leading to legally binding collective agreements. In the case of non-compliance, trade unions may initiate industrial action or, alternatively, represent their members before a labour court.¹³⁴

¹³¹ P. Davies, K.D. Ewing & M. Freedland (eds.), *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005 at p. 333.

¹³² W. Schroeder & B. Weßels, 'Das deutsche Gewerkschaftsmodell im Transformationsprozess: Die neue deutsche Gewerkschaftslandschaft' in W. Schroeder & B. Weßels, *Die Gewerkschaften in Politik und Gesellschaft der Bundesrepublik Deutschland*, Westdeutscher Verlag, Wiesbaden, 2003 at p. 14.

¹³³ For an example of the services and benefits offered see Ver.di, *Service* available at <http://service.verdi.de/>.

¹³⁴ Woerlen & Kokemoor note 100 above at p. 195.

Most collective agreements are drawn up for special industries and districts. However, due to a shift in the locus of negotiation and regulation of German industrial relations to the workplace collective agreements are increasingly “coming to be framework accords whose substance is specified by the actors at workplace level who bear the responsibility for fine-tuning them to their own specific circumstances.”¹³⁵ In terms of structure, collective agreements are bipartite in form.¹³⁶ The first part regulates the rights and duties as between the parties to the collective agreement. The most important obligations are the so-called ‘peace obligation’ (Friedenspflicht) which obliges both parties not to use industrial action to force new conditions into the agreement for the duration of that collective agreement and the ‘performance obligation’ (Durchführungspflicht) which requires both parties to ensure that the collective agreement is respected by workers and employers.¹³⁷ The second part regulates, through binding legal norms, the relationship and hence the individual employment contract between employer and worker. The trade unions thus have a collective representation function, as well as a regulatory function, through the collective agreements. This is confirmed in §1 of the Collective Agreements Act (Tarifvertragsgesetz) which provides that collective agreements can be applied as normative law in respect of the regulation, formation, content and termination of employment contracts. Due to the absence of a statutory minimum wage¹³⁸ in most German sectors, collective agreements play a vital part in setting the lowest common denominator. Whereas trade union members automatically benefit from the provisions of a collective agreement, non-members will only be included as beneficiaries where there is an express incorporation of the agreement into their contracts of employment.¹³⁹ However, this is usually the case in order to discourage the hiring by the employer of non-union labour at a lower rate of pay.

Despite a fall in membership of trade unions to about a quarter of all employees, data from the Organisation for Economic Cooperation and Development (OECD) suggest that up to 70% of

¹³⁵ Keller note 91 above at p. 48.

¹³⁶ § 1 Abs. 1 Tarifvertragsgesetz.

¹³⁷ Woerlen & Kokemoor note 100 above at p. 203.

¹³⁸ Trade Union European Information Project, ‘Germany goes for piecemeal introduction of minimum wage’ *European Review*, Issue 44, October 2008 at p. 5: Under its post-war industrial relations model, pay rate agreements in Germany were negotiated across entire industries and regulated pay for all employees. This system has begun to unravel for a number of reasons: first, many employers in former East Germany are not members of the employers’ associations who negotiate the pay agreements so they do not feel bound by the terms and conditions; second, the increase in trade union mergers and the founding of small unions independent of the DGB have blurred the distinctions between industries; and, third, a rival Christian trade union confederation has concluded lower pay agreements than the DGB in some firms. As a result, approximately 25% of workers in former West Germany are no longer covered by a pay rate agreement.

¹³⁹ Woerlen & Kokemoor note 100 above at pp. 206 – 207.

workers are still covered by a collective agreement.¹⁴⁰ This is largely due to non-union members benefiting from the incorporation of collective agreements into their employment contracts. Moreover, the collective agreement will be binding on all establishments that are members of an employers' association. Thus, while trade union membership may be higher in, for example, the UK, the coverage of collective agreements there is far lower than in Germany.¹⁴¹ This system of collective bargaining accords a much greater role to the regulatory function of trade unions which goes far beyond a mere representational function as is the case in the UK.

In addition, at least half of all employees are represented on a works council.¹⁴² The coverage of works councils depends to a large extent on both the industry sector – workers in the production sector are more likely to benefit from a works council than workers in the service sector – and the enterprise size. These data suggest that trade unions, far from being superfluous, still play a vital role in the regulation of the relationship between labour and management.

Co-determination operates at an enterprise level within this framework of collective bargaining. Since its inception it “has proven an effective mechanism to bring about an accommodation of interests at the level of the individual enterprise, resulting in a commitment of labour, in the form in which it is organised at the workplace, to competitiveness, productivity and profitability.”¹⁴³ Co-determination can either be within the enterprise through works councils, or at a ‘higher’ level on the supervisory board of companies. Co-determination on the supervisory board of enterprises provides, in certain industries (mainly coal, iron and steel), for equal representation from both sides, namely, employee and company.

Mandatory works councils are implemented under the Works Constitution Act (Betriebsverfassungsgesetz) in establishments employing five or more workers.¹⁴⁴ While

¹⁴⁰ OECD, *OECD Employment Outlook*, Paris, 2004 at p. 145.

¹⁴¹ European Industrial Relations Observatory, *Collective Bargaining Coverage and Extension Procedures*, 18/12/2002 available at <http://www.eurofound.europa.eu/eiro/2002/12/study/tn0212102s.htm>.

¹⁴² J.T. Addison, L. Bellmann, C. Schnabel & J. Wagner, ‘German Works Councils Old and New: Incidence, Coverage and Determinants’ *Discussion Paper No. 10*, Friedrich-Alexander Universität Erlangen-Nürnberg, May 2002.

¹⁴³ W. Streeck, *Social Institutions and Economic Performance: Studies of Industrial Relations in Advanced Capitalist Economies*, Sage, London, 1992 at p. 166.

¹⁴⁴ J. Addison et al., ‘The reform of the German Works Constitution Act: A critical assessment’ (2004) *Industrial Relations* 392.

German works councils are formally independent of trade unions, in practice most are filled with union nominees, if not union members.¹⁴⁵ Thus, it has been estimated that up to 85% of councillors in the industrial sector are union nominees.¹⁴⁶ Employers are often not opposed to this as they can expect “competent, reliable and predictable bargaining partners.”¹⁴⁷ The union therefore, again, plays a strong role in the regulation and representation of the workforce. The German works councils are excluded from negotiations over wages, an area reserved to the trade unions through collective bargaining. In exchange, they have extensive powers of information, consultation and co-determination regarding important aspects of a firm’s operation and decision-making. The amended Works Constitution Act, introduced in 2001, increased the influence of works councils at an enterprise level.¹⁴⁸ However, their major weakness remains: works councils do not have the power to call strikes in order to voice their interests. Therefore, their effectiveness depends to a large extent on both the nature of the relationship with the employer and the support of the background trade union. While the two channels of worker representation – collective bargaining and co-determination – are formally separate, one often finds overlaps in representation, with the trade union playing a key role in the coordination of workers in both channels.

As this analysis illustrates, the regulatory function is by far the most important function of German trade unions. The regulatory processes of collective bargaining and co-determination enable the unions to visibly “promote fairness and social justice not only at work but within the economy as a whole.”¹⁴⁹ However, the trade unions also perform a governmental and public administration function. With the decline in membership of trade unions and the increase in emphasis on labour market flexibility these functions may gain in importance as unions accept their changing role in the contemporary economic situation.

German trade unions, unlike their British counterparts, act largely independently of any political party. However, German trade unions are involved in the legislative process through limited consultation on policy development and frequently in the implementation of policy initiatives. This latter role can be seen most clearly where EU policy initiatives are

¹⁴⁵ W. Müller-Jentsch, ‘Germany: From collective voice to co-management’ in J. Rogers & W. Streeck (eds.), *Works councils: consultation, representation and cooperation in industrial relations*, University of Chicago Press, Chicago, 1995 at pp. 61 – 65.

¹⁴⁶ O. Jacobi & W. Müller-Jentsch, ‘West Germany: Continuity and structural change’ in G. Baglioni and C. Crouch (eds.), *European Trade Unionism: the Challenge of Flexibility*, Sage, London, 1990 at p. 134.

¹⁴⁷ *Ibid* at p. 140.

¹⁴⁸ J. Addison et al. note 144 above.

¹⁴⁹ Ewing note 106 above at p. 13.

implemented by the social partners performing a legislative function in collective agreements. Trade unions thus adopt a number of different governmental and public administration functions, ranging from input into the legislative process to delivery of the results of this process. These functions have hitherto complemented the direct regulatory role that trade unions play through collective bargaining and co-determination. However, the strategic importance of the function of trade unions in the development and implementation of public policy which they have had a part in creating, cannot be underestimated in a climate where the role of trade unions is shifting from one of regulation to one of political partnership. This becomes particularly relevant when one examines and compares the responses of trade unions in Germany and the UK to European enlargement and the new Member State workers. As the role of trade unions in a national labour law system changes so do their responses to external developments which impact on national systems. As the role of German trade unions becomes increasingly similar to that of their UK counterparts, there is greater scope for exchange between the two sides. This will become evident in the course of the case studies to be carried out on ver.di and UNISON described and analysed in later chapters.

F. European dimension

Since the adoption of the Single European Act in 1986, European competence in the area of social policy has added an extra layer of complexity to the role that trade unions adopt, not only at a European level but also at a national level. For the purposes of this chapter, the European dimension to the German and British labour law systems is relevant as it has increasingly influenced the role which trade unions adopt at a national level.

Trade union responses to the European Union have been varied. This section only intends to provide a cursory introduction to responses of trade unions for the purposes of putting the overall debate on the role and function of trade unions in Germany and the UK into its European context. The effect of the European Union and its policy of 'europeanising' national legal systems is examined in more detail in chapter three. It is argued that the European Union has played a strong role in shaping national labour law systems despite the absence of a clear system of 'European Labour Law'. This influence of the European Union has had both positive and negative effects on national trade unions. Nonetheless trade unions are able to effectively operate across and within frameworks established by the European Union. This

has profoundly influenced their actions at a national level as well as their cooperation within European trade union confederations. Nonetheless, there is scope for further development of interaction of national trade unions within a European framework. The results of the case studies on ver.di and UNISON suggest possible routes that could be taken.

The aversion of New Labour in the UK towards European social policies and the resultant negative lobbying by the government has made it notoriously difficult for British trade unions to support European social developments.¹⁵⁰ However, union leaders recognise the positive impact of those collective rights which originated from the EU, especially during the Thatcher and Major governments when national legislation was particularly hostile towards the granting of collective rights.¹⁵¹ While general trade union opinion seems to point in favour of cooperation at a European level on the basis of the common market, the discrepancy in rights enjoyed by UK workers vis-à-vis other European workers, especially under a Labour government, has left many British trade unionists outraged and disappointed.¹⁵²

Faced with increased competition from other economic actors, the European trade union movement has taken the initiative by setting up transnational support structures to improve the capacity of national trade unions in dealing with increased calls for flexibility in the employment relationship. The European Trade Union Confederation recognises the need for change within the European workforce “as long as it is justified, negotiated and well-managed in a socially responsible way”.¹⁵³ Calls in the academic literature for a strong European trade union movement are even stronger. Wedderburn, for example, talks of a “transnational union movement to match the transnational and multinational power of capital.”¹⁵⁴ However, much like at a domestic level in Britain, the response to changing structures in the employment relationship has focused on education and dialogue, in the hope of anticipating and avoiding restructuring before it occurs. British trade unions increasingly recognise the importance of the European Union and its social structures as a vital ingredient in their response to the

¹⁵⁰ B. Bercusson, ‘The trade union movement and the European Constitution’, *TUC Working Paper*, 2004.

¹⁵¹ Bill Hayes, TUC Spokesperson on Europe and General Secretary of the CWU in a speech at the TUC regional conference on the European Social Model, Cardiff, 23/11/2006 available at http://www.billyhayes.co.uk/permalink.php?id=774_0_1_0_M.

¹⁵² Brendan Barber, TUC General Secretary commenting on the outcome of the EU summit, 23/6/2007 available at <http://www.tuc.org.uk/international/tuc-13442-f0.cfm>.

¹⁵³ Education Department of the European Trade Union Institute, *Trade Unions Anticipating Change in Europe (TRACE) Handbook* available at <http://www.tuc.org.uk/extras/tracehandbook.pdf>.

¹⁵⁴ Lord Wedderburn, ‘Labour Law 2008: 40 Years On’ (2007) *Industrial Law Journal* 397 at p. 406.

perceived dangers emanating from globalisation and are thus in favour of a strong European Union, provided it possesses a “real European social dimension.”¹⁵⁵

In Germany the responses of trade unions have been similar. The German system of co-determination served as a basis for the 1994 European Works Councils Directive¹⁵⁶ and the 2002 European Framework Directive on informing and consulting employees¹⁵⁷. Both attempt to spread aspects of the German model Europe-wide. These developments have provoked positive reactions from German trade unions. It is recognised that the capacity of the European Union institutions to produce binding legislation is an important factor to consider when acting as a national trade union. Furthermore, ver.di calls for a greater role to be accorded to the European social dialogue in the formulation of social legislation.¹⁵⁸ In order to achieve this European Social Model, the German trade unions realise the need for organisation in large trans-European trade unions, much like the mergers seen at a domestic level which would be able to coordinate policies and responses at a European level.

In response to the European internal market, German trade unions have reacted equally positively, while at the same time recognising its shortcomings. According to ver.di, the internal market has not only created a prosperous economic zone but has also provided a framework within which European social principles can evolve. However, the inability of the internal market to eradicate the problem of high unemployment has been of great concern to trade unions and only serves to reinforce their calls for a fundamental rethinking of the structure of the internal market which should involve a sound social policy. While the European Union has had a positive influence, insofar as it has led to a rise in living standards across the continent as a whole, trade unions are wary of the negative sides of the Union, namely the alleged ‘social dumping’ occurring through the loosening of restrictions on free movement.¹⁵⁹

¹⁵⁵ Bill Hayes, TUC Spokesperson on Europe and General Secretary of the CWU in a speech at the TUC regional conference on the European Social Model, Cardiff, 23/11/2006 available at http://www.billyhayes.co.uk/permalink.php?id=774_0_1_0_M.

¹⁵⁶ Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees OJ L 254, 20/9/1994.

¹⁵⁷ Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation OJ L 80, 23/3/2002.

¹⁵⁸ Ver.di, *Europapolitik* available at <http://international.verdi.de/europapolitik>.

¹⁵⁹ Ver.di, *Binnenmarkt-strategie der EU Kommission* available at http://www.verdi.de/international/archiv/binnenmarkt_der_eu.

The German reactions to the European Commission's calls for greater "flexicurity"¹⁶⁰ have on the whole been negative.¹⁶¹ The responses to the Commission's Green Paper on "Modernising Labour Law to meet the challenges of the 21st century" and its public consultation thereon have been overwhelmingly critical of the proposals to increase flexibility in the working relationship and to encourage "atypical" or "new" forms of employment.¹⁶² While trade unions recognise that the traditional system of labour law in Germany is incapable of effectively dealing with the problems that have arisen in the wake of globalisation, they call for a balanced approach to reform based on involvement of the social partners in the place of the "radical" proposal of "flexicurity" suggested by the Commission.¹⁶³

G. Conclusion

The role played by trade unions in British labour law seems to have come full circle: from state abstentionism to positive support, returning to hostility which now seems to be weakening in favour of a more hospitable environment.¹⁶⁴ The European Union has, from the perspective of trade unions, undoubtedly played a positive role in recent decades in encouraging a greater involvement of trade unions in the workplace based on an involvement in the legislative process through the social dialogue, consultation and information; developments which have been welcomed by British and German trade unions alike. At a national level, British trade unions have also come to appreciate statutory involvement in the recognition procedure which has increased their chances of gaining important statutory rights. The position occupied by trade unions in British labour law has therefore shifted from a purely adversarial role to a more complex involvement in the political process with increasing emphasis on 'partnership'. There is thus "an emerging trend clearly perceptible which sees trade unions being pushed in the direction of service, governmental and public administration

¹⁶⁰ "Flexicurity" is defined as "a policy designed to bring about the flexibility of the labour markets, work organisations, and employment relations on the one hand and security – employment security and social security – on the other." See P. Watson, *EU Social and Employment Law*, Oxford University Press, Oxford, 2009 at p. 527.

¹⁶¹ See Ver.di, *Stellungnahme der Vereinten Dienstleistungsgewerkschaft ver.di zum Grünbuch "Ein modernes Arbeitsrecht für die Herausforderungen des 21. Jahrhunderts"*, 2007 available at http://ec.europa.eu/employment_social/labour_law/answers/documents/4_129_de.pdf.

¹⁶² Responses of the social partners can be found under European Commission, Employment, Social Affairs and Equal Opportunities, *Replies to the Green Paper "Modernising Labour Law to meet the challenges of the 21st century"* available at http://ec.europa.eu/employment_social/labour_law/green_paper_responses_en.htm#4.

¹⁶³ Ver.di see note 161 above.

¹⁶⁴ Deakin & Morris note 6 above at pp. 705 – 708.

functions.”¹⁶⁵ Their regulatory function is clearly being diminished in favour of less adversarial functions. As regards law, the principal purpose of trade unions remains the regulation of the relationship between workers and employers,¹⁶⁶ however, in practice there is only a limited commitment to enable trade unions to effectively perform this function. The range of functions that unions are now required to adopt in the changing political and economic atmosphere should not obscure the quintessential rationale for their existence as identified by Kahn-Freund: on the side of labour the (only) power is collective power.¹⁶⁷

In Germany, it must be recognised that trade unions play a vital role in the regulation of the employment relationship at a national level. This system of collective relations was introduced following the Second World War in the hope of securing a harmonious and democratic system of labour protection coupled with economic development. In recent years, the German model of collective relations has come under attack for being too protectionist and therefore being unable to adapt to the apparent need for flexibility in order to remain competitive on a global scale. In the view of the unions, this has engendered a rather hostile environment towards collective bargaining and co-determination, hence a shift towards a more governmental and public administrative function. The future ambit of the trade unions within German labour law remains, much like in the UK, unclear. However, critics suggest that without effective trade unions the German social model and its accompanying system of labour laws will collapse.¹⁶⁸ Therefore, in order to continue to operate effectively, trade unions in both countries need to adapt to their changing role in the present-day economy.

The subsequent chapters of this thesis develop the framework within which the responses of trade unions to the recent European enlargements and the new Member State workers can be analysed. The role that the trade unions play in a national context in Germany and the UK will be used as a basis in order to understand their reactions to these European developments. Moreover, the commonality in the development of the German and British labour law systems as well as the similar problems currently facing them as shown in this chapter will be used as a background for the comparison of the analysis of trade union responses. The comparative method used in this thesis requires a detailed understanding of the historical, social, cultural and economic context within which trade unions have developed as well as an understanding

¹⁶⁵ Ewing note 106 above at p. 20.

¹⁶⁶ Section 1, Trade Union and Labour Relations (Consolidation) Act 1992.

¹⁶⁷ Davies & Freedland note 43 above at p. 17.

¹⁶⁸ E.g. R. Geffken, *Ein Konferenzbericht: Die 1. Deutsch-Chinesische Konferenz zum Recht der Arbeit und des Sozialstaats*, NewsLetter Hamburg-Shanghai Network, Feb. 2005.

of the roles that the unions adopt within this context. This chapter therefore provides part of the theoretical underpinnings which the comparative method draws upon when analysing trade union responses to the European enlargements and, within that, to new Member State workers in a comparative context.

CHAPTER THREE

THE EUROPEANISATION OF GERMAN AND BRITISH LABOUR LAW

The European Union has, over the years, attempted to ‘europeanise’ national labour law systems both directly and indirectly. Therefore, in order to understand the environment within which trade unions operate one must be clear as to the implications of ‘europeanisation’ in the field of labour law. The main purpose of this chapter is to illustrate that there are different ways in which the ‘europeanisation’ of national labour law systems has been attempted ranging from hard law to soft law mechanisms. ‘Europeanisation’ should be seen in this context as a two-way process. The various attempts at ‘europeanisation’ have been successful to varying degrees. However, regardless of the successfulness of a measure, trade unions, when responding to European enlargements and the new Member State workers, need to act within this multi-faceted, complex system.

A. Introduction

The debate surrounding the nature of ‘europeanisation’ has been raging in the European Union (EU) for a number of years. It raises a variety of issues regarding the impact of the EU and its actions on the domestic politics and institutions of Member States and vice versa. As Scharpf points out:

The course of European integration from the 1950s onwards has created a fundamental asymmetry between policies promoting market efficiencies and policies promoting social protection and equality. [...] In response, there have been demands to re-create a “level playing field” by europeanising social policies.¹

Thus, in terms of labour law, the European Union has, over the years, attempted to ‘europeanise’ national labour law systems directly or indirectly by introducing measures under the banner of ‘European Labour Law’. However, there has always been a debate on the

¹ F.W. Scharpf, ‘The European Social Model: Coping with the Challenges of Diversity’ *MPIfG Working Paper* 02/8, July 2002 at p. 16: This asymmetry is brought about as “in the nation state, [both policies promoting market efficiencies and policies promoting social protection and equality] had been in political competition at the same constitutional level.” In the process of European integration, however, “economic policies were progressively europeanised while social-protection policies remained at the national level.”

successfulness of such measures as well as on the existence of a category of 'European Labour Law'.

Since the enlargements in 2004 and 2007 the debate on 'europeanisation' has been given a new lease of life and the role of the EU within the affairs of Member States has increasingly been called into question. In the sphere of collective relations, enlargement has thrown up changes in opportunity and regulatory structures for the social partners both at a national and at a European level. These structural changes at a European level have occurred primarily as a consequence of an increase in the free movement of workers and enterprises resulting in concerns over social dumping. The reactions of the Member States to the enlargements have differed substantially. The UK opened its labour markets to EU8² workers immediately, whereas Germany placed various restrictions on workers from new Member States entering its labour market. However, even in the UK workers from EU8 countries need to comply with certain formalities not required for workers from old Member States. As regards the enlargement in 2007, both countries placed restrictions on Romanian and Bulgarian workers³. Therefore, under the different transitional provisions in Germany and the UK, new Member State workers are granted limited free movement rights, coupled with some protection from discrimination as EU citizens. However, the imposition of these transitional provisions did little to alleviate the fear of workers and trade unions in old Member States that their economic and social position was being threatened by those workers and enterprises who may avail themselves of their rights under the Treaty in order to engage in 'social dumping'. Social dumping has been defined as "the export of products that owe their competitiveness to low labour standards."⁴ The term can also be used to "describe a variety of practices by both Member States and employers. In essence it concerns behaviour designed to give a competitive advantage to companies due to low labour standards rather than productivity."⁵ However, the occurrence of the phenomenon has long been a matter of controversy in the context of the EU. Barnard argues that "despite the perception that companies are engaging in social dumping in the European Union, there is little evidence of it in practice."⁶ Whether Barnard is right or not, the absence of evidence does little to alleviate the fear of unfair

² This describes those workers from Central and Eastern European States which joined the European Union in 2004.

³ These are referred to as EU2 workers throughout this thesis.

⁴ B. Hepple, 'New Approaches to International Labour Regulation' (1997) *Industrial Law Journal* 353 at p. 355.

⁵ C. Barnard, *EC Employment Law*, 3rd ed., Oxford University Press, Oxford, 2006 at p. 56 in part citing B. Hepple, 'New Approaches to International Labour Regulation' (1997) *Industrial Law Journal* 353.

⁶ C. Barnard, 'Social dumping and the race to the bottom: some lessons for the European Union from Delaware?' (2000) *European Law Review* 57 at p. 59. See also C. Barnard, *EC Employment Law*, 3rd ed., Oxford University Press, Oxford, 2006 at p. 55.

competition emanating from new Member State workers and enterprises. The responses of trade unions to the European enlargements and the new Member State workers must therefore be analysed in their national and European contexts. Trade union responses in Germany originate from a different starting point – the non-liberalisation of the labour market – to those in the UK. However, the case studies on UNISON and ver.di illustrate that, in practice, trade unions are reacting in similar ways. This is examined in later chapters.

This chapter examines the debate surrounding the ‘europeanisation’ of the German and British labour law systems and analyses the influence of recent European Court of Justice (ECJ) case law on this debate. There are a number of strands to this debate which have arisen in the context of an analysis of trade union responses to the recent European enlargements: (i) the increased movement towards soft law mechanisms in the development of a European Social Model; (ii) the difficulty of judging the success or lack thereof of measures which attempt to europeanise national labour law systems; and, (iii) the clash between free movement rights at a European level and fundamental collective rights enshrined in national law as evidenced by recent ECJ case law. All three strands are interlinked in various ways. First, unsuccessful measures of europeanisation of national labour law systems have led to this clash between free movement rights and fundamental collective rights which the ECJ has struggled with. Second, the increasing move from hard law to soft law mechanisms in the sphere of European Labour Law has made it more difficult to talk of successful and unsuccessful attempts of europeanisation as the impact of soft law mechanisms on national legal systems is hard to assess. The lack of hard law mechanisms has also created greater uncertainty for trade unions acting within a European Labour Law as the facts of the recent cases decided by the ECJ illustrate. Moreover, one sees a stark difference between the policies of the ECJ, which defends free movement rights, and the Member States who are becoming less and less eager to agree on hard law mechanisms which endorse free movement. The recognition, by the ECJ, of the fundamental right to strike also raises concern in some Member States such as the UK which does not grant a fundamental right to strike.

Together, these strands frame the European context within which national trade unions in Germany and the UK respond to the recent European enlargements and the new Member State workers. They therefore need to be set out and pulled together in this chapter so as to clarify the European context which influences the national labour law systems. The recent European enlargements also need to be assessed in order to determine what effect they have

had within the debate on europeanisation as well as on national legal systems. It is obvious that they have had some effect on old Member States at the very least due to the influx of new Member State workers. However, it is not clear whether they have also led to legal changes in the labour law systems as such. Arguably the enlargements have not had an effect on the legal systems themselves as they have not given rise to major changes in legislation or regulation of the national labour law systems in Germany and the UK. While the enlargements do not therefore alter the trade unions' legal frameworks they do place a heavy burden on them. This burden is evidenced, in legal terms, in the erosion of traditional means of the europeanisation of national labour law systems and in the difficult judgments issued by the ECJ, the facts of which only arose following the enlargements.

In order to pull the different strands surrounding the debate on europeanisation together with an analysis of the effects of the recent European enlargements, this chapter is structured in the following way.

At the outset, the debate on the 'europeanisation' of national legal systems is expounded, with specific attention being paid to the sphere of labour law. The purpose of this section is to develop a definition of the concept of 'europeanisation'. A number of examples are then set out in order to illustrate the content of the definition. First, it is proposed to examine whether an overarching category of 'European Labour Law' has developed. This is the most obvious form of 'europeanisation' of national labour law systems. However, as there is some doubt as to whether such a category of laws has developed, it is proposed, second, to look in more detail at two Directives which are measures of 'European Labour Law' and to discuss how to judge whether these Directives have successfully 'europeanised' national labour law systems. Due to the increasing tendency towards soft law in creating a system of 'European Labour Law' it is proposed, third, to look at this development of soft law mechanisms such as the Open Method of Coordination (OMC) in order to assess their impact on the process of the 'europeanisation' of national labour law systems. Finally, recent case law of the European Court of Justice has also had an impact on national labour law systems. It is therefore necessary, as a last example, to discuss the role of the European Court of Justice in the process of 'europeanisation' of national labour law systems. The purpose of these examples is to illustrate the environment within which trade unions act when responding to the European enlargements and the new Member State workers. As europeanisation will be defined as a two-way process, the examples also demonstrate that

there are different paths available to trade unions when responding to the changing regulatory and opportunity structures in their national legal systems. Trade unions therefore have a role to play at the European and at the national level. This is elaborated upon in more detail in relation to two specific German and British trade unions in chapter six.

B. 'Europeanisation'

Different techniques such as the OMC, the social dialogue, case law, and legislation which have been adopted by the European Community all attempt to 'europeanise' national labour law systems. 'Europeanisation' has been defined broadly in the academic literature by various writers. One of the earliest conceptualisations of the term was given by Ladrech who defined 'europeanisation' as "an incremental process of re-orienting the direction and shape of politics to the extent that EC political and economic dynamics become part of the organisational logic of national politics and policy making."⁷ In this context it is necessary to briefly differentiate between 'europeanisation' and 'globalisation' in order to avoid confusion. As Ladrech points out, "what makes europeanisation different [...] is first of all the geographic delimitation and, secondly, the distinct nature of the pre-existing national framework which mediates this process [...] in both formal and informal ways."⁸ This chapter has limited itself to an examination of the way in which trade unions are affected by 'europeanisation' and not 'globalisation', despite there being scope for overlap in this area.

A number of authors elaborated upon Ladrech's definition thereby widening it to include the development of political networks at a European level⁹ as well as "transnational influences that affect national systems"¹⁰ within the concept of 'europeanisation'. Following on from these definitions, "EC political and economic dynamics" can be integrated into a member state's organisational structure through either a 'top-down' or a 'bottom-up' approach. Olsen suggests five definitions of 'europeanisation': first, europeanisation is associated with the

⁷ R. Ladrech, 'Europeanisation of Domestic Politics and Institutions: The Case of France' (1994) *Journal of Common Market Studies* 69 at p. 69.

⁸ *Ibid* at p. 71.

⁹ T.A. Börzel & T. Risse, 'When Europe hits home: Europeanisation and Domestic Change' (2000) *European Integration Online Papers* 4.

¹⁰ B. Kohler-Koch, 'Europäisierung: Plädoyer für eine Horizonterweiterung' in M. Knodt & B. Kohler-Koch (eds.), *Deutschland zwischen Europäisierung und Selbstbehauptung*, Campus, Frankfurt, 2000: Kohler-Koch includes "auf die nationalen Systeme einwirkende trans-nationale Einflüsse."

external boundaries of the EU, and therefore the process of enlargement is the dynamic in which change in Europe's boundaries incorporating new members is understood; second, europeanisation may refer to the development of common practices and norms at the European level; third, europeanisation may concern the impact of EU governance on domestic practices; fourth, europeanisation can refer to the export of European norms to the wider international system; and, fifth, europeanisation may refer to the building up of a distinct European political identity.¹¹ In his most recent work entitled *Europeanization and National Politics*, Ladrech develops his earlier definition of 'europeanisation'. He explicitly situates his approach to 'europeanisation' in "the 'top-down' perspective in which domestic change is traced back to EU sources."¹² In doing so, he follows the recommendation of Börzel and Risse¹³ to "use the term europeanisation as focusing on the dimensions, mechanisms, and outcomes by which European processes and institutions affect domestic-level processes and institutions."¹⁴

In certain areas of law, the 'europeanisation' of national legal systems has been very successful. A typical example often given is that of competition law where the European Community has achieved a near-complete harmonisation of Member States' legal systems. However, harmonisation was not the aim of the process, rather, it was achieved due to a gradual convergence of national laws. Such convergence has not been achieved within the sphere of labour law and particularly, collective relations. This is mainly due to the socio-cultural context within which the labour laws of the individual Member States have developed. It is also a result of the "diversity of national welfare states [which] differ not only in levels of economic development and hence in their ability to pay for social transfers and services, but, even more significantly, in their normative aspirations and institutional structures."¹⁵ As a result, a 'top-down' approach has often resulted in fruitless attempts at approximation of laws and practices. The analysis of the German and British labour law systems in chapter two illustrates the differences in the two national systems. Alternatively, a

¹¹ J. Olsen, 'The Many Faces of Europeanisation' (2002) *Journal of Common Market Studies* 921. Other authors who have examined the meaning of europeanisation include K. Featherstone, 'Introduction: In the Name of "Europe"' in K. Featherstone & C.M. Radaelli (eds.), *The Politics of Europeanisation*, Oxford University Press, Oxford, 2003 at pp. 3 – 26 and C.M. Radaelli, 'The Europeanisation of Public Policy' in K. Featherstone & C.M. Radaelli (eds.), *The Politics of Europeanisation*, Oxford University Press, Oxford, 2003 at pp. 27 – 56.

¹² R. Ladrech, *Europeanization and National Politics*, Palgrave, Basingstoke, 2010 at p. 15.

¹³ T.A. Börzel & T. Risse, 'Europeanization: The Domestic Impact of European Union Politics' in K.E. Jørgensen, M.A. Pollack & B. Rosamund (eds.), *Handbook of European Union Politics*, Sage, London, 2007.

¹⁴ Ladrech note 12 above at p. 22 citing T.A. Börzel & T. Risse, 'Europeanization: The Domestic Impact of European Union Politics' in K.E. Jørgensen, M.A. Pollack & B. Rosamund (eds.), *Handbook of European Union Politics*, Sage, London, 2007 at p. 485.

¹⁵ Scharpf note 1 above at p. 16.

'bottom-up' approach is sometimes attempted in order to approximate labour standards across the EU. However, for similar reasons to those mentioned in the context of the 'top-down' approach, one equally struggles to implement a 'bottom-up' approach across the European Union as a whole as transnational influences are often difficult to reconcile with the socio-cultural context of labour relations systems. As Weiss points out, "at best there is a chance to approximate the systems in a functional sense, thereby eliminating distortions of competition arising from existing differences."¹⁶ Other attempts, like the social dialogue, avail themselves of a mixed approach. It combines a 'top-down' approach with the European umbrella organisations negotiating framework agreements, while the national affiliates, in a 'bottom-up' approach, should ideally have a strong input into those negotiations. However, despite the lack of success of the top-down and bottom-up approaches, any definition of 'europeanisation' must take into account the two-way process that takes place in the 'europeanisation' of national labour law systems. As Börzel points out, "approaching europeanisation exclusively from a top-down rather than bottom-up perspective may in the end fail to recognise the more complex two-way causality of European integration."¹⁷ For the purposes of this thesis, the following definition of 'europeanisation' is therefore employed. Europeanisation is, very broadly, a process of domestic change that can be attributed to European integration. This process of change can originate from the European and the national level. Europeanisation is, therefore, a two-way process.

In the area of labour law the europeanisation of national systems has largely been attempted under the banner of a so-called European Social Model¹⁸ since the early 1990s.¹⁹ The heads of state at the Nice European Council described the European Social Model in the following terms:

The European social model, characterized in particular by systems that offer a high level of social protection, by the importance of the social dialogue and by services of general interest covering activities vital for social cohesion, is today based, beyond the diversity of the Member States' social systems, on a common core of values. The European social model has developed over the last forty years through a substantial Community *acquis* which the Treaties of Maastricht and Amsterdam made it possible to strengthen to a considerable extent. It now includes essential texts in numerous

¹⁶ M. Weiss, 'Workers' Participation: Its Development in the European Union' (2000) *Industrial Law Journal* 737 at p. 738.

¹⁷ T.A. Börzel, 'Towards Convergence in Europe? Institutional Adaptation to Europeanisation in Germany and Spain' (1999) *Journal of Common Market Studies* 573 at p. 574.

¹⁸ This is the collective name given to the European Union's involvement in social policy which was seen as a necessary component in the economic integration project. For more information see J. Shaw, J. Hunt & C. Wallace, *Economic and Social Law of the European Union*, Palgrave, 2007 at pp. 341 – 367.

¹⁹ J. Bischoff & R. Detje, 'Das Europäische Sozialmodell und die Gewerkschaften', *Suppl. Zeitschrift Sozialismus* 1/2007.

areas: free movement of workers, gender equality at work, health and safety of workers, working and employment conditions and, more recently, the fight against all forms of discrimination.²⁰

However, this description of the content of the Model does not fully explain the nature of it.

The former EU Commissioner for Employment, Social Affairs and Equal Opportunities, Vladimír Špidla, describes the European Social Model as “an integrated strategy where social politics are perceived as an investment in human capital and therefore contribute to productivity.” Its objective is to “reconcile economic performance with worker well-being.”²¹ This description of the European Social Model as an arbitrator between economic interests and social protection is, however, not unproblematic. There has been a long-standing debate as to whether the European Social Model exists and, if so, what its role is. It is often stated, for example, that the European Social Model “is not really a model, it is not only social, and it is not particularly European.”²² In contrast, Vaughan-Whitehead recognises the existence of a European Social Model but lists countless criteria that it must fulfil in order to count as such.²³ A number of more general arguments are also often put forward when discussing the existence or lack of a European Social Model. First, it is impossible to define a Europe-wide social model. Every Member State has its own system which has developed varying standards, institutions and structures.²⁴ It is thus difficult to define a European norm and Social Model. Second, even where European standards exist these are often implemented to varying degrees and in different ways in the Member States. It is therefore difficult to speak of a clearly defined ‘European Social Model’. Pontussen, for example, borrows Esping-Andersen’s terminology²⁵ and argues:

The concept of a ‘social Europe’ is by no means clearly defined. For political and analytical reasons, it is better to differentiate between two ‘social models’ or even between two different visions of ‘social Europe’: the Northern European model on the one hand, and the Continental Model on the other. There are no clear lines of division between these two categories, however, there are differences in emphasis. Both models protect the individual against the risks of a free market economy but whereas

²⁰ Presidency Conclusions of the Nice European Council Meeting 2000 at paras. 11 – 12.

²¹ Vladimír Špidla, *Une nouvelle Europe sociale*, Speech 05/598, PES Conference *A new social Europe*, Brussels, 11/10/2005 at p. 5: He describes the European Social Model as “une stratégie intégrée où la politique sociale est conçue comme un investissement dans le capital humain et donc un facteur productif.” Its objective is, therefore, to “concilier performance économique et solidarité.”

²² A. Diamantopoulou, *The European Social Model – myth or reality?* Address at the fringe meeting organised by the European Commission’s Representation in the UK within the framework of the Labour Party Conference, 29/9/2003.

²³ D. Vaughan-Whitehead, *EU Enlargement versus Social Europe?* Elgar, London, 2003.

²⁴ J. Alber, ‘Das “europäische Sozialmodell” und die USA’ (2006) *Leviathan*, Heft 2.

²⁵ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, Princeton University Press, New Jersey, 1990.

the Northern European Model emphasises social equality, the Continental Model emphasises social stability.²⁶

All of the above-mentioned arguments illustrate the difficulty encountered in trying to pin down the idea of a European Social Model. However, the problem may not only lie with the availability of EU norms which may or may not make up a European Social Model. Rather, the difficulty in definition may be due to the criteria used. It is often argued, that the European Social Model cannot be compared with national social models which regulate a vast array of social matters.²⁷ Instead, the European Social Model should be seen as a political tool which enables the EU to create minimum standards in those areas that fall within its competence. These minimum standards are meant to reduce competition between Member States which should lead to further European integration. The hope of the EU is that, by combining economic and social welfare the EU will achieve “stronger, lasting growth and the creation of more and better jobs.”²⁸ By accepting that a European Social Model can only set minimum standards in certain areas one recognises the existence of a so-called European Social Model which can complement rather than replace national structures and institutions. As Giddens points out, the European Social Model is “a mix of values, achievements and hopes which differ in their form and in the extent of their development in the individual Member States.”²⁹ While this recognises the existence of a European Social Model it does not create expectations of a model akin to national social welfare systems.

Within the European Social Model, the European institutions have adopted a key role in europeanising national labour law systems through a ‘top-down’ approach. The European Community has enjoyed a limited amount of competence in the field of labour law since the adoption of the Single European Act in 1986. Apart from the provisions contained in the EU Treaties which enable the EU institutions to act in order to facilitate the free movement of

²⁶ J. Pontusson, ‘Wohin steuert das soziale Europa’ *WSI Mitteilungen* 10/2006 at p. 532: Pontusson argues “dass das Konzept eines ‘sozialen Europas’ unklar ist. Aus politischen wie auch aus analytischen Gründen ist es vielmehr sinnvoll, zwischen zwei verschiedenen ‘Sozialmodellen’ bzw. zwischen zwei verschiedenen Visionen eines ‘sozialen Europas’ zu unterscheiden: das nordeuropäische Modell einerseits und das kontinentale Modell andererseits. Die Unterscheidung zwischen diesen Modellen erzeugt zwar keine absolut trennscharfen Kategorien, jedoch legt sie unterschiedliche Schwerpunktsetzungen offen: Beide Modelle schützen den Einzelnen vor den Risiken des Markts, doch während das nordeuropäische Modell die soziale Gleichheit betont, stellt das kontinentale Modell die soziale Stabilität in den Vordergrund.”

²⁷ V. Špidla, *Une nouvelle Europe sociale*, Speech 05/598, PES Conference *A new social Europe*, Brussels, 11/10/2005.

²⁸ European Commission Communication to the Spring European Council, *Working together for growth and jobs: A new start for the Lisbon Strategy* COM (2005) 24.

²⁹ A. Giddens, *Zukunft des europäischen Sozialmodells*, Friedrich Ebert Stiftung Politikanalyse, Bonn, 2006 at p.1: As Giddens points out, the European Social Model is “ein Gemisch aus Werten, Errungenschaften und Hoffnungen, die hinsichtlich ihrer Form und des Grades ihrer Verwirklichung in den einzelnen europäischen Staaten unterschiedlich ausfallen.”

workers, article 153 TFEU (ex article 137 EC) allows for the introduction of directives on working conditions, information and consultation of workers, and equality at work between men and women. Limitations on legislative competence operate in other areas of labour law and, as an alternative, soft law techniques must be used. This has been most visible with the increased reliance on the Open Method of Coordination in the sphere of labour law since 2003.

There is also the option to make rules on matters related to employment law through the ‘social dialogue’ briefly mentioned above. This is the main route which allows trade unions to become involved in the legislative process of europeanisation through a ‘bottom-up’ approach. Introduced by the Treaty of Maastricht, the social dialogue consists of representatives of the two sides of industry: management and labour. The agreements concluded between the two sides may be given force of law through a Council decision under article 155 TFEU (ex article 139 EC), thereby turning the agreements into a Directive. National trade unions are thus afforded a direct role in the legislative process through their membership in the European trade union confederations. At a national level, the negotiated Directives can either be implemented through legislation or by the social partners. As a result, collective agreements at a national level have been accorded a role in legislation implementing EU standards. However, recent case law of the European Court of Justice³⁰ discussed below illustrates the difficulties encountered when national social partners acting in their specific social context are accorded a role in implementing EU legislation.

The Lisbon Treaty which came into force on 1st December 2009 does not greatly alter the Treaties in the area of employment. It inserts a new provision (article 151) into Title X of the Treaty on the Functioning of the European Union on Social Policy which consolidates and clarifies the role of the social partners in the making of social policy through the social dialogue. In doing so, it recognises the diversity of national systems and emphasizes the autonomy of the social partners. Moreover, article 4 TFEU provides for shared competence between the Union and the Member States in the area of social policy. Finally, the Charter of Fundamental Rights³¹ is given binding legal effect by the insertion of an amendment into article 6 TEU which results in it having the same legal value as the Treaties. The Charter

³⁰ C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008] ECR I-1989.

³¹ OJ C 364, 18/12/2000.

applies to the actions of the European institutions but also to the Member States when implementing EU law.³² Moreover, individuals may rely directly on the provisions of the Charter before the European Courts. This has led some Member States to fear that their national systems of human rights protection was being threatened by the Charter. Thus, the UK and Poland have secured a so-called ‘opt-out’³³ from the Charter which provides that the Charter:

does not extend the ability of the Court of Justice of the European Union, or any other court or tribunal of Poland or of the UK, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

Moreover, the opt-out guarantees that the Charter will not create any new justiciable rights in Poland or the UK. Arguably, however, the Charter never intended to create new fundamental rights, such as a general right to strike, under national law as it applies only when governments are applying EU law. How the Charter will work in practice and what implications it will have are therefore unclear.

The Charter brings together all social rights recognised in the Union and, in doing so, goes much further than the European Convention on Human Rights which only mentions freedom of association as a fundamental social right. Prior to the Charter, the non-binding Community Charter on the Fundamental Social Rights of Workers, adopted in 1989 by eleven Member States encouraged recognition of these rights. Moreover, the Agreement on Social Policy included in the Treaty of Amsterdam in 1997 provides that the Community shall

support and complement the activities of the Member States in areas which are also included in this chapter of the Charter (health and safety of workers, working conditions, information and consultation of workers, integration of people outside the labour market, equality of men and women), with the possibility of adopting directives which fix minimum requirements for gradual implementation.

The Charter recognises the importance of fundamental social rights by placing them alongside more easily recognisable fundamental rights such as the right to life³⁴ or the prohibition of torture³⁵. In this it is exceptional as it is the first international document to recognise the indivisibility of human rights by placing civil, political, social, cultural and

³² The ECJ has confirmed that Member States must respect fundamental rights (Case C-292/97 *Karlsson and Others* [2000] ECR I-02737).

³³ The Protocol establishing the opt-outs can be found under *Protocol on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom* OJ C 306/156 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF>.

³⁴ Article 2.

³⁵ Article 4.

economic rights on the same level. However, the Charter does not require Member States to respect a minimum level of social protection. The extent to which the chapter on solidarity rights will be useful in practice is therefore in doubt as the legal force of the rights granted in the Charter depends on implementation by national governments. As the Lisbon Treaty had only just come into effect at the time of writing this chapter, neither it nor the Charter are examined in more detail in this thesis.

The broad definition given to europeanisation in this chapter makes it necessary to look at a number of examples to illustrate the European context within which trade unions operate. As this introduction to europeanisation illustrates, the process of the europeanisation of national labour law systems involves a number of actors. From a ‘top-down’ perspective, the institutions of the European Union play a role in the legislative procedure. From a ‘bottom up’ approach, national and European trade unions can also become active in europeanising national labour law systems through their involvement in the social dialogue. Moreover, soft law techniques such as the OMC potentially allow for a combination of a ‘top-down’ and a ‘bottom-up’ approach.

C. Example 1: ‘European Labour Law’

As a whole, the legislative initiatives taken at a European level, ranging from Directives to soft law techniques such as the OMC as well as rule-making under the social dialogue, are often seen as comprising the category of ‘European Labour Law’³⁶. However, there has been a long-standing debate as to whether such an overarching category of laws has actually developed. The outcome of this debate is relevant to the research questions of the thesis as it determines the context within which these questions must be answered. If such a category of laws has developed then the German and British labour law systems have a common denominator in the form of a European system of labour law that both national systems adhere to. Although European labour laws are generally implemented differently in both legal systems (due to the laws often being in the form of Directives), they originate from a common core of rules at a European level. Conversely, if such a category of laws has not developed then the German and British labour law systems merely share common influences in the form

³⁶ For a discussion and definition of the term see B. Bercusson, *European Labour Law*, Cambridge University Press, Cambridge, 2009 at pp. 13 – 15.

of Directives originating from a European level rather than a category of laws that has become a part of their legal system.

Many academics in both Germany and the UK are sceptical as to the existence of a European Labour Law. Schmidt, for example, writes:

In reality, there is not really such a thing as a set of “European Labour Laws”. This is due to the absence, at a European level, of the usual division prevalent in Germany and other Member States between labour law as a form of private law and social security law as a form of public law. At a European level both categories fall under the umbrella of “European social policy”.³⁷

This view is shared by other authors³⁸, particularly in Germany, who dislike the use of the terminology of ‘Labour Law’ at a European level. This is based on an understanding of labour law in a national context with its inherent divisions into public and private law, collective and individual labour law. This categorisation is nigh-impossible at a European level which leads to the conclusion drawn by Schmidt above.

In contrast, Schiek argues that ‘European Labour Law’ is the “counterweight to national labour law. European Labour Law describes those labour law norms that originate at a European rather than a national level.”³⁹ This allows for a much broader interpretation of the term ‘European Labour Law’. It permits the recognition of such a category of laws as long as one limits the ambit of the subject-matter to those rules emanating from a European level, rather than requiring a complete system of labour law at a European level. This view is shared by other writers⁴⁰ who recognise the presence of labour law norms originating from a European level and who therefore classify these norms as ‘European Labour Law’. For the purposes of this and the following chapters the expression ‘European Labour Law’ will be used with caution to refer to those hard and soft law mechanisms originating from a European level which aim to approximate national labour law systems. The responses of German and

³⁷ G. Haverkate, M. Weiss, S. Huster & M. Schmidt (eds.), *Casebook zum Arbeits- und Sozialrecht der EU*, Nomos, Baden-Baden, 1999 at p. 15: “Ein ‘europäisches Arbeitsrecht’ gibt es, genau genommen, eigentlich nicht. Denn auf Gemeinschaftsebene ist die im deutschen Recht übliche Trennung zwischen dem dem bürgerlichen Recht zugeordneten Arbeitsrecht und dem öffentlichen Recht zugerechneten Sozialrecht – ebenso wie in den meisten anderen Mitgliedsstaaten der Gemeinschaft – unbekannt. Beide Materien unterfallen vielmehr gleichermaßen dem Begriff der ‘europäischen Sozialpolitik’.”

³⁸ Particularly Prof. M. Weiss and Prof. W. Kohte who reject the idea of a category of European Labour Law. See private communications, Prof. W. Kohte, Martin-Luther-Universität Halle-Wittenberg, Halle, January 2009 and Prof. M. Weiss, Goethe Universität Frankfurt, December 2008.

³⁹ D. Schiek, *Europäisches Arbeitsrecht*, 3rd ed., Nomos, Baden-Baden, 2007 at p. 17: ‘European Labour Law’ is the “Gegenbegriff zum nationalen Arbeitsrecht [...] [es bezeichnet] arbeitsrechtliche Normen, die keinen nationalen sondern einen europäischen Ursprung haben.”

⁴⁰ See, for example, Bercusson note 36 above.

British trade unions must be seen in the context of this category of laws and the influence of 'European Labour Law' needs to be taken into account when analysing trade union responses to EU enlargement and the new Member State workers at a national level. It is recognised that these rules of European Labour Law are by no means comparable to the systems of labour law prevalent at a national level, for example in the UK or Germany. Moreover, to a large extent, these rules (especially in the case of Directives) must be implemented within national systems in order to take effect. It is therefore difficult to judge whether the existence of 'European Labour Law' as a category of laws has actually led to a process of change in national labour law systems. One needs to look in more detail at the content of 'European Labour Law' in order to understand its effects on national labour law systems. Example two therefore analyses two Directives and assesses whether the way in which they have been implemented leads to the europeanisation of national labour law systems. Example three looks in more detail at the recent move towards soft law mechanisms in 'European Labour Law' and examines whether this is an appropriate way of europeanising national labour law systems.

D. Example 2: Directives

The European Union has legislated in a number of areas in recent years in order to achieve a certain degree of harmonisation in the area of labour law across the Member States. Various Directives were issued between 1994 and 2002⁴¹ in the area of labour law⁴² with a large proportion of these having been negotiated by the social partners through the social dialogue. Due to the relatively large number of Directives and the limited scope for discussing them in

⁴¹ Even though Directives were issued on social matters prior to 1994 (see, for example, Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women), the Maastricht Treaty marked the turn towards the pursuit of a social policy by the European Commission as well as an active involvement of the social partners. The first Directives following the Maastricht Treaty were issued in 1994. Directive 2002/14/EC of the European Parliament and of the Council of 11 March 2002 establishing a general framework for informing and consulting employees in the European Community - Joint declaration of the European Parliament, the Council and the Commission on employee representation marked the culmination of an eight year period of active legislating in the area of social policy by the Commission and the social partners. Even though Directives on social policy are still sporadically negotiated (for up to date information see http://ec.europa.eu/employment_social/social_dialogue/index_en.htm), soft law mechanisms have, since 2002, taken over as the preferred method for achieving an approximation of labour standards across the EU.

⁴² Beginning with Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees and ending with Directive 2002/14/EC on the information and consultation of employees.

this work, two particular Directives⁴³ are analysed briefly below, by way of example, in order to demonstrate a case in which their implementation into national labour laws was successful as well as a case in which it was not successful. It is argued that successful implementation also indicates a successful europeanisation of national labour law systems in this case. Europeanisation has been defined in this chapter as a process of domestic change that can be attributed to European integration. Directives aim to bring about domestic change. Therefore, successful implementation implies successful europeanisation.

These two Directives have been chosen for a number of reasons. On the one hand, Directive 94/45 on the establishment of a European Works Council is often given as an example of a very successful attempt to europeanise national labour law systems. The framework provided by the Directive for transnational cooperation illustrates how a European approach can solve Community-wide issues often encountered in the operation of so-called Community-scale undertakings. Elements of this approach may be transferable to the analysis of German and British trade union responses to the Community-wide issue of new Member State workers following enlargement and the problems associated therewith. On the other hand, Directive 96/71 concerning the posting of workers is given as an example of an unsuccessful attempt at the europeanisation of national labour law systems. The problems surrounding the Directive have become very topical following a number of rulings by the ECJ discussed below. The difficulties encountered in the Directive are therefore used as an example not only to illustrate the problems associated with the europeanisation of national labour law systems but also as background to the cases discussed below.

A framework is needed in order to judge whether Directive 94/45 and Directive 96/71 have been successfully implemented into national labour law systems. If so, then one can assume that they have also successfully europeanised national labour law systems. The problem of judging whether a Directive - as an example of 'European Labour Law' as a whole - has been successfully implemented starts with the terminology used. It is, first and foremost, difficult to define what one means by 'successful implementation'. It is argued that the literature on europeanisation and on the Directives does not come up with useful definitions or criteria. Therefore, the 'successfulness' of an instrument of European Labour Law is defined on the

⁴³ Directive 94/45/EC of 22 September 1994 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees and Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

basis of whether it has perceptibly altered the 'Rechtswirklichkeit', i.e. the law in practice rather than the law in the books. In determining whether something has 'successfully' influenced a national labour law system one will always come up against differing degrees of successfulness. Of course, the true extent of the europeanisation of a legal system, using the definition mentioned above, can only be determined with the help of empirical research into individual legal systems and on the basis of individual measures. This goes far beyond the realm of this thesis. However, even with the above-mentioned definition one can at least outline the successfulness of a European measure.

The second step is then to look at the criteria that a measure itself, in this case a Directive, must fulfil in order to be able to change the 'Rechtswirklichkeit' of a national system, i.e. in order to be successful. It is difficult to generalise the criteria as every aspect of a certain Directive that works well in a given situation may not work in a different setting. Much depends on the nature of the measure and on the way in which it is imposed and implemented. This is similar to the problem encountered in comparative labour law in the area of legal transplants.⁴⁴ A large body of literature⁴⁵ has been devoted to this topic and sharp controversies have arisen regarding the portability of labour law from one system to another. The difficulty with legal transplants is above all the different legal traditions and concepts encountered when transposing a rule from one system to another. This is the same for measures of European Labour Law.

Two main theoretical strands have emerged on the issue of transplantation. For Watson, "a rule transplanted from one country to another [...] may equally operate to different effect in the two societies, even though it is expressed in apparently similar terms in the two countries."⁴⁶ This implies that the transplantation of legal rules without adjustment of those rules is possible albeit while positive examples of this form of transplantation can be found, the success of rules borrowed from one legal system and directly imported to another system is rare. The second strand of thinking on the transplantability of legal rules stems from Otto Kahn-Freund. For Kahn-Freund, the degree to which a rule can be transplanted depends on

⁴⁴ For a brief overview of the literature on comparative labour law see chapter one.

⁴⁵ Authors who have written on transplantation include: R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialised Market Economies*, 8th ed., Kluwer, Deventer, 2004; O. Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) *Modern Law Review* 1; P. Legrand, 'The impossibility of legal transplants' (1997) *Maastricht Journal of European and Comparative Law* 111; A. Watson, *Legal Transplants: an approach to comparative law*, Scottish Academic Press, Edinburgh, 1974.

⁴⁶ A. Watson, *Legal Transplants: an approach to comparative law*, Scottish Academic Press, Edinburgh, 1974 at p. 20.

the extent to which it conforms with the foreign political and legal structure.⁴⁷ Thus, “we cannot take for granted that rules or institutions are transplantable [...]; any attempt to use a pattern of law outside the environment of its origin continues to entail the wish of rejection.”⁴⁸ For the purposes of this chapter, Kahn-Freund’s position⁴⁹ on legal transplants is preferred over the alternative arguments due to the inherent pragmatism of his approach. According to Kahn-Freund, rules and regulations are usually closely connected with the social and political structure of a country. This is particularly so in the area of labour law. These rules and regulations cannot easily be directly imported to a different legal system without undergoing some form of mutation.

The measures of European Labour Law are generally loosely connected to one or more national legal systems. By way of example, it is very rare for a Directive to have a completely ‘European’ content. Even where this might arguably be the case, as in Directive 94/45 on European Works Councils, one can still discern ideas which have been borrowed from various national legal systems. In order for the measure to be successful, according to Kahn-Freund’s theory, these borrowed aspects from national legal systems must be ‘mutated’. It is argued that this is done at a European level in the area of European Labour Law before then being ‘transplanted’ in the Member States. To clarify, when legislation is initiated in European Labour Law (e.g. a Directive), elements of the European legislation are often borrowed from national legal systems. These are then ‘mutated’ in the course of the discussions on the legislation until an acceptable agreement is reached. This is then passed on to the Member States for implementation.

It is submitted that in ‘mutating’ borrowed measures of national law, the EU must ensure that certain criteria are fulfilled in order to ensure for the successful implementation of the measure into national labour law systems. The criteria suggested that a European Labour Law measure must meet are—

1. flexibility, i.e. leaving sufficient room for national systems to adapt the rules contained in the measure to their own system;
2. neutrality, i.e. the avoidance as far as possible of state-specific concepts; and
3. appropriateness, i.e. using the right mechanisms in the appropriate context.

Therefore, in order to be implemented successfully, a measure of European Labour Law must fulfil these three criteria in terms of its content. If it does, then it can also successfully

⁴⁷ O. Kahn-Freund, ‘On Uses and Misuses of Comparative Law’ (1974) *Modern Law Review* 1.

⁴⁸ *Ibid* at p. 27.

⁴⁹ *Ibid*.

Europeanise national labour law systems. This framework is applied to Directive 94/45 and Directive 96/71 in order to illustrate whether or not these measures are successful in Europeanising national systems of labour law.

Directive 94/45 on the establishment of a European Works Council was adopted with the goal of improving the availability and provision of information to employees and ensuring their consultation at a transnational, European level.⁵⁰ It must be noted at this stage that the Directive did not, originally, affect the UK as it was negotiated when the UK opt-out to the European social policy was still in place.⁵¹ The Directive provides that multinational enterprises, which fulfil the requirement of being ‘Community-scale undertakings or groups of undertakings’⁵² can be required to establish transnational information and consultation bodies in the form of European Works Councils (EWCs) or, alternatively, to set up information and consultation procedures (ICPs). This is meant to ensure that employees are involved whenever decisions are taken in another Member State that may affect them. British companies who fulfilled the transnational requirements of the Directive could therefore still be caught by its provisions despite the UK opt-out. Following the reversal of the UK opt-out by the Labour government in 1997, the Directive was adopted⁵³ by the UK, thereby rendering the Directive fully applicable. Space precludes a discussion of the ways in which these EWCs or ICPs can be established.⁵⁴

Overall, the Directive is considered to be an effective piece of European legislation in the area of labour law. It is generally accepted that EWCs which have been set up in approximately one-third of ‘Community-scale undertakings’ have enhanced the level and quality of communication between management and employees. They are seen to have great potential for the promotion of social dialogue between multinationals and trade unions.⁵⁵ The Directive

⁵⁰ For an academic discussion see e.g. J. Pipkorn, ‘Europäische Aspekte der Informations- und Mitwirkungsrechte der Arbeitnehmer’ in O. Due (ed.), *Festschrift für Ulrich Everling*, Bd. II, Nomos, Baden-Baden, 1995 from p. 1113.

⁵¹ The UK maintained an opt-out to the Social Policy Protocol annexed to the Treaty of Maastricht between its adoption in 1991 and 1997. Directive 94/45 was extended to the UK by Directive 97/74/EC of 15 December 1997 extending, to the United Kingdom of Great Britain and Northern Ireland, Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees.

⁵² Art. 2 prescribes that the undertakings must employ a minimum of 1,000 employees on the territories of the Member States, with at least 150 employees in each of at least two Member States.

⁵³ It was implemented through the Transnational Information and Consultation of Employees Regulations 1999.

⁵⁴ For a good overview see e.g. P. Lorber, ‘Reviewing the European Works Council Directive: European Progress and United Kingdom Perspective’ (2004) *Industrial Law Journal* 191.

⁵⁵ For a list of other benefits see the list in Appendix III of European Economic and Social Committee, *Opinion on the Practical Application of the European Works Councils Directive (94/45/EC) and on any aspects of the*

also displays negative aspects. A majority of multinationals have not set up EWCs. Furthermore, while information is provided to EWCs set up in undertakings, they are often not involved in the decision-making itself. Meaningful consultation does not always, therefore, take place.

Nonetheless, the Directive has largely had a positive impact. A review process that began in 1999 and ended with the adoption of a slightly revised Directive on 5th June 2009⁵⁶, suggested that the Directive has largely been satisfactorily received and implemented by the Member States.⁵⁷ It can therefore be said that the Directive has changed the ‘Rechtswirklichkeit’ in the Member States. The Directive seems to have bypassed the usual difficulties associated with labour legislation originating from the EU. In part this seems to be due to the fact that “its aim is not harmonisation of existing national systems of information and consultation but the adoption of new measures in each Member State to create a Europe-wide legal framework for a transnational tier of information and consultation within ‘Community-scale’ undertakings or groups.”⁵⁸ The Directive is, therefore, flexible and neutral enough to be well-received in the Member States. In the eyes of some academic writers, the Directive embodies a typical application of the principle of subsidiarity. Pipkorn, for example, writes: “The Directive is characteristic of the original principle of subsidiarity, i.e. the differentiation between the sphere of influence of the State and that of non-state actors who, within their confines, can effectively develop an economic and social order.”⁵⁹

Moreover, the provisions of the Directive are largely procedural in nature rather than rights-based, thus making them more easily adaptable to national systems of worker representation. This is an example of where the right mechanisms were used in an appropriate context to

directive that might need to be revised, SOC/139, 24/9/2003 available at http://eescopinions.eesc.europa.eu/EESCopinionDocument.aspx?identifier=ces\soc\soc139\ces1164-2003_ac.doc&language=EN. Also, the European Works Councils Bulletin 43 highlights a number of benefits recognised by the social partners.

⁵⁶ The revised Directive (Directive 2009/38/EC of the European Parliament and of the Council of 6 May 2009 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purpose of informing and consulting employees) strengthens workers’ rights and improves the practical application of the Directive so as to encourage the formation of more works councils.

⁵⁷ See, e.g. Commission Communication on the application of the Directive on the establishment of a European works council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees COM (2000) 188.

⁵⁸ M. Carley & M. Hall, ‘The Implementation of the European Works Councils Directive’ (2000) *Industrial Law Journal* 103 at p. 103.

⁵⁹ Pipkorn note 50 above at p. 1127: “[Sie] ist eine Ausprägung des Subsidiaritätsprinzips in seiner ursprünglichen Ausformung, nämlich der Abgrenzung der staatlichen Sphäre von derjenigen, in der nichtstaatliche Organisationen und gesellschaftliche Kräfte wirksam die Wirtschafts- und Sozialordnung gestalten können.”

achieve the aims stated in the Directive. As a result, Directive 94/45 fulfils all three criteria set out above which are necessary for the successful europeanisation of national labour law systems. A further positive characteristic of the Directive is “the considerable scope it gives for devolved, national-level regulation of key aspects of the legal framework for the establishment of EWCs.”⁶⁰ Weiss echoes this sentiment by describing the Directive as a “flexible new concept” which is part of the “secret to its success”.⁶¹ Bercusson points out that “the regulatory strategy is that the Directive provides the framework, but it is the negotiations between the social partners which determine the final outcome.”⁶²

A working party convened by the European Commission oversees the implementation process, therefore ensuring quite a high degree of harmonisation of procedures. It is this mixed and flexible approach to implementation that seems to have had a positive impact and brought about the successful implementation of the provisions of the Directive. Although EWCs contain certain core characteristics, they vary greatly from undertaking to undertaking, and from country to country, in terms of the exact model they adopt. While there is therefore some degree of harmonisation of transnational employee representation, there is also sufficient scope for diversity across the Member States, thereby reflecting the differences in their labour law systems and structures. This is particularly evident in the British implementation of the Directive. Whereas the majority of European Member States, particularly Germany, could draw upon existing representative structures in their industrial relations systems, the UK had to create a “statutory standing works-council-type employee representation body for the first time ever, ... albeit on a transnational basis.”⁶³ While this caused some difficulty in the UK the Directive left sufficient freedom for legislators to create a system of representation specifically tailored to British industrial relations. Conversely, German legislators profited from the ability, under the Directive, to draw upon existing representative structures. The legislation on German works councils, which are already established in a large majority of national undertakings, was used as a basis and then expanded upon to cover EWCs.⁶⁴ Directive 94/45 therefore illustrates, particularly due to its flexibility, neutrality and appropriateness, the potential of European Labour Law to successfully establish a basis for the harmonisation of national labour law systems across the

⁶⁰ Carley & Hall note 58 above at p. 104.

⁶¹ M. Weiss, ‘Arbeitnehmermitwirkung in Europa’, *Neue Zeitschrift für Arbeitsrecht* 4/2003 at p. 179: Weiss echoes this sentiment by describing the Directive as a “flexibles neues Konzept” which is the “Erfolgsehemnis” of the Directive.

⁶² Bercusson note 36 above at p. 22.

⁶³ Carley & Hall note 58 above at p. 114.

⁶⁴ For a more substantial discussion see Weiss note 61 above at pp. 177 – 232.

European Union. It also shows the positive impact that European regulations can have on trade unions acting within a national context but faced with 'European-wide' problems.

In contrast, Directive 96/71 concerning the posting of workers in the framework of the provision of services has caused great controversy in the European Union. Accordingly, it is a good example of the difficulties encountered in the europeanisation of national labour law systems and illustrates the difficult regulatory and opportunity structures within which trade unions are operating. Directive 96/71 aimed to establish "a legal frame for labour conditions of workers posted for a temporary period to another Member State. Its content is about [...] a guarantee of minimum protection, fair competition and respect for the regulatory frame in the host country."⁶⁵ With increasing cross-border activity in the form of posted workers in the European Union, the European Commission proposed in 1991 to regulate the provision of services in an attempt to find a balance between workers' rights and the free provision of services.⁶⁶ This followed the decision by the European Court of Justice in *Rush Portuguesa*⁶⁷ where the Court decided that Community law does not preclude host Member States from extending their legislation, or collective labour agreements entered into by both sides of industry, to any person who is employed, even temporarily, within their territory, no matter in which country the employer is established. It should be noted that Member States were merely given permission to extend their domestic regulation to posted workers. Posted workers were not given a right to equal treatment with employees of host State establishments. In effect, the Court clarified that national treatment by the host State, as far as labour standards were concerned, did not amount to indirect discrimination against home State service providers.⁶⁸ As a result, most Member States extended their domestic regulation to posted workers in order to combat the fear of 'social dumping' by posted workers.

The Commission therefore proposed to regulate the cross-border temporary provision of services in order to create legal certainty for the employer. As the legal base for the Directive can be found in articles 53 and 62 TFEU (ex articles 47 and 55 EC) on the provision of services and the right to establishment, rather than in the social policy provisions, it has been suggested that the aim of the Directive is to facilitate the cross-border provision of services

⁶⁵ J. Cremers, J.E. Dølvik & G. Bosch, 'Posting of workers in the single market: attempts to prevent social dumping and regime competition in the EU' (2007) *Industrial Relations Journal* 524 at p. 524.

⁶⁶ *Ibid* at p. 526.

⁶⁷ Case C-113/89 *Rush Portuguesa Lda v Office national d'immigration* (1990) ECR I-1417.

⁶⁸ P. Davies, 'Posted Workers: Single Market or Protection of National Labour Law Systems?' (1997) *Common Market Law Review* 571.

rather than to protect employees.⁶⁹ However, in its result, the Directive is somewhat confusing:

On the one hand, the ECJ having apparently dealt the importing States most of the aces, they naturally played their cards so as to produce a Directive which was highly protective of domestic labour regulation. On the other hand, the legal base chosen for the Directive required that a primary aim should be the promotion of cross-border provision of services.⁷⁰

The Directive prescribes minimum standards of core working conditions which should apply equally to national and posted workers. Posted workers are those workers who are sent temporarily to work in another Member State by their employer. They are guaranteed certain labour conditions that the host Member State considers to be of 'general interest' to the worker at issue. In effect, therefore, the labour conditions to be applied are identified by the host State yet their substantive content is not harmonised across the Member States. This system did not prove to be particularly problematic prior to the European enlargements in 2004 and 2007 even though critics writing at the time of the adoption of the Directive questioned how the Court would interpret its provisions.⁷¹ However, prior to the *Laval* case discussed below, the Court was not asked to rule on many of the key aspects of the Directive. Most cases were decided before the deadline for implementation of the Directive had passed.⁷² In the pre-*Laval* cases, the Court had adopted a four-stage process⁷³ which was not as bold as the decision in *Rush Portuguesa*:

The Court has looked to see (1) whether the requirements imposed by the host state on the service provider restrict the freedom to provide services (the answer is usually yes). It then examines (2) whether the measure can be justified on the grounds of, for example, worker protection, especially the interests of the posted workers (again the answer is usually yes); (3) whether the same interest is already protected in the state of establishment (this is usually left to the national court to decide); and finally (4) whether the steps taken are proportionate. While the proportionality question should be considered by the national court, sometimes the Court of Justice provides the answer itself.⁷⁴

Following the European enlargements and the increased number of posted workers sent from new to old Member States, the Directive fell far short of its goal of guaranteeing certain

⁶⁹ *Ibid* at pp. 572 – 573.

⁷⁰ *Ibid* at pp. 591 – 592.

⁷¹ *Ibid*.

⁷² Barnard note 5 above at p. 278.

⁷³ *Ibid* at p. 278. The four-stage process can be seen in Case C-165/98 *Criminal proceedings against André Mazzoleni and Inter Surveillance Assistance SARL* [2001] ECR I-2189.

⁷⁴ *Ibid* at p. 278 citing Joined Cases C-49, 50, 52, 54, 68 and 71/98 *Finalarte Sociedade de Construção Civil Lda* [2001] ECR I-7831 and Joined Cases C-369 and 376/96 *Criminal Proceedings against Jean-Claude Arblade and Arblade & Fils SARL and against Bernard Leloup and others* [1999] ECR I-8453.

labour conditions to posted workers. The ECJ was finally asked to give a ruling on the Directive in the *Laval* and *Rüffert* cases discussed below.

The implementation of the Directive has proved problematic, due to the diverse interpretation of the provisions in national labour law systems. It has been argued that the Directive does not take sufficient account of differences in national industrial relations systems.⁷⁵ As a result, effective national implementation has been lacking. In a 2003 Communication on the implementation of the Directive⁷⁶, the Commission concluded that the Directive had encountered difficulties in its practical implementation. The Directive has therefore not managed to alter the 'Rechtswirklichkeit' in the Member States. Above all, there was a failure to monitor compliance, as well as a lack of access to relevant provisions applicable in the host country. Member States thus seem to be lacking in their effective implementation of the provisions of the Directive. A Resolution adopted by the European Parliament in 2004 considers the Directive to be insufficient to combat unfair competition and social dumping. The Parliament therefore called for a review of the substantive content of the Directive.⁷⁷

Following the enlargements in 2004 and 2007 the debate on the effectiveness of the Directive has been given a new lease of life due to large numbers of workers being sent from new to old Member States. In practice, this has led to waves of protest across old Member States against cheap labour originating from new Member States.⁷⁸ Moreover, workers from new Member States often fail to receive the rights due to them under Directive 96/71. In Germany, such allegations were raised in the meat industry by Polish workers.⁷⁹ More recently, the debate surrounding 'British Jobs for British Workers' in the UK illustrated the difficulty of using posted workers in host labour markets struggling with the current economic crisis.⁸⁰ The Lindsey oil refinery dispute provided the catalyst to this debate. In January 2009 workers at Lindsey oil refinery began unofficial strike action in protest against perceived discrimination against British workers. The owners of the refinery had awarded construction of a new unit at the plant to an American company who had sub-contracted part of the work to an Italian

⁷⁵ See Cremers, Dølvik & Bosch note 65 above.

⁷⁶ Report from the European Commission on the Implementation of Directive 97/71/EC concerning the Posting of Workers in the Framework of the Provision of Services COM (2003) 458.

⁷⁷ European Parliament Resolution on the implementation of Directive 96/71/EC in the Member States COM (2003) 458.

⁷⁸ For examples see T. Krings, 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour' (2009) *European Journal of Industrial Relations* 49.

⁷⁹ C. Tenbrock & B. Wielinski, "'Kapitalismus Pur': Hungerlöhne, miese Arbeit: Polen in deutschen Betrieben fühlen sich getäuscht', *Die Zeit*, 10/05/2007.

⁸⁰ The dispute is discussed in more detail in chapter four.

company. Workers at Lindsey oil refinery commenced unofficial strike action after learning that the sub-contractor would post its own permanent workforce of foreign nationals (Italians) to the refinery to complete the project rather than employing British workers. This illustrates the feeling, as evidenced by many of the placards bearing Gordon Brown's pledge of 'British Jobs for British Workers', that British workers should be accorded preference over foreign nationals, in this case EU workers, in the allocation of employment contracts.

In the UK, application of the Directive has, in theory, been made easier since the introduction of a statutory minimum wage⁸¹ in April 1999. This allows posted workers to effectively demand equal treatment with national workers. Nonetheless, countless workers fall through the loopholes present in the Directive and are therefore not benefiting from the relevant provisions. Moreover, workers often suffer from a lack of information and, as a result, cannot avail themselves of the protection under the Directive. While textual implementation of the Directive is not an obvious problem, its practical application, as mentioned above, is.⁸² The Directive has thus failed to alter the 'Rechtswirklichkeit' in the UK.

Likewise, implementation in Germany has proved difficult, but for different reasons. Its lack of success is mainly due to the absence of a statutory minimum wage. The problem of the Directive is, therefore, that it gives posted workers a right that does not exist in such a form in Germany. By requiring a minimum wage rather than leaving room for real alternatives, the Directive is also not sufficiently neutral, flexible or appropriate to allow for the successful europeanisation of the national labour law system. While in certain sectors in Germany general collective agreements lay down the terms required by the Directive, collective bargaining in other sectors is heavily fragmented and does not lead to effective collective agreements. The implementation of the Directive had therefore been initially confined to the building, cleaning and postal service sector.⁸³ Yet, the debate on an effective form of implementation of the Directive continued.⁸⁴ Following the ruling by the ECJ in *Rüffert*, the German government revised the relevant Posted Workers Law (Arbeitnehmerentsendegesetz)⁸⁵ which came into force on 24th April 2009. It extends the provisions of the Directive to cover other vulnerable sectors such as the care and security

⁸¹ National Minimum Wage Act 1998.

⁸² Cremers, Dølvik & Bosch note 65 above at pp. 529 – 530.

⁸³ W. Däubler, 'Posted Workers and Freedom to Supply Services' (1998) *Industrial Law Journal* 264.

⁸⁴ Cremers, Dølvik & Bosch note 65 above at pp. 530 – 531.

⁸⁵ Arbeitnehmerentsendegesetz (AentG) BGBl. I 2009, S. 799.

industry. It provides the social partners with the opportunity to extend the negotiated minimum wage to cover all workers in that industry.⁸⁶

Control mechanisms to monitor implementation of the Directive at a national level are weak and uncoordinated across Member States. This has given rise to criticism from the European Trade Union Confederation (ETUC) in its position on the Directive. According to the ETUC, coordination and cooperation among Member States is, in practice, almost non-existent.⁸⁷ This makes compliance with the Directive difficult. As Cremers et al point out,

the over-riding challenge in all the countries is to develop effective mechanisms of enforcement compatible with the constraints of EU principles and regulations. At the European level, in the meantime, the shift in political climate seems to indicate that the weight is shifting in the opposite direction, towards the supremacy of the free provision of services.⁸⁸

This suspicion is confirmed by recent ECJ case law discussed below. Directive 96/71 is therefore an example of a failure by the European Commission and the Member States to harmonise national labour laws, due to a lack of understanding of the prevalent national systems. As a result, the Directive does not fulfil the criteria set out above and fails to successfully europeanise the national labour law systems.

The illustration of a successful and an unsuccessful example of the europeanisation of national labour law systems demonstrates the difficult task facing the EU when it tries to create minimum labour standards across the Union. While an overarching category of European Labour Law has arguably developed, the legislative measures which make up this category of laws have only partly achieved their goal. Both Directives also show that trade unions responding to the recent European enlargements and the new Member State workers in Germany and the UK must take account of the problems but also of the opportunities that europeanisation offers if they are to benefit from it.

As the EU has, in recent times, turned away from hard law mechanisms in order to europeanise national labour law systems, example three looks in more detail at the increasing

⁸⁶ For more information see Bundesministerium für Arbeit und Soziales, *Arbeitnehmerentendegesetz* available at <http://www.bmas.de/portal/13888/aentg.html>.

⁸⁷ European Trade Union Confederation, *ETUC position on the implementation of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services*, 14 – 15 March 2006 available at <http://www.etuc.org/a/2222>

⁸⁸ Cremers, Dølvik & Bosch note 65 above at p. 535.

movement towards soft law in ‘European Labour Law’ and examines whether this is an appropriate way of europeanising national labour law systems.

E. Example 3: Movement towards soft law

Since 2002 there have been no significant ‘hard law’ developments at a European level in the field of Labour Law. A number of reasons have been put forward for this. Bercusson, for example, argues that the paucity of new ‘hard law’ is due to a lack of enthusiasm for social measures within the European Commission. According to Bercusson, the Lisbon Agenda does not encourage further social developments.⁸⁹ Weiss, on the other hand, places culpability at the feet of the Member States. He argues that, following enlargement, the interests of the 27 Member States have become too diverse to negotiate effective social instruments. Ashiagbor includes “the resort to soft law as a means of finding a middle ground between legal and political interventions, [which is] particularly important whilst Member States continue to be so reluctant to sanction further inroads into their sovereignty.”⁹⁰ The ETUC concludes that:

[Over the past four years] a majority of the Commission, most employers and some Member States have combined to stop progress on measures such as working time and temporary agency workers. Indeed, at times, some governments have questioned whether there is a social Europe at all. [...] Instead they have argued that Europe does not need a social dimension, carelessly forgetting the need to win popular support for the project of European integration.⁹¹

In either case, the emphasis since 2002 has been on soft law mechanisms – “framework agreements, joint declarations and guidelines and codes of conduct”⁹² – in order to achieve some sort of harmonisation of national labour laws across the European Union. Moreover, there has been a growing emphasis on the Open Method of Coordination⁹³ which has been described as a “means of spreading best practice and achieving greater convergence towards the main EU goals.”⁹⁴ It “combines processes of common target setting by member states, cross-country benchmarking and periodic review.”⁹⁵ The OMC originated under the EU’s

⁸⁹ Bercusson note 36 above at pp. 554 – 555.

⁹⁰ D. Ashiagbor, ‘Soft Harmonisation: The “Open Method of Coordination” in the European Employment Strategy’ (2004) *European Public Law* 305 at p. 313.

⁹¹ ETUC, *The Seville Manifesto* adopted by the XIth ETUC Congress, Seville 21 – 24 May 2007 at p. 2.

⁹² P. Marginson, ‘Europeanisation and Regime Competition: Industrial Relations and EU Enlargement’ *Industrielle Beziehungen*, 13. Jg., Heft 2, 2006 at p. 103.

⁹³ For a brief overview of the historical development see, for example, Scharpf note 1 above at pp. 7 – 8.

⁹⁴ Commission Communication, *European Benchmarks in Education and Training: follow-up to the Lisbon European Council COM (2002) 629* at para 14.

⁹⁵ Marginson, note 92 above at p. 103.

Employment Strategy, which is essentially “a coordinated and Commission-facilitated inter-governmental process.”⁹⁶ Barnard and Deakin argue that the OMC can be seen as a way of regulatory intervention which attempts to provide space for experimentation in rule-making and to encourage regulatory learning through the exchange of best practice between different levels.⁹⁷ Scott and Trubek explain that:

The OMC aims to coordinate the actions of several Member States in a given policy domain and to create conditions for mutual learning that hopefully will induce some degree of voluntary policy convergence. Under the OMC, the Member States agree on a set of policy objectives but remain free to pursue these objectives in ways that make sense within their national contexts and at differing tempos.⁹⁸

The OMC can therefore be seen as “a response to regulatory failure, as well as a response to the ‘joint decision trap’ or the ‘competency gap’ in social policy and in other policy areas.”⁹⁹ As a form of governance, the OMC “has the potential to achieve policy coordination without threatening jealously-guarded national sovereignty, *and* to allow Member States to implement policy in accordance with their socio-economic development.”¹⁰⁰

There are conflicting views on the effectiveness of the OMC. Advocates of the method argue that it “allows the parties to agree on a common set of standards to be aimed at, but leaves decisions on actions to be taken to achieve these to individual national actors – thereby circumventing the considerable institutional and cultural differences which exist between member states.”¹⁰¹ Moreover, “with an increasingly differentiated European Union, and in light of [...] enlargement, the coordination approach is appealing, as it does not seek to establish a single common framework, but instead, to put the EU Member States on a path towards achieving common objectives.”¹⁰² Ashiagbor suggests that the OMC “can provide an innovative regulatory strategy which in fact leads to more effective coordination of social policy, by providing a flexible framework in which Member States can achieve the aims of European social policy on their own terms.”¹⁰³ The characteristics often associated with the

⁹⁶ *Ibid* at p. 103.

⁹⁷ C. Barnard & S. Deakin, ‘Market access and Regulatory Competition’ in C. Barnard & J. Scott (eds.), *The Law of the Single European Market: Unpacking the Premises*, Hart, Oxford, 2002 at pp. 197 – 294.

⁹⁸ J. Scott & D. Trubek, ‘Mind the Gap: Law and New Approaches to Governance in the European Union’ (2002) *European Law Journal* 1 at pp. 4 – 5.

⁹⁹ Ashiagbor note 90 above at p. 318: The ‘joint decision trap’ or the ‘competency gap’ describes a situation where “the national capacity to regulate markets is severely reduced as a result of economic integration, whilst the problem-solving capacity at European level is constrained by conflicts of interest among governments.”

¹⁰⁰ *Ibid* at p. 318.

¹⁰¹ Marginson note 92 above at p. 103 referring to J. Arrowsmith, K. Sisson & P. Marginson, ‘What can “Benchmarking” Offer the Open Method of Coordination?’ (2004) *Journal of European Public Policy* 311.

¹⁰² C. de la Porte, ‘Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?’ (2002) *European Law Journal* 38 at p. 39.

¹⁰³ Ashiagbor note 90 above at p. 319.

OMC are therefore flexibility, adaptability and pervasiveness.¹⁰⁴ This could be of particular relevance in the field of labour law where europeanisation of national systems often fails due to the country-specific context within which the systems operate. There is also provision for the social partners to play a significant role in “modernising the European social model [and to be] actively involved in this OMC, especially benchmarking practices, using variable forms of partnership.”¹⁰⁵

Opponents of the OMC challenge its effectiveness and argue that it only “impacts on domestic policy-making, when the European objectives coincide with the national policy objectives.”¹⁰⁶ Streeck criticises that a shift from hard to soft law in social policy (which he describes as “neo-voluntarism”) could lead to “a type of social policy that tries to do with a minimum of compulsory modification of both market outcomes and national policy choices, presenting itself as an alternative to hard regulation as well as to no regulation at all.”¹⁰⁷ Empirical research also demonstrates that the effectiveness of the OMC is often lacking particularly as there are no time constraints on implementation or enforcement mechanisms to ensure compliance.¹⁰⁸ Moreover, according to one author, the OMC may:

damage the future legitimacy of the EU and its Institutions [...] as it does not confer any new competencies on them but specifically limits their reach on national policies in the fields concerned. More importantly still, there is a risk that the OMC replaces the classic Community method in fields where the latter currently prevails.¹⁰⁹

The lack of legislative measures in the field of labour law since 2002 seems to confirm such suspicions.

The principal idea behind the OMC to encourage an exchange of best practice amongst Member States is not a bad one. It enables States and non-state actors such as trade unions to learn from one another. However, the OMC is not suitable to achieve the EU’s policy of minimum labour standards. This view is supported by trade unions who prefer ‘hard law’

¹⁰⁴ M-J Rodriguez & M Telo (eds.), *Vers une société européenne de la connaissance. La stratégie de Lisbonne 2000-2010*, Éditions de l’Université de Bruxelles, Bruxelles, 2004.

¹⁰⁵ C. Barnard, ‘The Social Partners and the Governance Agenda’ (2002) *European Law Journal* 80 at p. 84.

¹⁰⁶ de la Porte note 102 above at p. 50.

¹⁰⁷ W. Streeck, ‘From Market-Making to State-Building? Some Reflections on the Political Economy of European Social Policy’ in S. Leibfried & P. Pierson (eds.), *European Social Policy Between Fragmentation and Integration*, The Brookings Institute, Washington, D.C., 1995 at p. 424.

¹⁰⁸ For examples see V. Hatzopoulos, ‘Why the Open Method of Coordination is Bad For You: A letter to the EU’ (2007) *European Law Journal* 309.

¹⁰⁹ *Ibid* at pp. 318 – 319.

initiatives at an EU level.¹¹⁰ Minimum labour standards are widely recognised as necessary in order to combat EU-wide problems such as the perceived threat of social dumping or an increasing number of free moving workers and establishment.¹¹¹ Trade unions in Germany and the UK responding to such changes would benefit from legislative measures originating from the EU rather than soft law mechanisms such as the OMC.

A final example of a mechanism originating from the EU level which attempts to europeanise national labour law systems is the case law of the European Court of Justice. In particular, a number of recent cases must be discussed in order to illustrate the role that the ECJ has played in the europeanisation of national labour law systems. This final example completes the illustration of the environment within which trade unions act when responding to the European enlargements and new Member State workers.

F. Example 4: Case law

The ECJ's jurisdiction in labour law offers the prospect that it could play a major role in europeanising national labour law systems through the preliminary rulings procedure¹¹² which allows a national court to stop domestic legal proceedings and send a question to the ECJ for interpretation. The ECJ has used this mechanism "to ensure that states respect their European legal obligations."¹¹³ Moreover, "the legal cases raised by private litigants and referred by national courts are used by the ECJ to advance integration by expanding the reach and scope of European law. [...] The effects [...] reverberate through national legal systems, shifting the national legal and political context."¹¹⁴ However, the success of the ECJ's policy has also led to criticism by opponents of European integration. In the sphere of labour law, the ECJ has largely played a successful role through the preliminary rulings procedure in advancing the idea of the existence of 'European Labour Law' and its importance vis-à-vis the common market. This was particularly evident in a decision of 10 February 2000 which concerned the

¹¹⁰ See, for example, Hatzopoulos note 108 above or Interview, Confederal Secretary ETUC, ETUC Headquarters, Brussels 25/2/2009.

¹¹¹ See interviews with the International Officer and the National Development Manager for Migrant Workers, UNISON Headquarters, London, 28/5/2009 and 20/10/2008 and the interviews with the Europe Officer and the Migration Officer, Ver.di Headquarters, Berlin, both on 29/1/2009.

¹¹² Article 267 TFEU (ex article 234 EC).

¹¹³ K. J. Alter, *Establishing the Supremacy of European Law – The Making of an International Rule of Law in Europe*, Oxford University Press, Oxford, 2001 at p. 1.

¹¹⁴ *Ibid* at p. 3.

exclusion of part-time workers from supplementary occupational pension schemes.¹¹⁵ The ECJ recognised that:

The economic aim pursued by Article 119 of the Treaty [now article 157 TFEU], namely the elimination of distortions of competition between undertakings established in different Member States, is secondary to the social aim pursued by the same provision, which constitutes the expression of a fundamental right.¹¹⁶

As Bercusson points out, “interventions by the ECJ may have a critical impact on the future of European Labour Law.”¹¹⁷ For the purposes of this chapter, the case law of the ECJ evidently results in domestic change caused by European integration and serves as the last example of europeanisation which affects trade unions responding to the recent European enlargements and the new Member State workers. A number of recent decisions of the ECJ in particular illustrate the impact that the ECJ may have on trade unions acting in national labour law systems.¹¹⁸ These decisions differed from previous decisions by the ECJ in the field of labour law as they took place following the recent European enlargements which have led to a difficult interface between free movement law and national labour regulation. As Ashiagbor points out, they also “provide the clearest examples to date of the conflict between the values of social solidarity and those of the internal market, between collective labour rights and free trade.”¹¹⁹

1. The *Viking* case

In the *Viking* case, the English Court of Appeal referred a number of questions to the ECJ regarding the extent to which trade unions are able to use industrial action to resist social dumping in the EU. The facts of the case are relatively straightforward. Viking Line ABP (Viking), a ferry operator incorporated under Finnish law and running regular services on the route between Tallinn and Helsinki, sought in 2003 to reflag its vessel by registering it in Estonia. This was due to the higher wages applicable under a collective bargaining agreement,

¹¹⁵ Case C-50/96 *Deutsche Telekom AG v Lilli Schröder* (2000) ECR I-743.

¹¹⁶ *Ibid* at para. 57.

¹¹⁷ Bercusson note 36 above at p. 655.

¹¹⁸ C-438/05 *The International Transport Workers' Federation and The Finnish Seamen's Union v Viking Line ABP and OÜ Viking Line Eesti* ECR [2007] I-10779; C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Ruffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008] ECR I-1989; C-319/06 *Commission of the European Communities v Grand Duchy of Luxemburg* [2008] ECR I-04323.

¹¹⁹ D. Ashiagbor, 'Collective Labor Rights and the European Social Model' (2009) *Law & Ethics of Human Rights* 223 at p. 223.

governed by Finnish law, with the Finnish Seaman's Union (the FSU). This caused Viking to run its services at a loss on the above-mentioned route. In accordance with Finnish law, Viking gave notice of its intentions to reflag to the FSU who opposed the plans. Based on the 'Flag of Convenience' policy of the International Transport Workers' Federation (ITF), the FSU requested that the ITF, whose headquarters was in London, send out a circular asking its affiliates to refrain from entering into negotiations with Viking which it duly did. Following the expiry of the manning agreement in November 2003, the FSU threatened strike action against Viking – which was legal under Finnish law - in order to deter Viking from its plans to reflag its vessel. As a compromise, the FSU indicated that it would refrain from strike action in the case, provided first that Viking gave an undertaking that it would continue to follow Finnish law and the collective bargaining agreements governed thereby. Second, the FSU required Viking to guarantee that the reflagging would not lead to any changes in the terms and conditions of employment without the consent of the employees, thereby essentially rendering a reflagging pointless. In December 2003 Viking put an end to the dispute by accepting the trade union's demands and by giving an undertaking that reflagging would not commence prior to February 2005. The ITF's above-mentioned circular, however, remained in force.

Since Viking was still running its vessels at a loss, it pursued its intention of reflagging. This was hindered by the ITF's circular. Following Estonia's accession to the European Union in 2004, Viking brought an action before the High Court of Justice of England and Wales, Queen's Bench Division (Commercial Court), requesting it to declare the action taken by the ITF and the FSU contrary to article 49 TFEU (ex article 43 EC), to order the withdrawal of the ITF's circular, and to order the FSU not to infringe the rights which Viking enjoys under EU law. The court granted the order on 16 June 2005 on the grounds that the actual and threatened collective action constituted a restriction on freedom of establishment contrary to article 49 TFEU. However, this was appealed on 30 June 2005 by the ITF and the FSU who claimed, *inter alia*, that the right of trade unions to take collective action to preserve jobs is a fundamental right recognised by Title X of the TFEU (ex Title XI of the EC Treaty). Before deciding the case before it, the Court of Appeal referred a number of questions to the ECJ pertaining to, *inter alia*, the horizontal effect of the Treaty provisions on freedom of movement (in particular, article 49), and on the relationship between social rights such as the right to take collective action, and the rights guaranteed by the Treaty on freedom of

movement. Advocate-General Maduro's opinion was published in May 2007 and the ECJ, subsequently, gave its ruling in December 2007.

By its first question, the Court of Appeal was trying to ascertain whether collective action taken by trade unions which is liable to impinge on the exercise of an undertaking's right to freedom of establishment falls within or outside the scope of article 49 TFEU. In response, the FSU and the ITF argued that collective action taken by trade unions, which promotes the objectives of the Community's social policy, falls outside the scope of article 49 TFEU. If this were not the case, the right of workers to bargain collectively and to strike with a view to achieving a collective agreement would be undermined. The ITF and the FSU further argued that, as the right of association and the right to strike are constitutional traditions common to the Member States, they therefore represent general principles of Community law. Moreover, by analogy to the ECJ's reasoning in *Albany*¹²⁰, the social provisions in Title X of the Treaty effectively exclude the application of article 49 TFEU in the field of labour disputes.

Neither the ECJ, nor Advocate General Maduro in his Opinion¹²¹, accepted these arguments. In rejecting the claims by the FSU and the ITF which were endorsed by a number of Member States in their submissions, the ECJ firstly established that collective action such as that at issue which is inextricably linked to the collective agreement being sought by the FSU falls within the scope of article 49 TFEU. As working conditions in Member States can be governed by provisions laid down by law as well as by collective agreements, drawing a distinction between the two would create inequality in the application of article 49 TFEU.

While the Court accepted that the right to take collective action must be regarded as a fundamental right which forms an integral part of Community law, this right may be subject to restrictions. In addition, by reference to previous case law¹²², the ECJ held that the nature of collective action as a fundamental right did not justify it falling outside the scope of article 49 TFEU. The exercise of a fundamental right must be reconciled with the requirements of the Treaty. In doing so, regard must be had to the principle of proportionality. In this context,

¹²⁰ C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751: The ECJ acknowledged that collective agreements concluded in the context of collective negotiations between management and labour which aim to improve conditions of work and employment must, by virtue of their nature and purpose, be regarded as falling outside the scope of the competition provisions contained in the EC Treaty.

¹²¹ Opinion of Advocate General Maduro delivered on 23 May 2007.

¹²² C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659; C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609.

the ECJ ruled out the application of the reasoning applied in *Albany* to the present case. The main reason given was that “it cannot be considered that it is inherent in the very exercise of trade union rights and the right to take collective action that those fundamental freedoms will be prejudiced.”¹²³

Turning to the second question relating to the horizontal direct effect of article 49 TFEU, the ECJ did not provide a detailed reply. The ECJ, firstly, reiterated its familiar arguments that non-state bodies which neither exercise a regulatory task nor possess quasi-legislative powers may also, by their actions, create barriers to the exercise of Community rights. Following on from this, and in reliance on the decision in *Defrenne*¹²⁴ as well as the case law on the free movement of goods¹²⁵, the ECJ concluded that article 49 TFEU “must be interpreted as meaning that [...] it may be relied on by a private undertaking against a trade union”¹²⁶.

The third to tenth questions referred by the Court of Appeal were examined together by the ECJ. The answer is split into two sections: firstly, whether the collective action at issue constitutes a restriction within the meaning of article 49 TFEU; and, secondly, whether such a restriction may be justified.

In the first section, the Court reiterated its settled case law¹²⁷ on the definition and scope of freedom of establishment. Using this as a basis the Court concluded that:

collective action such as that envisaged by 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 Viking from enjoying the same treatment in the host Member State as other economic operators established in that State.¹²⁸

This is thus the logical conclusion from the preceding answer on the horizontal direct effect of article 49 TFEU as between a private undertaking and a trade union or association of trade unions. Furthermore, the Court confirmed that the action taken by the ITF in the present case “must be considered to be at least liable to restrict Viking’s exercise of its right of freedom of

¹²³ Para. 52.

¹²⁴ C-43/75 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1976] ECR 455.

¹²⁵ C-265/95 *Commission of the European Communities v French Republic* [1997] ECR I-06959; C-112/00 *Schmidberger* note 122 above.

¹²⁶ Para. 61.

¹²⁷ E.g. C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991] ECR I-3905.

¹²⁸ Para. 72.

establishment.” The Court did not, therefore, distinguish between primary and secondary action.

Leading on from this, the Court considered whether the restriction on freedom of establishment by the trade unions could be justified. The Court elaborated on the balance to be struck between the right to collective action and freedom of establishment. The collective action must pursue a legitimate aim compatible with the Treaty and be justified by overriding reasons of public interest. Furthermore, according to settled case law, the restriction would have to be proportionate to the objectives being pursued. Both the Court and the Advocate-General discussed the issues at length and came to similar conclusions, albeit by taking different approaches. It is thus proposed to summarise the arguments given by both.

Advocate-General Maduro leaves it up to the national court to determine whether collective action, such as that taken by the FSU, which has the effect of restricting the right contained in article 49 TFEU is lawful in light of the applicable domestic laws regarding the right to collective action. However, in placing the present case in the broader social context of fears over social dumping, Maduro sets out a number of considerations that the national court should take into account when deciding upon the balance to be struck. Collective action in a case where relocation is at issue, such as in the present case, is lawful if it takes place before the act of relocating abroad. This is justified on the basis that workers should be entitled to take collective action, as in a situation of purely domestic relocation, in order to protect their wages and working conditions. On the other hand, action taken to block an undertaking established in one Member State from providing its services in another Member State would have the effect of partitioning the labour market and would thus “strike at the heart of the principle of non-discrimination on which the common market is founded.”¹²⁹

Regarding the action initiated by the ITF a different picture emerges. Again, by placing the action taken in the context of social dumping, Maduro recognises that coordinated collective action may be permissible as a “reasonable method of counter-balancing the actions of undertakings who seek to lower their labour costs by exercising their rights to freedom of movement.”¹³⁰ This is supported by the fundamental nature of the right as recognised by the Charter of Fundamental Rights of the European Union. Furthermore, Maduro suggests that

¹²⁹ Opinion of Advocate General Maduro delivered on 23 May 2007, C-438/05 *The International Transport Workers' Federation & Finnish Seamen's Union v Viking Line ABP & OÜ Viking Line Eesti*, para. 62.

¹³⁰ *Ibid* at para. 70.

“the recognition of their right to act collectively on a European level simply transposes the logic of national collective action to the European stage.”¹³¹ However, the action taken by ITF in this respect can only be lawful if it is not “abused in a discriminatory manner”¹³². The value judgment in this matter is, again, left to national courts.

The ECJ approached the question of justification in a slightly different manner. It accepted that “the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty.”¹³³ The Court thus followed the precedents set out in cases such as *Schmidberger*¹³⁴ and, furthermore, cited the European Court of Human Rights¹³⁵ to emphasise that the competing rights must be balanced against each other. However, the Court again left it to the national courts to consider whether the objectives of the action taken by the FSU concerned the protection of workers. The Court, thus, did not draw a distinction between the timing of the action and the relocation, but instead gave the national courts rather strict guidance as to the objectives that the action must pursue in order for it to be justified. Factors to be considered are the seriousness of the threat to the jobs or conditions of employment at issue, the proportionality of the collective action, and the exhaustion of other possible means before the initiation of collective action by the FSU.

Regarding the action pursued by the ITF, the Court clearly states that the restrictions on freedom of establishment in this case cannot be objectively justified. However, it leaves it up to the national courts to decide the matter on a case by case basis in situations where this type of secondary action is justified on pressing public policy grounds.

The *Viking* case raises a number of issues which are discussed in more depth and placed in the context of the debate on europeanisation following a summary of the *Laval* and *Rüffert* cases.

¹³¹ *Ibid* at para. 70.

¹³² *Ibid* at para. 71.

¹³³ Para. 77.

¹³⁴ C-112/00 *Schmidberger* note 122 above.

¹³⁵ Para. 86.

2. The *Laval* case

The *Laval* case seems to raise similar issues to those discussed in *Viking* and indeed, the ECJ in its judgment refers to the *Viking* case. However, on closer inspection the cases deal with two separate problems. As a result, the dispute in the proceedings is slightly different.

Laval un Partneri (Laval), a Riga-based company incorporated under Latvian law, posted workers to Sweden in line with the Posted Workers' Directive¹³⁶ in May 2004 to work on building sites operated by a Swedish company. In Sweden, all terms and conditions of employment, save for minimum rates of pay, are laid down by law. Minimum rates of pay are determined by collective agreements which are not declared universally applicable by accompanying legislation as they are negotiated on a case by case basis between management and labour.

The work on the building sites in this case was carried out by a subsidiary of Laval: L&P Baltic Bygg AB (Baltic Bygg). In June 2004, Laval, on the one hand, and the Swedish building and public works trade union, Svenska Byggnadsarbetareförbundet (Byggnadsarbetareförbundet), on the other, began negotiations to determine the rates of pay for the posted workers contained in a collective agreement for the building sector. However, negotiations failed and Laval signed collective agreements with the Latvian building sector trade union, to which a large majority of the posted workers were affiliated. As a result, the Byggnadsarbetareförbundet established a blockade – legal under Swedish law – of all sites that Laval was working on in Sweden. In addition, the Swedish Electricians' Union gave notice of sympathy action directed against electrical installation work at all the construction sites of the company in Sweden. This led to Baltic Bygg being declared bankrupt and the posted workers being sent back to Latvia.

Laval brought an action before the Swedish Labour Court (Arbetsdomstolen) against the unions, *inter alia*, for a declaration as to the unlawfulness of the collective action and for compensation for the loss suffered. The unions contested all of the claims. In the course of the proceedings, the Arbetsdomstolen decided to refer a number of questions to the ECJ for a preliminary ruling in order to ascertain whether EU law precludes trade unions from taking collective action in the circumstances of the case. In particular, the Arbetsdomstolen

¹³⁶ Directive 96/71/EC of the European Parliament and the Council concerning the posting of workers in the framework of the provision of services.

considered that the content of Articles 18 and 56 of the Treaty on the Functioning of the European Union (ex articles 12 and 49 EC) as well as the Directive concerning the posting of workers were not clear enough for the court to be able to decide the case.¹³⁷ Advocate General Mengozzi issued his opinion in May 2007 and the Court published its judgment in December 2007.

At the outset, it must be highlighted that the Court, in considering the direct effect of article 56 TFEU, used the familiar arguments set out in case law¹³⁸ to establish the horizontal direct effect of that article. The judgment does not deal with the direct effect of the Directive despite it being considered an issue by the Advocate General and some of the parties. However, as the issue of horizontal direct effect of the Directive did not arise on the facts of the case at issue the approach taken by the Court seems to have been correct.

In response to the first question the Court considered whether the collective action in the form of a blockade taken by trade unions in this case is compatible with the EU rules on the freedom to provide services and the prohibition of discrimination on the grounds of nationality. One aspect that the Court discussed at length was the characteristic of the host country that the legislation to implement the Directive concerning the posting of workers had no express provision concerning the application of terms and conditions of employment in collective agreements. The relevant collective agreement in this case provided for more favourable conditions than those envisaged by the Directive. The Court, therefore, considered whether the collective action taken was justifiable in light of its objective, namely, to force a service provider to grant more favourable conditions to its workers than those prescribed by EU law.

In response the Court, firstly, reiterated its settled case law on articles 56 and 57 TFEU mentioned above which does not allow a Member State to prohibit the free movement of a service provider established in another Member State on its own territory. In addition, the host Member State may not make the movement of the service provider subject to more restrictive

¹³⁷ R. Eklund, 'The Laval case' (2006) *Industrial Law Journal* 202.

¹³⁸ C-36/74 *Walrave & Koch v Association Union cycliste internationale, Koninklijke Nederlandsche Wielren Unie and Federación Española Ciclismo* [1974] ECR 01405; C-415/93 *Union royale belge des sociétés de football association ASBL v Jean-Marc Bosman, Royal club liégeois SA v Jean-Marc Bosman and others and Union des associations européennes de football (UEFA) v Jean-Marc Bosman* [1995] ECR I-04921; Joined Cases C-51/96 and C-191/97 *Christelle Delière v Ligue francophone de judo et disciplines associées ASBL, Ligue belge de judo ASBL, Union européenne de judo and François Pacquée* [2000] ECR I-02549; C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-04139.

conditions than national service providers. A Member State may thus apply its legislation or collective agreements to the service provider as long as the application of these rules is appropriate for securing the protection of workers and does not go beyond what is necessary for the attainment of the objective. As mentioned above, the Directive concerning the posting of workers therefore lays down a level of minimum protection the exact content of which may be defined by the individual Member States. However, the Court did not accept the method of implementation of the Directive in Sweden where the applicable rates of pay were negotiated on a case by case basis through the social partners without being supplemented by legislation providing for universal applicability as this leads to a climate of unfair competition as between national and posted service providers. Furthermore, the Court pointed out that the Directive does not allow 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.

On this basis, the Court then turned to an assessment of the collective action at issue within article 56 TFEU. Neither the Advocate General nor the Court accepted the *Albany* argument, i.e. that the right to take collective action falls outside the scope of article 56 TFEU. This argument was espoused by a number of Member States as well as the trade unions. In rejecting it the Court followed the opinion of Advocate General Mengozzi who opined that, while the EU has no power to legislate on the right to strike, the right still falls within the scope of the Treaty and may be dealt with by the EU through other means.

However, the Court did recognise the fundamental nature of the right to strike and confirmed it to be an integral part of the general principles of EU law in citing, *inter alia*, the Charter of Fundamental Rights¹³⁹, thereby again following the opinion put forward by Mengozzi. Yet, the exercise of the right must be reconciled, in line with cases such as *Schmidberger*, with the requirements of other rights protected under the Treaty in accordance with the principle of proportionality. The Court thus adopted the same approach as that in the *Viking* case: it examined whether the collective action in question constituted a restriction on the freedom to provide services, and, if so, whether it could be justified.

The Court pointed out that the right of collective action which may be used to force foreign service providers to sign collective agreements is liable to make the provision of services by

¹³⁹ OJ 2000 C 364 at p. 1.

those providers more difficult and less attractive in the host member state. The action thus constituted a restriction on the freedom to provide services within the meaning of article 56 TFEU. This is particularly pertinent, according to the Court, in the present case where the collective bargaining is of unspecified duration.

A restriction on the freedom to provide services can, as mentioned above, only be justified if the action does not go beyond what is necessary and suitable to secure the attainment of a legitimate objective and is furthermore justified by overriding reasons of public interest. By citing, *inter alia*, the *Viking* case the Court recognised that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding public interest. In this context, a blockade such as that in question falls, in principle, within the objective of protecting workers.¹⁴⁰ However, the employer in the present case is only required to observe the minimum standards laid down by the Directive. The nature of the blockade which aims to force the signature of a collective agreement going beyond the minimum standards cannot, therefore, be justified with regard to such an objective due to the type of obstacle that it poses to the freedom to provide services. Furthermore, the lack of national provisions on minimum rates of pay make the negotiations excessively difficult if not impossible in practice for an undertaking and the resulting collective action cannot therefore be justified.

Finally, in relation to the second question, the Court made it clear that the national rules prevalent in Sweden which “fail to take into account [...] collective agreements to which undertakings that post workers to Sweden are already bound in the Member State in which they are established, gave rise to discrimination against such undertakings.”¹⁴¹ This kind of discrimination is only justifiable on grounds of public policy, public security or public health. However, as none of these considerations are raised by the present case, it is evident that the discrimination is not justifiable.

¹⁴⁰ Paras. 103 & 107.

¹⁴¹ Para. 116.

3. The *Rüffert* case

The *Rüffert*¹⁴² case, similar to *Laval*, also deals with Directive 96/71 on the posting of workers. However, the case was raised in a different context.

In 2003, the German federal state of Lower Saxony invited tenders for a contract to complete structural work in a prison. The contract was awarded to Objekt und Bauregie GmbH, a German company. The written contract between the federal state and Objekt und Bauregie contained a declaration requiring compliance, by the company, with the applicable collective agreements. This followed the requirements of the Landesvergabegesetz (the law of Lower Saxony on the procurement of public contracts). In particular, the contract required the “payment to employees employed on the building site of at least the minimum wage in force at the place where those services were to be performed pursuant to the collective agreement mentioned in the list of sample collective agreements [in the contract]”¹⁴³. It must be noted that these collective agreements were not declared to be universally applicable by legislation. Moreover, similar to Sweden, Germany does not have a statutory minimum wage. Instead, this is negotiated between the social partners on a sector-wide basis and covers national and posted workers.

Objekt und Bauregie subcontracted the work on the building site to an undertaking established in Poland, which posted workers to the German site. In 2004, the Polish undertaking was suspected of not paying the minimum wage applicable under the collective agreement to the workers employed on the building site. Subsequently, Objekt und Bauregie and the federal state of Lower Saxony terminated the contract for work. Lower Saxony issued a penalty notice to the Polish subcontractor, accusing them of paying 53 workers engaged on the building site only 46.57% of the applicable minimum wage. At first instance, the Landgericht Hannover held that “Objekt und Bauregie’s outstanding claim under the contract for work was offset in full by the contractual penalty in favour of [the federal state of Lower Saxony]. It dismissed the remainder of that undertaking’s action.”¹⁴⁴ On appeal, the regional Appeal Court (Oberlandesgericht Celle) decided to refer a question to the ECJ on whether the requirement to comply with the applicable collective agreements, as set down in the

¹⁴² C-346/06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008] ECR I-1989.

¹⁴³ Para. 10.

¹⁴⁴ Para. 12.

Landesvergabegesetz, is compatible with the freedom to provide services under Article 56 TFEU. Advocate General Bot issued an opinion on 20 September 2007. The ECJ published its judgment on 3 April 2008.

The Advocate General established at the outset that the Directive was applicable in the proceedings at issue. The Advocate General was of the opinion that the Directive did not preclude the validity of the collective agreement. In support of his view, the Advocate General cited both the preamble to, and Art. 3(7) of the Directive, both of which permit a Member State:

where the services are performed to improve, for the matters referred to in Article 3(1) of the Directive, the level of social protection which it wishes to guarantee to workers employed in its territory and which it can therefore apply to workers posted there. Hence, in principle, this provision authorises the implementation of enhanced national protection.¹⁴⁵

Moreover, the Advocate General argued that, as there is a system in Germany for declaring collective agreements universally applicable, the rates of pay at issue should be permissible as they, in his opinion, fall under the definition of ‘enhanced national protection’. However, the Advocate General recognised that the collective agreement and the rates of pay contained therein constituted a restriction on the freedom to provide services within the meaning of article 56 TFEU. Nonetheless, he argued that “the disputed provisions of the Landesvergabegesetz are appropriate for securing the attainment of the objectives of protecting workers and preventing social dumping and do not go beyond what is necessary in order to attain them.”¹⁴⁶

The ECJ issued a very short judgment which focused mainly on the interpretation of Directive 96/71. As is evident from the judgment of the Court, it does not share the view of Advocate General Bot, opting instead to apply a strict interpretation of the Directive to the proceedings at hand in a manner similar to its decision in *Laval*. It, like the Advocate General, established at the outset that the Directive was applicable in the proceedings at issue. It then went on to discuss whether the provisions of the Directive requiring minimum rates of pay for posted workers to be laid down by law or by a collective agreement, which has been declared universally applicable, had been complied with. As the Landesvergabegesetz itself does not set out minimum rates of pay, it cannot be classified as a relevant law for those purposes under the Directive. With reference to a written answer from the federal state of Lower

¹⁴⁵ Para. 83.

¹⁴⁶ Para. 114.

Saxony, which confirmed that the applicable collective agreement in this case had not been declared universally applicable, the ECJ concluded that the provisions of the Directive had not been complied with. Moreover, it inferred from the foregoing conclusion and with reference to *Laval*, that the rate of pay set out in the German collective agreement could not be classified as a “minimum rate of pay within the meaning of Article 3(1)(c) of Directive 96/71 which Member States are entitled to impose, pursuant to that directive, on undertakings established in other Member States, in the framework of the transnational provision of services.”¹⁴⁷ The ECJ then concluded that the host Member State, in this case Germany, could not “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.”¹⁴⁸

The minimum rate of pay prescribed by the applicable collective agreement could not therefore be imposed on the Polish subcontractor. With reference to Advocate General Bot, the ECJ was of the opinion that:

by requiring undertakings performing public works contracts and, indirectly, their subcontractors to apply the minimum wage laid down by the ‘Buildings and public works’ collective agreement, a law such as the *Landesvergabegesetz* may impose on service providers established in another Member State where minimum rates of pay are lower an additional economic burden that may prohibit, impede or render less attractive the provision of their services in the host Member State.¹⁴⁹

The ECJ concluded that this could constitute a restriction on the freedom to provide services within the meaning of article 56 TFEU. The Advocate General and the Court both recognised, therefore, that the measure constituted a restriction. However, unlike the Advocate General, the Court expressly rejected the justifications put forward by Lower Saxony as well as a number of Governments that such measures are necessary both for the protection of workers and to ensure the protection for independence in the organisation of working life by trade unions.¹⁵⁰

It thus seems clear that the *Viking*, *Laval* and *Rüffert* cases are based on different issues. *Viking* seems to fall much more comfortably within the ECJ’s settled case law, as illustrated by *Omega* and *Schmidberger* on the balancing of the economic freedoms contained in the EC Treaty with fundamental rights. However, *Laval* and *Rüffert* illustrate to a greater extent the

¹⁴⁷ Para. 31.

¹⁴⁸ Para. 33.

¹⁴⁹ Opinion para. 103.

¹⁵⁰ Paras. 38 & 41.

difficulties of interaction between national regulation, or lack thereof, and national systems of industrial relations and collective bargaining within an enlarged Europe. It merits mention at this stage that in a subsequent case, *Commission v Luxembourg*¹⁵¹, the ECJ was also asked to consider the correct implementation of Directive 96/71 on the posting of workers. However, as this action was based on incorrect implementation of the Directive (under article 258 TFEU (ex article 226 EC)), rather than a direct clash between national labour law and European norms, this case is not dealt with in this chapter.

4. Analysis of the cases

The *Viking*, *Laval* and *Rüffert* cases were referred to the ECJ amidst a climate of fear amongst workers in ‘old’ Member States that the presence in their labour markets of new Member State workers whose wage demands are often lower would lead to a race to the bottom. As mentioned above, the social policy of the European Union has traditionally aimed to establish a threshold of rights for workers in the hope of broadly approximating labour standards across the Member States and, in turn, eliminating unfair competition. However, the “disparities in wages and working conditions among the Member States, exacerbated by the accession of new Member States, has led to challenges which have yet to be accommodated by EU law.”¹⁵² This is coupled with the fact that the “commitment to harmonisation is in decline and there has been a growing emphasis on promoting a European social model by softer means.”¹⁵³ The europeanisation of national labour law systems has therefore become more problematic as soft law mechanisms are not as successful at europeanising national labour law systems as the other examples given in this chapter. The opinions and judgments in the above-mentioned cases illustrate the difficult balance that the Court had to strike between social rights and the free movement provisions. Moreover, the cases show the problems facing trade unions due to the changes in opportunity and regulatory structures as a consequence of europeanisation.

In order to better understand the judgments and opinions, one must view them within the context of the above-mentioned tendency towards soft law mechanisms in the development of

¹⁵¹ C-319/06 *Commission of the European Communities v Grand Duchy of Luxembourg* [2008] ECR I-04323.

¹⁵² Bercusson note 26 above at p. 656.

¹⁵³ A.C.L. Davies, ‘The Right to Strike versus Freedom of Establishment in EC Law: The Battle Commences’ (2006) *Industrial Law Journal* 75 at p. 85.

the European Social Model. The consequences of the judgments are hitherto unclear¹⁵⁴, however, they have the potential to bring about serious ramifications for national labour law systems and they must, therefore, be taken into account when analysing trade union responses in Germany and the UK to European enlargement. The recent enlargements of the European Union and the challenges and pressures raised by them play a pivotal role in the development of the European Social Model and are a key factor in the changing structures facing trade unions.

All three judgments are difficult to evaluate due to the sensitive political nature of the subject matter.¹⁵⁵ Much of the language used in the judgments is familiar due to the standard formulations and terminology employed. Moreover, the Court frequently relied on its settled case law. Essentially, the Court left it up to the national courts to decide similar issues arising in the future on a case by case basis. However, some of the arguments and aspects of the judgments merit closer scrutiny.

At the outset it should be noted that the Court, in both *Viking* and *Laval*, emphasised the fundamental nature of the right to take collective action and, as authority, cited the Charter of Fundamental Rights. This thus allows trade unions in future to rely on a fundamental rights argument in cases where their right to take collective action is doubted. This may be of particular significance in countries where the right to strike is not legally recognised, such as the UK. In both cases the Court also recognised the legitimacy of using collective action to combat the practice of social dumping. This illustrates not only the social side of the European Union but also a realisation of the threat that relocation of enterprises and lower wage demands by new Member State workers pose to both the 'old' European labour market as well as to the well-established structures of trade unions in these countries.

¹⁵⁴ It should be noted at this stage that the *Viking* case was settled out of court between the parties: M. Murphy, 'Finish shipping group settles case over cheap labour' *Financial Times* 04/03/2008. The Swedish Labour Court ruled on 2 December 2009 that the actions of the trade unions in the *Laval* case had violated the fundamental market freedom of *Laval* to offer its services in Sweden using posted workers and imposed a fine on the unions: C. Woolfson, C. Thörnqvist & J. Sommers, 'The Swedish model and the future of labour standards after *Laval*' (2010) *Industrial Relations Journal* 333.

¹⁵⁵ There is a substantial amount of literature discussing the judgments, not all of which can be mentioned in this section. For different views on the judgments see, for example, M. Rönmar (ed.), *EU Industrial Relations vs National Industrial Relations. Comparative and Interdisciplinary Perspectives*, Kluwer, Frederick, MD, 2008; R. Blanpain & A.M. Swiatkowski (eds.), *The Laval and Viking Cases: freedom of services and establishment v industrial conflict in the European Economic Area and Russia*, Kluwer, Frederick, MD, 2009; and articles by A. Dashwood, T. Novitz, M. Rönmar, S. Deakin and S. Sciarra in C. Barnard (ed.), *Cambridge Yearbook of European Legal Studies*, 2007-2008, Vol. 10, Hart Publishing, Oxford.

However, the balance struck by the Court is unclear. Both judgments recognise limits to the type of action available to trade unions. In particular, by rejecting the *Albany* solution and instead establishing the horizontal direct effect of the free movement provisions which led to the recognition of the collective action as a restriction that may be justifiable, the Court introduced a judicial dimension to labour relations. By choosing to balance the right to strike with the economic freedoms at issue, the Court is, in effect, revealing its expectation that national courts should get involved in the autonomous bargaining structures of collective relations. This conflict of norms which has not been adequately resolved by the Court leads to legal uncertainty for trade unions and employers and, effectively, constitutes a limitation on the right to industrial action enjoyed by trade unions.

The introduction of the concept of ‘proportionality’ in balancing the opposing rights in both cases is a difficult concept to reconcile with the process of collective relations. While the concept may be sufficiently broad and flexible to satisfy both employers and trade unions in some situations, it also leaves a lot of room for interpretation by national courts and influence by national political sentiments. This may potentially create wide disparities in the protection of collective action across the Member States of the European Union and was thus not welcomed by trade unions.¹⁵⁶ As Bercusson points out:

It is in the very nature of negotiations that both parties set demands at their highest and through negotiation over time seek a compromise. [...] At what stage of this process and against what criteria is the test of proportionality to be applied? Any test based on proportionality in assessing the legitimacy of collective action is generally avoided in the industrial relations morels of Member States for the very reason that it is essential to maintain the impartiality of the state in economic conflicts.¹⁵⁷

In addition, the judgment in *Viking* has been criticised as creating potential obstacles to the exercise of the right to collective action in cross-border situations as it does not explicitly deal with the question of the right to strike in the case of relocation across borders.¹⁵⁸ While this was addressed by Advocate General Maduro, his line of reasoning is unsatisfactory. Maduro proposed an alternative solution to that of proportionality: assessing the lawfulness of collective action on the basis of the timing of the action. However, this raises both conceptual and practical problems.¹⁵⁹ At a conceptual level the timing of the action draws a distinction

¹⁵⁶ European Trade Union Confederation, *Press release on the Viking case*, 11/12/2007 available at <http://www.etuc.org/a/4376>.

¹⁵⁷ B. Bercusson, ‘The Trade Union Movement and the European Union: Judgment Day’ (2007) *European Law Journal* 279 at p. 304.

¹⁵⁸ European Trade Union Confederation note 156 above.

¹⁵⁹ B. Bercusson, *Assessment of the Opinions of the Advocates General in Laval and Viking and Six Alternative Solutions: Advice to the ETUC*, October 2007 available at <http://www.etuc.org/a/4295>.

between collective action directed against European and non-European relocations. A strict interpretation of Maduro's criteria would mean that collective action against non-European relocations would always be lawful whereas action directed at European relocations would have to fulfil the requirements of timing. In practice this creates, *inter alia*, problems of definition and ignores the practicalities of cross-border transfers. The requirements for the lawfulness of cross-border collective action are thus not clear following the *Viking* case. As the issues surrounding social dumping and the resulting cross-border collective action following the European enlargements have become increasingly topical, the failure of the Court to clarify the lawfulness of collective action in such scenarios is regrettable.

By way of final remark on the judgment in *Laval* on the Directive concerning the posting of workers, it is noted that the Court objected to the lack of legislation in Sweden implementing the Directive. In requiring the collective agreement to be 'universally applicable', the Court applied a strict interpretation of its case law¹⁶⁰ in this area. However, it failed to take into account the successful and flexible system of collective bargaining prevalent in Sweden. Ironically, the bargaining system established in Sweden and other Nordic countries is often described as the model for 'flexicurity' currently being promoted by the European Commission. By requiring 'universally applicable' legislation the Court's judicial activism may be seen as threatening not only autonomous collective bargaining structures in the Member States, but also the flexibility inherent in the European Social Model and, in particular, the Open Method of Coordination. The Swedish authorities have reacted by rejecting the idea of the introduction of a minimum wage in favour of central industry-wide collective agreements which regulate certain subjects such as pay, hours and holidays.¹⁶¹ However, both the unions and the employers are sceptical as to whether this solution complies with the ECJ's concerns.¹⁶²

Moreover, the Court interpreted the Directive narrowly as a minimum level of protection for posted workers which may not be improved through the type of collective action at issue. In effect, this creates an inequality in protection between domestic and posted workers, the very problem which the Directive was meant to resolve. The obstacles to collective action in these cases pose a problem for the trade union structures in old Member States *vis-à-vis* new

¹⁶⁰ Case 143/83 *Commission of the European Communities v Kingdom of Denmark* [1985] ECR 427.

¹⁶¹ Trade Union European Information Project, 'New law for Swedish unions after *Laval* case' *European Review*, Issue 48, December 2009 at p. 6.

¹⁶² *Ibid* at p. 6.

Member State workers; it renders the tool of collective action to force higher wages meaningless. In addition, the defeat for the Swedish trade unions in *Laval* illustrates the hurdles that national regulatory mechanisms experience in adapting to EU requirements. In essence, the difficulties in *Laval* stem not from the actions of the social partners but from an inadequate europeanisation of the industrial relations system by the Swedish government. Recognising these difficulties, the Court in the *Laval* judgment thus oscillates between two positions: on the one hand, it does not endorse the flexicurity approach as practised in Sweden and endorsed by the European Commission as part of its soft law mechanism for harmonisation; on the other hand, the Court does not take the opportunity of regarding the Directive concerning the posting of workers as a minimum threshold of rights which the social partners can improve upon to create the best conditions possible for posted workers. Rather, by applying this narrow interpretation of the Directive, the Court makes it very clear that the unions' ability to promote and guarantee the protection of workers is limited by the free movement provisions contained in the Treaty.

It has been suggested that the narrow interpretation of the Directive may have serious implications for the German industrial relations system.¹⁶³ Following the decision in *Laval* it is the present author's view that the outcome of *Rüffert* was relatively easy to predict. The Directive expressly requires the universal applicability of collective agreements. The German system at issue in *Rüffert* is evidently not compatible with the judgment in *Laval*. As Davies therefore rightly points out, "the decision [in *Rüffert*] seems to represent not simply a cleaner application of the *Laval* approach but also a reinforcement of it."¹⁶⁴ Nonetheless, in failing to appreciate the intricacies of the German system, the decision in *Rüffert* was met with heavy criticism from all sides of the German labour law system. It is accepted that the judgment will be difficult to implement in Germany as there is no universal minimum wage which could apply within the nucleus of mandatory rules required by the Directive. Due to the lack of a minimum wage it is difficult to set out a threshold wage applicable to posted workers. Advocate General Bot's view that the specific collective agreements could be understood as 'enhanced national protection' under the Directive would certainly have been easier to digest for German labour lawyers and trade unionists. However, in light of the decision in *Laval* this view was neither realistic nor tenable. In practice, the German federal states have reacted

¹⁶³ This view is held by a number of authors. See e.g. T. Blanke, 'Die Entscheidung des EuGH in den Fällen *Viking*, *Laval* und *Rüffert* – Domestizierung des Streikrechts und europaweite Nivellierung des industriellen Beziehungen' *Oldenburger Studien zur Europäisierung und zur transnationalen Regulierung* 18/2008.

¹⁶⁴ P. Davies, 'Case C-346/06 *Rüffert v Land Niedersachsen* (2008) IRLR 467 (ECJ)' (2008) *Industrial Law Journal* 293 at p. 293.

pragmatically by altering the laws applicable to public procurement in order to avoid future conflict. Undertakings are no longer required to abide by specific collective agreements which have not been declared universally applicable. Similarly to Sweden following the case of *Laval*, therefore, Germany is now attempting to europeanise its labour law and industrial relations system in order to ensure future compliance.

The judgments by the Court have been heavily criticised and the full range of their effects on national labour law systems remains to be seen. As Bercusson points out

The outcome is deeply unsatisfactory. [...] Hobbled by the historical baggage of the internal market, the court falls into a historical application of market concepts to a Europe which is not that of the common market of 1957, nor the Single European Market of 1985, but, post-Maastricht, a Europe with a social dimension even larger than its ambitions. The studiously ignored elephant lurking in the European Social Model lumbered onto the stage before the ECJ in *Viking* and *Laval*: the consequences of the disparity in wage costs and labour standards between the old Member States and the new accession states.¹⁶⁵

The domestic change brought about by the ECJ in its judgments does not clarify the context within which trade unions must react to the recent European enlargements and the new Member State workers. Instead, it “fails to establish clear rules of European Labour Law governing collective action”¹⁶⁶, and complicates the situation for trade unions acting within their europeanised national systems.

G. Overall analysis of europeanisation and conclusion

The various examples of how national labour law systems have been europeanised illustrate that trade unions are acting in a complex and multi-faceted system. The process of europeanisation has only had limited success in achieving an overarching category of European Labour Law. The examples of two Directives of European Labour Law illustrate the difficulties inherent in providing for Europe-wide standards in labour law. The recent movement to soft law mechanisms in the area of labour law has not had a large impact on national systems. Finally, the ECJ has also come up against problems in europeanising national labour law systems in a way that successfully accommodates economic and social interests.

¹⁶⁵ Bercusson note 36 above at p. 706.

¹⁶⁶ *Ibid* at p. 705.

Part of these difficulties stem from the recent European enlargements which have enhanced the disparity in labour standards across the European Union. This is most clearly illustrated by the recent case law of the ECJ. The facts of all three cases arose following the recent European enlargements. Particularly *Laval* and *Rüffert* were the consequence of an unsuccessful europeanisation of national legal systems in the form of Directive 96/71. While difficulties in the implementation of the Directive were foreseen at the time of its adoption, such an interpretation by the ECJ as that in *Laval* and *Rüffert* was not predictable. The increasing move towards soft law mechanisms as favoured by the European Commission has stalled any revision of the Directive. A conflict between the provisions of the Directive and national labour law systems with which it is incompatible was therefore waiting to be unleashed. Although the recent enlargements have not had a direct effect in legislative terms on national labour law systems, they have reignited and intensified debates on age-old issues in the sphere of European Labour Law. The *Viking*, *Laval* and *Rüffert* cases are unfortunate examples of this development. Trade unions in Germany and the UK must find a way to adapt to the changing regulatory and opportunity structures within which they must act at a national and European level when responding to new Member State workers.

These changing regulatory and opportunity structures have come about due to demographic and economic changes and challenges within 'old' Member States and the European Union as a whole. The traditional welfare state, of which trade unions were an integral part, has come under increasing pressure to adapt to the individualisation of social protection rights.¹⁶⁷ According to Hyman, national industrial relations regimes are challenged by key features of 'globalisation', like the intensification of cross-national competition, the internationalisation of product chains, and the volatility of finance capital flows.¹⁶⁸

In the context of the EU, "political support for flexibility and deregulation as a recipe for competitiveness comes together with societal trends like individualisation, decreasing unionisation, [...] decentralisation of collective bargaining, and the gradual replacement of collective industrial relations by individual employment relations."¹⁶⁹ There has thus been a need to counteract the fears of traditional workers concerning social dumping and job insecurity, amongst other things. Due to the change and decline in the traditional employment

¹⁶⁷ K.J. Vos, 'Americanisation of the EU Social Model' (2005) *International Journal of Comparative Labour Law and Industrial Relations* 355.

¹⁶⁸ R. Hyman, 'The Europeanisation – or the erosion of – industrial relations?' (2001) *Industrial Relations Journal* 280.

¹⁶⁹ Vos note 167 above at p. 365.

structures, and the increasing trend towards deregulation by governments, trade unions at a national level are faced with difficult regulatory changes. Moreover, the role played by the European Union in recent decades in providing minimum labour standards through its policy of europeanisation has opened up new opportunities of involvement and cooperation for national trade unions. Europeanisation is thus a two-way process. Adaptation has proved to be difficult, especially due to the increasing individualisation of national economies and labour markets and the decline in unionisation, developments to which trade unions have been slow to react. These developments must be taken into account in order to understand trade union responses in Germany and the UK to European enlargements and new Member State workers.

The recent enlargements have enhanced social diversity within the EU thereby exacerbating the above-mentioned societal and economic changes and challenges for the trade unions in the old Member States. In addition, there are suggestions that social cohesion is in decline across all Member States.¹⁷⁰ While defending statutory social protection systems, European trade unions are slowly recognising the need to adapt the social protection and regulatory systems to the challenges and pressures facing them, in order to safeguard the financial viability of social security systems.¹⁷¹ Hitherto, “solidaristic trade union ‘internationalism’ has remained purely verbal, and the horizontal and vertical coordination needed to make it a reality is far from being realised.”¹⁷² As Ebbinghaus and Visser argue, trade unions are too embedded in national-level political economic institutions.¹⁷³ However, there is also recognition of a lack of viable alternatives to the national sphere due to the limited competence of the EU’s institutions in the social sphere.¹⁷⁴ More recent initiatives taken by, for example, the so-called Doorn initiative¹⁷⁵, the European Metalworkers’ Federation¹⁷⁶ or the European Trade Union

¹⁷⁰ *Ibid* at p. 365.

¹⁷¹ M. Hutsebaut, ‘Social Protection in Europe: A Trade Union Perspective’ (2003) *International Social Security Review* 53.

¹⁷² B. Keller, ‘National Industrial Relations and the Prospects for European Collective Bargaining – The view from a German standpoint’ in W. Lecher & H-W. Platzer (eds.), *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, Oxford, 1998 at p. 51.

¹⁷³ B. Ebbinghaus & J. Visser, ‘European labor and transnational solidarity: challenges, pathways and barriers’ in J. Klausen and L. Tilly (eds.), *European integration in social and historical perspective. 1850 to the present*, Rowman & Littlefield, Lanham, MD, 1997.

¹⁷⁴ W. Streeck, ‘Citizenship under regime competition: the case of the “European Works Councils”’ in K. Eder & B. Giesen (eds.), *European citizenship. National legacies and transnational projects*, Oxford University Press, Oxford, 2001.

¹⁷⁵ This initiative was launched by German and Benelux trade union confederations in 1998 to prevent a ‘race to the bottom’ by means of cross-border collective bargaining coordination. See J. Kreimer-de Fries, ‘Tarifkooperation der Gewerkschaftsbünde BeNeLux-Deutschland: Die “Erklärung von Doorn”’ in R. Bispinck & T. Schulten (eds.), *Tarifpolitik under dem EURO*, VSA Verlag, Hamburg, 1999.

¹⁷⁶ For a description of the initiatives see M. Weiss, ‘Enlargement and Industrial Relations: Building a New Social Partnership’ (2004) *International Journal of Comparative Labour Law and Industrial Relations* 5; and J.

Confederation coordinating national systems of collective bargaining are a first step in this direction. As the ETUC pointed out in *Viking*:

Trade unions are in favour of European economic integration. But labour is not a commodity. Competition over labour standards threatens economic integration and undermines support for the European project. Collective industrial action is not protectionism. Community law on free movement, if interpreted consistently with the legal recognition of collective action in national law, Member States' constitutions, and international law, will encourage support for European integration by trade unions and their representative at EU level, the ETUC.¹⁷⁷

However, national trade unions are often slower to react than their European counterparts. Despite efforts by the European representatives to coordinate a European response on behalf of national trade unions, initiatives at the national level between individual affiliates have been slow to develop.

As a result of the very different industrial relations systems prevalent in the new Member States and in response to the above-mentioned societal, political and economic changes, the norms and values underpinning the legislative aspects of the European Union's policy on europeanisation have slowly been eroded¹⁷⁸. There has thus been the movement examined above towards soft law mechanisms like the OMC. The underlying rationale for the European social policy has hitherto merely been the demand for broad equivalence in labour standards rather than a uniform harmonisation.¹⁷⁹ However, as such standards, in order to be adopted, need to be acceptable to all Member States and can only be so if they are economically viable in the less wealthy countries and compatible with existing industrial relations and welfare state institutions, they are usually relatively permissive.¹⁸⁰

Following the European enlargements and the accession of twelve new States with their differing labour relations systems, this task has become increasingly difficult. As one author comments, two common features of the labour markets of the new Member States of Central and Eastern Europe are their relatively low levels of employment and productivity.¹⁸¹ They are thus prime targets for enterprises from old Member States seeking to outsource or relocate

Visser, 'More Holes in the Bucket: Twenty Years of European Integration and Organised Labour' (2004-2005) *Comparative Labour Law and Policy* 477.

¹⁷⁷ ETUC's letter attached to the submission of the ITF, *Viking* case, paras. 23-27.

¹⁷⁸ Hyman note 168 above at p. 289.

¹⁷⁹ N. Adnett & S. Hardy, *The European Social Model – Modernisation or Evolution?*, Elgar, Cheltenham, 2005.

¹⁸⁰ W. Streeck, 'Neo-Voluntarism. A New European Social Policy Regime?' (1995) *European Law Journal* 31 and W. Streeck, 'Industrial Citizenship under Regime Competition: The Case of European Works Councils' (1997) *Journal of European Public Policy* 643.

¹⁸¹ D. Vaughan-Whitehead, *EU Enlargement vs. Social Europe: The Uncertain Future of the European Social Model*, Elgar, Cheltenham, 2003.

labour-intensive stages of production. Furthermore, most of the new Member States of Central and Eastern Europe have adopted the liberal-individualist approach to social and welfare policies. This has progressed without a development of adequate social dialogue and worker representation. Yet, “from the perspective of the new Member States of Central and Eastern Europe this process [of relocation by enterprises], and that of the related migration of some of their workers to the old Member States, are the means by which convergence on Western European levels of productivity and per capita income are achieved.”¹⁸²

By way of contrast, trade unions in old Member States still strongly support the statutory social protection systems. According to the European trade union movement, “social protection policies should be looked upon as a positive social and economic factor which promotes social cohesion, avoids social exclusion and poverty, facilitates structural change and supports consumption, economic growth and employment.”¹⁸³ However, in the age of economic deregulation and European enlargement these statements seem to represent unattainable goals. The breakdown of the traditional social protection systems has led to an increasing change in the regulatory and opportunity structures facing trade unions. Coupled with competition from new Member State workers who have lower wage demands and an absence of collective representative structures, trade unions in old Member States recognise the need to adapt, albeit slowly, to the changing environment within which they operate. The instances of trade unions reacting with blockades and strikes in the face of competition as illustrated by the *Viking* and *Laval* cases, are prime examples of the types of problems facing German and British trade unions in an enlarged Europe, as well as being indicators of the regulatory and opportunity challenges facing them in dealing with European enlargement and new Member State workers.

In conclusion, the European Union’s policy of europeanisation is struggling to accommodate the changes brought about as a result of the disparities in working conditions among Member States which have been exacerbated by the recent enlargements. The examples of attempts at europeanisation set out in this chapter demonstrate that trade unions, when responding to the recent European enlargements and the new Member State workers, are acting in a complex national environment which is heavily influenced by the European Union’s policy on europeanisation. A comparison of trade union responses must therefore take account of the

¹⁸² Adnett & Hardy note 179 above at p. 201.

¹⁸³ Hutsebaut note 171 above at p. 66.

European influence on national labour law systems in order to present a complete picture of the context within which trade unions operate.

CHAPTER FOUR

TRADE UNIONS, MIGRANT WORKERS AND THE EUROPEAN UNION

The European enlargements and large flows of new Member State workers come at a time when trade unions are already struggling to adapt to changing regulatory and opportunity structures in their national labour markets. The influx of large numbers of new Member State workers has increased these problems for trade unions in Germany and the UK especially as the characteristics of a majority of the new Member State workers make it difficult to integrate them into traditional trade union structures. The traditional trade union structures available for migrants have their origin in trade unions' historic responses to migrant workers. The purpose of this chapter is to examine the literature on trade union responses to migrant workers and the European Union in order to complete the contextual framework which influences trade union responses to the European enlargements and the new Member State workers. This enables the author to make suggestions as to how one would expect trade unions to respond to the European enlargements and the new Member State workers. In a subsequent chapter these suggestions are compared with actual trade union responses so as to provide a comparator for analysis of trade union responses to the European enlargements and the new Member State workers.

A. Introduction

Trade unions, as illustrated in chapters two and three of this thesis, operate within and across complex national and European legal frameworks. These frameworks create expectations as to how trade unions may be reacting to the European enlargements and the new Member State workers. In addition, literature examining historic trade union attitudes to migrant workers and trade union reactions to the European Union (EU) serve as an indication of the institutional context within which UNISON and ver.di are responding to the most recent European enlargements. The enlargements in 2004 and 2007 differ from previous enlargements for a number of reasons:

At the outset of the EU's Eastern enlargement round, the income differentials between the new and the incumbent member states of the Community have been markedly

larger than those of previous enlargement rounds. Moreover, the iron curtain and the maintained immigration restrictions of the incumbent EU member states have prevented large scale migration movements from the East to the West in Europe before enlargement. This distinguishes the EU's Eastern enlargement from the Southern enlargement episode where large parts of the migration potential have been already realised before accession.¹

As a result, trade unions are struggling to react to the new Member State workers, particularly those arriving in Germany and the UK following the enlargements, using their 'traditional'² methods of responding to migrant workers. Chapter four explores the 'traditional' responses of trade unions in Germany and the UK to migrant workers as well as their reactions to the European Union. The characteristics of new Member State workers are also examined to illustrate why trade unions are struggling in their responses. Finally, suggestions are made as to how trade unions are expected to be reacting based on the theoretical framework elaborated in the earlier part of this thesis and the literature set out in this chapter.

B. Unions and migrant labour

It has been argued that "migration is driven primarily by labour market mechanisms."³ As a result, it "brings the institutional nature of labour markets into sharp relief as it exposes, among other things, the influence of the nation state, processes of labour market segmentation, and the role of trade union policy and practice."⁴ Labour migrants are often seen as those who have "limited prospects in their country of origin, and so migrate to other countries where they may earn higher wages, even for relatively unskilled jobs."⁵ The purpose of this thesis is to expose trade union policy and practice to migration by comparing and analysing specific trade union responses, in Germany and the UK, to the European enlargements and the associated migration (or, in the case of Germany, fear of migration) of new Member State workers. In order to effectively analyse trade union responses, it is necessary to give a brief overview of traditional trade union responses to migrant labour. Historically, trade unions have reacted in different ways to migrant labour. As Penninx and Roosblad explain, trade unions are faced with a number of dilemmas when confronted with

¹ European Integration Consortium, *Labour Mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg, 2009 at p. 2.

² This refers to the methods described in the literature in the course of this chapter.

³ P. McGovern, 'Immigration, Labour Markets and Employment Relations: Problems and Prospects' (2007) *British Journal of Industrial Relations* 217 at pp. 218 – 9.

⁴ *Ibid* at p. 219.

⁵ *Ibid* at p. 219.

migrant labour: first, they must decide if they support or oppose migration of labour; second, they must find ways to recruit migrants; and, third, they must decide whether to devise special policies for recruited migrants that meet their particular concerns.⁶ In Penninx and Roosblad's work, John Wrench⁷ suggests five ways in which British trade unions reacted to migrant workers:

1. Racial exclusion: to exclude migrant workers initially from the labour market but later from the trade union and/or from trade union benefits;
2. Incorporation: union membership is extended to migrant workers but the basis of inclusion goes no further than that consistent with a traditional trade union class analysis, thus no special measures are adopted to distinguish between different types of workers;
3. Partial autonomy: union rules, structures and policies are adapted to allow for the experiences of exclusion and racism of the migrant worker membership;
4. Race and Class perspective: stresses the potential of migrant workers for galvanising of unions into more radical and political action; and
5. Separatist: migrant workers can only be properly represented by their own organisations, including their own migrant workers unions.

Wrench's categories provide a useful guide for an analysis of trade union responses and his approach is used in chapter six to contextualise and analyse UNISON and ver.di's reactions to migrant workers. However, UNISON and ver.di's responses cannot be fully understood without an historical overview of trade union reactions to migrant workers, which this chapter outlines.

Trade unions have a long history of responding to migrant labour flows into their respective countries. However, often trade unions have seen inward labour migration as "a potential threat to wages, working conditions and the organisational unity of workers in the receiving country."⁸ They have therefore often been hostile towards large groups of new workers entering the country.⁹ Trade unions have been particularly challenged by the recruitment of migrant labour following the end of World War II as "the importation of workers is perceived as a potential threat to jobs and working conditions, and may lead to a downward pressure on wage levels."¹⁰ This thesis limits itself to providing an overview of trade union responses to

⁶ R. Penninx & J. Roosblad (eds.), *Trade Unions, Immigration and Migrants in Europe 1960-1993*, Berghahn Books, Oxford, 2000 at pp. 4 – 12.

⁷ J. Wrench, 'British Unions and Racism: Organisational Dilemmas in an Unsympathetic Climate' in R. Penninx and J. Roosblad (eds.), *Trade Unions, Immigration, and Migrants in Europe 1960-1993*, Berghahn Books, Oxford, 2000 at pp. 149 – 152.

⁸ G. Avci & C. McDonald, 'Chipping Away at the Fortress: Unions, Immigration and the Transnational Labour Market' (2000) *International Migration* 191 at p. 197.

⁹ S. Patterson, *Migrants in Industry*, Oxford University Press, Oxford, 1968 at p. 240.

¹⁰ Avci & McDonald note 8 above at p. 198 citing H.A. Adelman et al., *Immigration and Refugee Policy: Australia and Canada Compared*, University of Toronto Press, Toronto, 1994 at p. 114, and C.M. Schmidt et al., 'Mass migration, unions and government interventions' (1994) *Journal of Public Economics* 185.

migrants since the end of the Second World War as this period has already been the subject of much academic writing in both countries and therefore provides a useful tool to analyse trade union responses to new Member State workers. Castles and Kosack explain the inherent dilemma that migrant workers pose to trade unions:

Limitation of the number of workers has traditionally been regarded as a weapon in the struggle for better wages and conditions, as competition among employers for scarce labour leads to higher wages. A large additional labour supply has the converse effect: it causes competition among workers for scarce jobs, and tends to keep wages down. [...] The protectionist attitude of workers towards new migrants cannot, therefore, in the first place, be ascribed to racialism or xenophobia. [...] It is clear that the immigration of new workers is in the economic interests of the employers and against those of established labour.¹¹

As a result, “national labour organisations have consistently been viewed as a natural opponent to foreign workers.”¹² As McGovern points out, “immigration is a thorny issue for trade unionism”, because opposing immigration “contradict[s] notions of international solidarity.”¹³ Also, it may seem logical for trade unions to oppose immigration as the migrant workers are perceived to pose a threat to indigenous workers who form the organisational base of the trade unions. However, “once there are migrant workers in the country, it is essential to organise them – not only in their own interests, but also in the interests of the rest of the workers.”¹⁴ Castles and Kosack note in their study of the German, British, Swiss and French trade union movements that “everywhere, trade unions have demanded that migrant and indigenous workers should receive equal pay for equal work.”¹⁵ Yet migrants are traditionally perceived to be more difficult to organise than national workers as “they are deemed to be highly individualistic.”¹⁶ Also, “the typical migrant work situation is one of relative segregation from indigenous workers.”¹⁷ Yet, “despite their reputation for being ‘unorganisable’, there is little empirical support for the idea that migrants are inimical to trade unionism.”¹⁸

¹¹ S. Castles & G. Kosack, *Migrant Workers and Class Structure in Western Europe*, Oxford University Press, Oxford, 1973 at pp. 118 – 119.

¹² Avci & McDonald note 8 above at p. 197.

¹³ McGovern note 3 above at p. 228.

¹⁴ Castles & Kosack note 11 above at p. 128.

¹⁵ *Ibid* at p. 128.

¹⁶ McGovern note 3 above at p. 228.

¹⁷ Castles & Kosack note 11 above at p. 125.

¹⁸ McGovern note 3 above at p. 228.

1. UK

Providing an overview of trade union policy towards migrants in the UK is not an easy task. Comparatively few works examine the subject in detail.¹⁹ Those that do tend to emphasise that “history shows the record of the trade union movement to be characterised at worst by appalling racism and often by an indefensible neglect of the issues of race and equal opportunity.”²⁰ On the other hand, Lunn²¹ calls for a re-evaluation of this account of trade union attitudes to immigration. He focuses on the discrepancies between national and branch-level trade union policies which paint a much more differentiated picture of trade union responses to migrant workers. This section merely seeks to provide an overview of British trade union reactions to migrant workers. Thus, while it is recognised that different accounts of trade union policy may exist, this section does not explore them in detail and focuses largely on the national level responses of trade unions, mainly through the Trades Union Congress (TUC), to immigration.

Wrench divides postwar immigration into the UK into two categories.²² Castles and Kosack recognise a third category, namely Irish workers.²³ However, for a number of reasons, no special policy was adopted towards these workers: they enjoyed full political and civil rights in the UK; they spoke English; and, they were accepted as part of the labour force.

The first category of postwar immigration, recognised by both Wrench and Castles and Kosack, arrived immediately following the war. The UK recruited European workers between 1945 and 1950 in the form of Polish ex-servicemen, other European migrants and so-called

¹⁹ Those that do include K. Lunn, ‘Complex Encounters: Trade Unions, Immigration and Racism’ in J. McIlroy, N. Fishman & A. Campbell (eds.), *British Trade Unions and Industrial Politics: The High Tide of Trade Unionism, 1964-1979*, vol. 2, Ashgate, Surrey, 1999; S. Castles & G. Kosack, *Migrant Workers and Class Structure in Western Europe*, Oxford University Press, Oxford, 1973; R. Miles & A. Phizacklea, *The New TUC, Black Workers and Commonwealth Immigration 1954 – 1973*, Routledge, Warwick, 1977; and, J. Wrench, ‘British Unions and Racism: Organisational Dilemmas in an Unsympathetic Climate’ in R. Penninx & J. Roosblad (eds.), *Trade Unions, Immigration and Migrants in Europe 1960-1993*, Berghahn Books, Oxford, 2000.

²⁰ J. Wrench, ‘Unequal Comrades: trade unions, equal opportunity and racism’, *Policy Papers in Ethnic Relations*, no. 5, Centre for Research in Ethnic Relations, University of Warwick, 1986 at p. 3.

²¹ K. Lunn, ‘Complex Encounters: Trade Unions, Immigration and Racism’ in J. McIlroy, N. Fishman & A. Campbell (eds.), *British Trade Unions and Industrial Politics: The High Tide of Trade Unionism, 1964-1979*, vol. 2, Ashgate, Surrey, 1999.

²² Wrench note 7 above: He divides immigration into European Voluntary Workers (EVWs) and Commonwealth workers.

²³ Castles & Kosack note 11 above at p. 138.

'European Voluntary Workers' (EVWs).²⁴ Castles and Kosack describe this category as "the foreigners"²⁵. Trade unions were actively involved in the negotiation and execution of this migration policy and established strict conditions applicable to the workers. Thus, for example, EVWs were required to join the appropriate union and, in return, were covered by the applicable collective agreements. Under these agreements, the European workers received the same wages and working conditions as other workers.²⁶ However, the remainder of the provisions were extremely restrictive. Thus, foreign workers were to be dismissed first in the case of redundancies and maximum quotas of foreign workers were set.²⁷ Trade unions are often described as having been extremely hostile towards these groups of workers which even led to their complete exclusion from some workplaces.²⁸ This was particularly the case at a national level.²⁹ The TUC's concern was to convince its members that adequate safeguards were in place to protect 'British' jobs.³⁰

The second category of migrants was comprised of migrants from ex-colonies. These workers had the right to enter, work and live in the UK through Commonwealth citizenship. Trade union attitudes to these workers were very different. As Wrench points out:

Because of their former colonial status most of the postwar migrants to Britain were different from the 'guest workers' found in many other European countries. They had the same political and legal rights as the indigenous population. [...] Coming from former colonies they had a knowledge of the language and culture of their new home.³¹

Thus, the TUC passed a resolution in 1955 which affirmed the right of Commonwealth citizens to come and work in Britain and which opposed any discrimination against them. It also called for "immediate steps to develop the resources of Commonwealth territories so as to establish balanced economies which would make it unnecessary for the native population

²⁴ These were recruited from refugee camps and from Italy (J. Wrench, 'British Unions and Racism: Organisational Dilemmas in an Unsympathetic Climate' in R. Penninx & J. Roosblad (eds.), *Trade Unions, Immigration and Migrants in Europe 1960-1993*, Berghahn Books, Oxford, 2000).

²⁵ Castles & Kosack note 11 above at p. 138.

²⁶ Wrench note 7 above at p. 133.

²⁷ Castles & Kosack note 11 above at pp. 138 – 139.

²⁸ See, Castles & Kosack note 11 above; J.A. Tannahill, *European Volunteer Workers in Britain*, University Press, Manchester, 1956; and, D. Kay & R. Miles, *Refugees or Migrant Workers? European Volunteer Workers in Britain, 1946 – 1951*, Routledge, Oxford, 1992.

²⁹ Lunn (K. Lunn, 'Complex Encounters: Trade Unions, Immigration and Racism' in J. McIlroy, N. Fishman & A. Campbell (eds.), *British Trade Unions and Industrial Politics: The High Tide of Trade Unionism, 1964-1979*, vol. 2, Ashgate, Surrey, 1999 at p. 74) explains that local studies suggest a more complex interaction between union members, local communities and employers. He also points to evidence of positive support for European workers. However, at a national level, there was an overwhelmingly hostile attitude towards the workers.

³⁰ Lunn note 21 above at p. 74.

³¹ Wrench note 7 above at p. 134.

to seek employment and security elsewhere.”³² The policy on non-discrimination of Commonwealth workers was reaffirmed at the 1958 Congress³³ following the Notting Hill race riots³⁴, however, the “opposition [to non-discrimination] was purely verbal – the TUC took no practical measures to fight discrimination or to tackle migrant workers’ specific problems.”³⁵ As Radin explains, “the official voice of the trade union movement saw no reason to give special attention to the migrants who were entering the country, the labour market, and the unions.”³⁶ The TUC thus extended its traditional policy of ‘laissez-faire’ into the sphere of migrant workers. However, policies at a district, local and branch level differed from that at a national level. There is evidence that “once in the union, black workers often had to fight to secure equal treatment and their membership rights.”³⁷ Racist sentiments within trade unions led to migrant workers receiving inferior treatment, lower wages and less job protection. Yet up until the early 1970s, the TUC clung to its policy of ‘laissez-faire’ which took no account of the specific problems that Commonwealth workers faced. Thus, the TUC consistently “failed to recognise and accept white trade unionists’ hostility towards black and Asian workers and claimed in contrast that tensions were due to the migrants’ refusal or inability to integrate into a British way of life.”³⁸

However, this changed in the early 1970s when the TUC started adopting special policies against racism. Miles and Phizacklea describe the 1973 TUC Congress, where Congress called on the next Labour government to repeal the 1971 Immigration Act, as the “turning point in the TUC’s policy towards black workers in Britain”³⁹. This was in response to “increasing organisation on the issue of racism by black and white trade union activists”⁴⁰, the occurrence of open union racism towards striking black members, and “the growth of extreme right-wing groups such as the National Front, who played on the divisions between black and

³² TUC, *Congress Report 1955* at p. 471.

³³ TUC, *Congress Report 1958* at p. 458.

³⁴ This describes a series of racially-motivated riots that took place in London in August and September 1958.

³⁵ Castles & Kosack note 11 above at p. 140.

³⁶ B. Radin, ‘Coloured Workers and British Trade Unions’ (1966) *Race* 161.

³⁷ Wrench note 7 above at p.136.

³⁸ Lunn note 21 above at p. 78 referring to R. Miles & A. Phizacklea, *The New TUC, Black Workers and Commonwealth Immigration 1954 – 1973*, Working Papers on Ethnic Relations No. 6., Research Unit on Ethnic Relations, University of Bristol, Bristol, 1977. However, Castles and Kosack (S. Castles & G. Kosack, *Migrant Workers and Class Structure in Western Europe*, Oxford University Press, Oxford, 1973 at p. 141) argue that the TUC was preoccupied during this time with keeping the government out of its traditional sphere of industrial relations and was less concerned about discrimination of Commonwealth workers.

³⁹ R. Miles & A. Phizacklea, *The New TUC, Black Workers and Commonwealth Immigration 1954-1973*, Working Papers on Ethnic Relations No. 6., Research Unit on Ethnic Relations, University of Bristol, Bristol, 1977 at p. 32. The Immigration Act 1971 had the effect of restricting access to the UK for non-white Commonwealth citizens. For more information on the Act see Wrench note 7 above at p. 135.

⁴⁰ Wrench note 7 above at p. 138.

white workers.”⁴¹ The rise of fascist groups still produces strong reactions within trade unions today. As will be shown in the case studies in chapter five, UNISON adopts an active political role when it comes to combating right-wing parties such as the British National Party (BNP). In 1975 the TUC established an Equal Rights Committee and in 1976 the General Council announced a programme “to promote equality of opportunity and good race relations in industry and in the community generally.”⁴² Increasingly, therefore, British trade unions have adopted equal opportunity policies and anti-racist statements. This culminated in a debate on the advantages and disadvantages of ‘self-organisation’⁴³ in the early 1990s. The debate led to the suggestion at the TUC national black workers’ conference in 1992, which has been implemented in the TUC and its affiliate unions, that unions should create black members’ groups at all levels in a union, with an annual black workers’ conference where decisions are made by black representatives on issues of specific concern to black members.⁴⁴

Overall, British trade unions have a complex history of responding to migration. It is difficult to neatly categorise them using Penninx and Roosblad’s criteria. Broadly speaking, they have moved from a general opposition to migrants to a position of supporting migration of labour. They have then found ways to recruit migrants and have eventually devised special policies, such as separate committees and structures for migrant workers, to cater for their needs. In terms of Wrench’s categories, one sees a movement beginning with racial exclusion (category 1) continuing through initial incorporation (category 2) and culminating in partial autonomy (category 3). The case study on UNISON (below) illustrates that this has influenced the way in which trade unions respond to new Member State workers following the recent European enlargements.

⁴¹ *Ibid* at p. 138.

⁴² TUC, *General Council Report*, 1976 at p. 107.

⁴³ ‘Self-organisation’ brings together members from certain under-represented groups - women members, black members, disabled members and lesbian, gay, bisexual and transgender members. Self-organisation helps the union identify and challenge discrimination and build equality. It can be a way for members to get involved in the union, developing skills, expertise and confidence. (UNISON, *Organising for Equality* available at <http://www.unison.org.uk/equality/organising.asp>).

⁴⁴ Wrench note 7 above at pp. 141 – 143.

2. Germany

Germany is not considered to be a classic country of immigration.⁴⁵ The immigration of workers only really started with the arrival of the ‘guest workers’ (Gastarbeiter)⁴⁶ in 1955. As a result, trade union reactions to foreign labour were the subject of much discussion in the 1950s. Initially, the Confederation of German Trade Unions (Deutscher Gewerkschaftsbund – DGB) supported the Christian Democratic Union of Germany (Christlich Demokratische Union Deutschlands – CDU) in its proposal that:

The last German worker should have a job before we can think about [recruiting foreign workers] and we ask the government to ensure first and foremost that our economy and industry goes to those parts of the country where there are still unemployed Germans.⁴⁷

However, after the first bilateral agreement was signed with Italy in 1955 to enable Gastarbeiter to come to Germany, the DGB decided to support the recruitment of foreign labour⁴⁸ and to adapt its policies so as to “ensure for equal rights for foreign workers at work and in social insurance.”⁴⁹ Apart from the Gastarbeiter, most foreigners in Germany after the Second World War were:

refugees and expellees from the former German territories in the East, and then German settlers from non-German territories in Eastern and South-Eastern Europe. In addition, up to 1961 when the border was closed, a large number of refugees and migrants came from the Soviet Occupation Zone or GDR. A total of 15 million people came to Germany by these means.⁵⁰

The German settlers from non-German territories were admitted as ‘Aussiedler’ with ‘deutsche Volkszugehörigkeit’ (ethnic Germans)⁵¹ from 1950 onwards. They automatically

⁴⁵ K.-J. Bade et al. (eds.), *Deutsche im Ausland, Fremde in Deutschland: Migration in Geschichte und Gegenwart*, 3rd ed., Beck, München, 1992.

⁴⁶ Gastarbeiter (guest workers) refers to those migrant workers who moved to West Germany mainly in the 1960s and 70s under bilateral recruitment agreements signed with their home countries to fill labour shortages. The agreements were signed with Italy (1955), Greece and Spain (1960), Turkey (1961), Morocco, Tunisia and Portugal (1963-1965) and Yugoslavia (1968). Turkish workers made up the largest group of migrants and, even though their stay was meant to be for a temporary period, many remained in Germany and were joined by their families.

⁴⁷ U. Herbert, *Geschichte der Ausländerpolitik in Deutschland: Saisonarbeiter, Zwangsarbeiter, Gastarbeiter, Flüchtlinge*, Bundeszentrale für politische Bildung Schriftenreihe, Band 410, Beck, München, 2001 citing the CDU MP Niederalt at p. 203: “Der letzte deutsche Arbeiter muss doch erst in Arbeit sein, bevor wir an diese Dinge denken, und wir müssen die Bundesregierung wirklich bitten, zunächst alle Anstrengungen zu machen, um unsere Wirtschaft und Industrie zu bewegen, dort hinzugehen wo noch Arbeitskräfte sind.”

⁴⁸ P. Kühne, ‘The Federal Republic of Germany: Ambivalent Promotion of Migrants’ Interests’ in R. Penninx & J. Roosblad (eds.), *Trade Unions, Immigration and Migrants in Europe 1960-1993*, Berghahn Books, 2000 at p. 43.

⁴⁹ *Ibid* at p. 43.

⁵⁰ *Ibid* at p. 41.

⁵¹ W. McNeill & R. Adams (eds.), *Human Migration*, Indiana University Press, Bloomington, 1978 at p. 62. See also G. Dale, ‘Germany: Nation and Immigration’ in G. Dale & M. Cole (eds.), *The European Union and*

received full citizenship rights, language tuition and assistance with needs such as housing. Even though they often did not speak German they, like the refugees and expellees, were welcome as they filled the shortages in the labour market which were enormous following the Second World War.⁵² As Herbert explains, “without the ‘economic miracle’ [of the 1950s], the smooth integration of refugees and expellees would not have been possible; without their additional labour supply and potential, the ‘economic miracle’ would not have occurred.”⁵³ Refugees, expellees and particularly ethnic Germans also became politically important as Germany demanded that any ‘Germans’ could emigrate from the Soviet Union during the Cold War and be given refuge in Germany.⁵⁴ However, the population movements were not sufficient to fill all of the shortages in the German labour market, especially following the closure of the border between East and West Germany in 1961, which deprived West Germany of Eastern German workers.

The shortages in the German labour market led to the very successful recruitment of labour through the Gastarbeiter scheme from Mediterranean countries between 1955 and 1973 when the scheme ended as a result of the first serious economic and employment crisis in postwar Germany.⁵⁵ By 1973 Gastarbeiter made up 11.6% of the total number of employed persons in Germany.⁵⁶ Under the scheme, Germany negotiated bilateral agreements with a number of Mediterranean countries. The agreements provided the legal framework for the recruitment of foreign workers and laid down their working terms and conditions which were meant, in theory, to be the same as those accorded to German workers.⁵⁷ As a result of this guarantee of

Migrant Labour, Berg, Oxford, 1999 at p. 127. ‘Aussiedler’ are defined by §6 Bundesvertriebenengesetz (BVFG) as persons of ethnic German origin: “§6 (1) Deutscher Volkszugehöriger im Sinne dieses Gesetzes ist, wer sich in seiner Heimat zum deutschen Volkstum bekannt hat, sofern dieses Bekenntnis durch bestimmte Merkmale wie Abstammung, Sprache, Erziehung, Kultur bestätigt wird. (2) Wer nach dem 31. Dezember 1923 geboren worden ist, ist deutscher Volkszugehöriger, wenn er von einem deutschen Staatsangehörigen oder deutschen Volkszugehörigen abstammt und sich bis zum Verlassen der Aussiedlungsgebiete durch eine entsprechende Nationalitätenerklärung oder auf vergleichbare Weise nur zum deutschen Volkstum bekannt oder nach dem Recht des Herkunftsstaates zur deutschen Nationalität gehört hat.”

⁵² It should be noted that while ethnic Germans, refugees and expellees were integrated into the labour market, more recent evidence points to tensions in the integration of these groups into German society. For more information see U. Herbert, *Geschichte der Ausländerpolitik in Deutschland: Saisonarbeiter, Zwangsarbeiter, Gastarbeiter, Flüchtlinge*, Bundeszentrale für politische Bildung Schriftenreihe, Band 410, Beck, München, 2001 at pp. 195 – 197 or A. Kossert, *Kalte Heimat – Die Geschichte der Deutschen Vertriebenen nach 1945*, Siedler Verlag, München 2008.

⁵³ Herbert note 47 above at p. 195: “Ohne das ‘Wirtschaftswunder’ wäre die Integration der Flüchtlinge und Vertriebenen, ohne deren zusätzliches Arbeitskräftepotential wäre das ‘Wirtschaftswunder’ nicht möglich gewesen.”

⁵⁴ Dale note 51 above.

⁵⁵ Kühne note 48 above.

⁵⁶ *Ibid.*

⁵⁷ Castles & Kosack note 11 above at p. 129.

equal treatment, trade unions did not oppose the arrival of the Gastarbeiter.⁵⁸ Also, according to Kindleberger, “the trade union welcome to migrants seems to have had its origin in uneasy consciences about the Third Reich’s treatment of foreigners rather than in close economic calculation.”⁵⁹ The German Metalworkers’ Federation (IG Metall) pointed out that unions were positive towards immigration “in the interests of full employment and continued economic growth.”⁶⁰ Under the scheme, inter-state frameworks were set up which enabled employers to develop direct relations with the labour markets of the sending states so as to recruit labour abroad.⁶¹ Family members were not initially permitted to join the Gastarbeiter, as the workers were recruited on the principle of ‘rotation’. Work permits were linked to the employment in Germany and were granted initially for one year. An extension of the permit was at the discretion of the issuing authority.⁶² Gastarbeiter were expected to return to their home countries and permanent settlement was discouraged. Indeed, permanent settlement was seen by the courts as a breach of the terms of the bilateral agreements.⁶³ As the recruitment of Gastarbeiter was regarded as a temporary solution to the problem of labour shortages, no thoughts were given to integrating them into the German society.⁶⁴ However, towards the end of the 1960s work permits were increasingly being prolonged which led to the majority of Gastarbeiter becoming a core section of the workforce.⁶⁵ From the 1970s onwards, family reunification was permitted, resulting in the majority of the Gastarbeiter remaining in Germany.⁶⁶ From 1971 onwards, five-year work permits were also issued to those Gastarbeiter who had been in Germany for at least five years.⁶⁷ This made it more difficult to force their return. Trade unions favoured the abolition of the rotation principle, as it made it easier to integrate workers into the workforce and the union if they were permitted to stay for longer periods.⁶⁸ Following the end of the Gastarbeiter scheme in 1973, some workers did

⁵⁸ *Ibid.*

⁵⁹ C.P. Kindleberger, *Europe’s Postwar Growth: The Role of Labour Supply*, Harvard University Press, Cambridge, 1967 at p. 201.

⁶⁰ IG Metall, *Die Ausländerwelle und die Gewerkschaften*, Frankfurt a. M., 1966.

⁶¹ Dale note 51 above.

⁶² §2 Ausländergesetz (AuslG).

⁶³ S. Bethlehem, *Heimatvertreibung, DDR-Flucht, Gastarbeiterzuwanderung, Wanderungsströme und Wanderungspolitik in der Bundesrepublik*, Klett-Cotta, Stuttgart, 1982 at p. 168.

⁶⁴ Herbert note 47 above at p. 211.

⁶⁵ *Ibid* at p. 225.

⁶⁶ Bundesanstalt für Arbeit (ed.), *Repräsentativuntersuchung ’72 über die Beschäftigung ausländischer Arbeitnehmer im Bundesgebiet und ihre Familien- und Lebensverhältnisse*, Nürnberg, 1973.

⁶⁷ Verordnung über die Arbeitserlaubnis für nichtdeutsche Arbeitnehmer (Arbeitserlaubnisverordnung, AEVO) vom 2.3.1971, BGBI.I. S. 152.

⁶⁸ Herbert note 47 above at p. 227 citing ‘Die deutschen Gewerkschaften und die ausländischen Arbeitnehmer’ in *Europa ’73. Die EWG und die ausländischen Arbeitnehmer*, Köln, 1973 at p. 231.

return to their home countries. However, the majority remained in Germany and integration into German society continued to prove difficult.⁶⁹

Unlike migrant workers from former colonies in the UK or the ethnic Germans who arrived after the Second World War, Gastarbeiter in Germany were not granted any political rights through which they could make their voice heard. As a result, trade unions focused on securing equality of rights at work for Gastarbeiter, on the basis that:

[T]his was in the interest of the majority of members who were German. In this way any doubts in the organisation about the employment of foreign workers were removed.⁷⁰

Unlike in the UK, German trade union policy did not focus on the elimination of racism and discrimination, instead, “trade union migration policy was essentially reactive, and therefore turned on the state of government policy.”⁷¹ German trade unions have been described as having the position of a ‘quasi-public corporation’⁷² and, as a result, they have been involved in formulating government migration policy. For example, they were able, through their role on the administrative board of the Federal Labour Agency⁷³, to influence the Gastarbeiter recruitment policy and to obtain complete equality for migrant workers in pay, labour and welfare legislation.⁷⁴ The same policy was applied to posted workers who came to Germany in the early 1990s under the bilateral service agreements with the Central and Eastern European (CEE) states, the structure of which is examined below. Trade unions were only in favour of the arrival of the workers if they could be integrated into the labour market structure on equal terms to German workers. Otherwise they were seen to pose a threat to German workers. In order to secure equal treatment of the workers, German trade unions were very active in the debate on the regulation of posted workers.⁷⁵ They wanted to avoid the wage undercutting of German workers by posted workers from the CEE states as this could threaten industrial peace and lead to racist sentiments against the foreign workers.

⁶⁹ For more information see Herbert note 47 above.

⁷⁰ Kühne note 48 above at p. 45.

⁷¹ *Ibid* at p. 43.

⁷² G. Briefs, *Zwischen Kapitalismus und Syndikalismus: Die Gewerkschaften am Scheideweg*, Francke Verlag, Bern, 1952 at p. 88.

⁷³ At the time Bundesanstalt für Arbeitsvermittlung, renamed 1969 into Bundesanstalt für Arbeit, since 2004 Bundesagentur für Arbeit.

⁷⁴ For a more detailed historical overview see Kühne note 48 above.

⁷⁵ For more details see T. Faist, K. Sieveking, U. Reim, & S. Sandbrink, *Ausland im Inland: Die Beschäftigung von Werkvertragsarbeitnehmern in der Bundesrepublik Deutschland – Rechtliche Regulierung und politische Konflikte*, Nomos, Baden-Baden, 1999 at pp. 135 – 156.

Thus, traditional trade union policy has always focused on securing equality of wages and treatment for German and foreign workers. As a result, German trade unions did not accord special rights to foreign workers within their structure as racism and discrimination were not considered an issue. Castles and Kosack argue that “the German unions have probably done more than those of any other country to integrate the foreign workers into the labour force, and have even taken on welfare functions going beyond normal trade union tasks.”⁷⁶ Thus, the composition of works councils was altered to reflect the diverse nature of the workforce. In addition, printed media in the languages of migrant workers as well as German language courses were made available from 1973 onwards.⁷⁷ Trade union legal protection was also extended to cover problems specific to migrant workers. However, with the exception of the IG Metall⁷⁸, German trade unions did not institutionally establish special structures similar to the black workers’ committees in British trade unions. Instead, the focus was always on providing for equal treatment between German and migrant workers. German trade unions thus fit into Penninx and Roosblad’s criteria in a different way. They supported labour migration and recruited migrants in the same way as German workers. As a result, they decided not to devise special policies such as self-organisation for recruited migrants. Black Member Committees or similar structures are therefore, historically, a foreign concept for German trade unions. In terms of Wrench’s categories, German trade unions fit neatly into category two, that of incorporation. Union membership was extended to migrant workers, but the basis of inclusion went no further than the level which was consistent with a traditional trade union class analysis. Thus no special measures were adopted to distinguish between different types of workers. The case study on ver.di shows that this policy is the subject of much debate in the trade union with regard to migrants from new Member States.

Despite there being a traditional perception that trade unions were generally hostile towards migrant workers, trade unions arguably have “a direct stake in the foreign labour issue.”⁷⁹ As a result, attitudes to foreign labour within trade unions are slowly changing. Moreover, migrant workers have increasingly been seen as “a huge pool of members and potential members, many in an untapped part of the fast growing service and high tech sectors of the economy.”⁸⁰ This position is growing in importance at a time when membership levels are

⁷⁶ Castles & Kosack note 11 above at p. 130.

⁷⁷ Kühne note 48 above at pp. 58 – 59.

⁷⁸ *Ibid* at p. 59: The IG Metall established foreign worker committees at the local, regional and branch level from 1984 onwards.

⁷⁹ Avci & McDonald note 8 above at p. 197.

⁸⁰ TUC, *Annual Conference Report*, TUC, London, 1991 at p. 313.

declining, particularly as examples from the United States show that pro-immigration policies can lead to a dramatic rise in membership levels.⁸¹ The case studies (below) show that trade unions in Germany and the UK are slowly beginning to realise this potential.

C. Trade Unions and the European Union

Overall, trade unions in Germany and the UK have a positive attitude towards the European Union and European integration. However, this was not always the position adopted by British trade unions. German trade unions were supportive of Germany's membership in the European Union yet this was not an easy decision. This section provides a brief overview of the relationship between British and German trade unions, and the European Union, before turning to the most recent enlargements and the associated difficulties.

The TUC originally adopted a pragmatic approach to the UK's proposed entry into the European Economic Community (EEC). It neither supported nor opposed entry *per se* but was concerned with the terms and conditions on which Britain may join the EEC.⁸² Following the publication of the Conservative government's negotiated terms for entry, the TUC heavily opposed membership of the EEC. The TUC's 1972 Congress voted to oppose Britain's membership of the EEC in principle and from participating in any EEC institutions. It also urged a 'No' vote in the 1975 British referendum on membership of the EEC.⁸³ However, following the referendum in favour of the UK remaining in the EEC, the General Secretary of the TUC announced an end to its boycott of EEC institutions and the TUC played an active role at a European level from then on.

During the early 1980s, the TUC went through a phase of disillusionment with the EEC which again led to the annual Congress calling for the UK's withdrawal from membership in 1981. However, this phase came to an end from the mid-1980s onwards, when the TUC adopted a policy of realism "in an effort to modernise organised labour's role in British industrial relations."⁸⁴ As Teague and Grahl point out, "becoming pro-European came to be an aspect of

⁸¹ R. Milkman, *Organising Migrants: The Challenge for Unions in Contemporary California*, ILR Press, Ithaca, 2000.

⁸² P. Teague & J. Grahl, *Industrial Relations and European Integration*, Lawrence and Wishart, London, 1992 at pp. 191 – 192.

⁸³ *Ibid* at pp. 194 – 195.

⁸⁴ *Ibid* at p. 200.

the modernising process for the British TUC.”⁸⁵ Thus, in 1989 the TUC adopted a positive approach to the EEC at its annual Congress⁸⁶ and this has remained the position ever since. The International Officer at UNISON explains that, historically, “trade unions in the UK had been opposed to EU membership but they made a shift when Delors actually came to the TUC and sold his idea of a social Europe.”⁸⁷ In addition, during successive Conservative governments between 1979 and 1997, social legislation originating from the EU was seen as the only positive development for trade unions in British labour law. As Hyman explains, “the ‘social dimension’ of the EU became far preferable to the market liberalism of the Thatcher government.”⁸⁸

In line with its positive position on the EEC, the TUC “overwhelmingly backed Maastricht [and], despite qualifications and internal divisions, it has supported EMU [Economic and Monetary Union] entry.”⁸⁹ More recently, a slightly different picture emerges. A switch to the left in the leadership of Unite, one of the largest TUC affiliates, coupled with a pragmatic TUC General Secretary (Brendan Barber) who succeeded the pro-European John Monks in 2003, has resulted in a more critical position on EU matters.⁹⁰ Thus, the TUC rejected the European Constitution on the grounds that it entrenched economic liberalisation and it voted in favour of a referendum on the Lisbon Treaty in 2007 as a protest against the UK’s opt-out from the Charter of Fundamental Rights.⁹¹

German trade unions have generally been in favour of European integration and of Germany’s founding membership in the European Economic Community. The DGB felt that “only by banding together, economically, can the nations of Western Europe ensure their continued independence of other states and power blocs.”⁹² In addition, the trade unions had a “peace

⁸⁵ *Ibid* at p. 208.

⁸⁶ *Ibid* at p. 209.

⁸⁷ Interview, International Officer, UNISON Headquarters, London, 28/5/2009. See also TUC, *John Monks, General Secretary TUC Warwick Lowry Lecture*, 17 March 2003 available at http://www.tuc.org.uk/the_tuc/tuc-6424-f0.cfm: Jaques Delors (President, European Commission, 1985 – 1994) attended the 1988 TUC Congress and offered British trade unions a different vision of the European Community. In particular, he stressed the need for a social dimension to the EEC and offered trade unions “a social model of deliberative governance, a quest for consensus, genuine social partnership and a legitimate role for unions.”

⁸⁸ R. Hyman, “Trade Unions and “Europe”: Are the Members out of Step?” *LEQS Paper* No 14/2009, November 2009 at p. 26.

⁸⁹ *Ibid* at p. 26.

⁹⁰ *Ibid*.

⁹¹ *Ibid* at p. 26. For more information on the UK’s opt-out see the Protocol establishing the opt outs which is available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:306:0156:0157:EN:PDF>.

⁹² R. Colin Beever, *European Unity and the Trade Union Movements*, Sythoff, Leyden, 1960 at p. 216.

motive”⁹³ following the Second World War which led them to support the European project. It was believed that future wars could only be prevented by forming strong alliances between nation states, particularly France and Germany. As Brenner, the former General Secretary of the IG Metall points out:

[t]he European trade union movement supported the democratic aims of the European project from the very beginning following the Second World War. We did not do this lightly and we were critical on individual points. But the criticism was never against forming a European Community. Its purpose was to strengthen the project.⁹⁴

The criticism focused mainly on the economic side of European integration. German trade unions feared that the European Union would lead to a lowering of social and labour standards. However, European integration also opened up new opportunities for German trade unions who were losing influence in their national political field.⁹⁵ This has often led to a “strategic dilemma”⁹⁶ for trade unions: how should they criticise EU policy without denying their positive approach to European integration? As is shown in the case study on ver.di in chapter five, the DGB tries to balance this ongoing dilemma by calling for a social side to the European Union, while recognising that the German trade unions need to europeanise their policies in order to benefit from European integration.

D. The European enlargements and the new Member State workers

Following this brief overview of trade union responses to the European Union, this section examines the most recent enlargements and the impact that they have had on the German and British legal system. Germany and the UK have responded to the European enlargements in different ways. However, in both cases, a distinction was made in the legal regime applicable to new and old Member State workers. As Currie points out:

⁹³ T. Schulten, ‘Gewerkschaften und europäische Integration – Aktuelle Facetten eines ambivalenten Verhältnisses’ in J. Beerhorst & H.-J. Urban (eds.), *Handlungsfeld europäischer Integration*, VSA-Verlag, Hamburg, 2005 at pp. 20 – 21: “Friedensmotiv”.

⁹⁴ O. Brenner, ‘Die Aufgaben der Gewerkschaftsbewegung in einem integrierten Europa’ in O. Brenner, *Gewerkschaftliche Dynamik in unserer Zeit*, Europäische Verlagsanstalt, Frankfurt, 1966 at p. 133: “Die europäische Gewerkschaftsbewegung hat die demokratischen Bestrebungen zur Einigung Europas nach dem Zweiten Weltkrieg schon in ihren Anfängen unterstützt. Wir haben das nicht ohne Vorbehalte getan und uns nicht gescheut, in Einzelfragen auch Kritik zu üben. Aber die Kritik hat sich niemals gegen den europäischen Zusammenschluss an sich gerichtet. Sie zielte im Gegenteil darauf, die europäische Integration zu stärken.”

⁹⁵ Schulten note 93 above at p. 23: “Die europäische Integration wurde für die Gewerkschaften immer mehr zum politischen Hoffnungsträger, um das auf nationaler Ebene verloren gegangene arbeits- und sozialpolitische Terrain durch supranationale Regelungen auf europäischer Ebene wieder zurück zu gewinnen.”

⁹⁶ R. Hyman, ‘Europäische Integration und Arbeitsbeziehungen, Strategische Dilemmata für die Gewerkschaften’ in E. Hein, T. Niechoj, T. Schulten & A. Truger (eds.), *Europas Wirtschaft gestalten. Makroökonomische Koordinierung und die Rolle der Gewerkschaften*, VSA-Verlag, Hamburg, 2004.

[t]he citizenship status they occupy is not immediately analogous to that of EU15 nationals. Neither is the status of EU8 and EU2 nationals equivalent to that of most third-country nationals as they are, as nationals of EU Member States, citizens of the Union in spite of the imposition of transitional mobility restrictions. Consequently CEE accession migrants occupy a unique status under Community law. They may be Union citizens by formal definition but, in practical terms, their repertoire of rights is limited.⁹⁷

The UK granted access to its labour market to workers from those Member States that joined in 2004 from the date of accession. However, this right of access was coupled with a mandatory Worker Registration Scheme (WRS) for all new Member State workers with the exception of those from Cyprus and Malta. While the UK economy “appeared to be in need of foreign labour across a number of different sectors of the employment market”⁹⁸, there was a public fear that migrants would pose a threat to the benefits system and the labour market.⁹⁹

The WRS sought to strike a compromise in attempting:

to knit together the issues of employment, legal residence, and access to social benefits for EU8 migrants. The effect of the system is to make legal residence dependent upon being in employment and, in turn, access to social benefits is restricted to those legally resident, in other words, those in work.¹⁰⁰

Under this scheme¹⁰¹, workers must register if they wish to work for an employer in the United Kingdom for more than one month. The employment status of EU8 nationals is dependent on registration. In the same way, an EU8 worker is only legally resident once he has registered under the scheme. After a consecutive period of employment of 12 months, workers no longer need to be registered and are treated in the same way as other European citizens to whom the scheme does not apply. The scheme does not apply to self-employed persons or posted workers from the new Member States. A review of the scheme was conducted in 2009 by the Migration Advisory Committee which recommended that the scheme should stay in force for the whole duration of the transitional arrangements. The Committee argued that:

[i]f the WRS were to be ended, the labour inflow from the EU8 countries would probably be a little larger than otherwise. In these disturbed times, some of the inflow

⁹⁷ S. Currie, *Migration, Work and Citizenship in the Enlarged European Union*, Ashgate, Surrey, 2008 at p. 3.

⁹⁸ *Ibid* at p. 34.

⁹⁹ See, for example, S. Smith, ‘Immigration Hysteria: What they said about ... Immigration and the EU – Tabloids threaten “Flood” of Gypsies’, *The Guardian*, 21 January 2004.

¹⁰⁰ Currie note 97 above at p. 35.

¹⁰¹ For more information see UK Border Agency, *Worker Registration Scheme* available at <http://www.ukba.homeoffice.gov.uk/workingintheuk/eea/wrs/>. The Scheme was implemented by the Accession (Immigration and Worker Registration) Regulations 2004 and the Social Security (Habitual Residence) Amendment Regulations 2004.

of EU8 workers may displace UK workers. The WRS also provides useful data for monitoring immigration which would be lost.¹⁰²

The scheme will therefore continue to operate until May 2011. A different regime applies to workers from Romania and Bulgaria. Romanians and Bulgarians wishing to work in the UK need to apply for permission from the Home Office before starting work. Low-skilled Romanians and Bulgarians may only apply to work as seasonal agricultural workers or in sector-based schemes. Highly-skilled EU2 nationals and those with specialist skills are admitted on the basis of work permits.¹⁰³ After a 12-month consecutive period of employment, Romanians and Bulgarians are given the same full rights of free movement as other European citizens. Again, the restrictions do not apply to self-employed or posted workers. A report published by the Migration Advisory Committee in December 2008 did “not recommend fully removing UK labour market restrictions on employment of EU2 nationals.”¹⁰⁴ The restrictions on Romanian and Bulgarian workers will therefore continue at least until 2011 when the next review of the provisions is due under the transitional arrangements.

Germany availed itself of the transitional arrangements in the Accession Treaties to enact national measures which severely restrict the right of new Member State workers to move freely between their home country and Germany. The legal basis for the restrictions can be found in the Accession Treaties of 16 April 2003 regarding the accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, and of 25 April 2005 regarding the accession of Bulgaria and Romania which allowed ‘old’ Member States to enact national measures which restricted access to their labour markets for up to seven years following accession. German trade unions in particular lobbied extensively for the imposition of such measures as they feared that the arrival of new Member State workers would result in a reduction in wages and a rise in the already high unemployment rate in Germany.¹⁰⁵ Under German law, most new Member State workers (EU8 and EU2) require

¹⁰² Migration Advisory Committee, *Review of the UK’s transitional measures for nationals of member states that acceded to the European Union in 2004*, April 2009.

¹⁰³ For more information see UK Border Agency, *Living and working in the United Kingdom – Bulgarian and Romanian nationals* available at <http://www.ukba.homeoffice.gov.uk/workingintheuk/eea/bulgariaromania/liveworkuk/>.

¹⁰⁴ Migration Advisory Committee, *The labour market impact of relaxing restrictions on employment in the UK of nationals of Bulgarian and Romanian EU member states*, December 2008.

¹⁰⁵ E. Jileva, ‘Visa and Free Movement of Labour: The Uneven Imposition of the EU *Acquis* on the Accession States’ (2002) *Journal of Ethnic and Migration Studies* 683 at p. 694. In 2004 there were approximately 4 million unemployed people in Germany. For an overview of the figures see Bundesagentur für Arbeit, *Statistik nach Themen – Arbeitsmarkt, Jahresdurchschnittswerte 1991 – 2008* available at <http://www.pub.arbeitsagentur.de/hst/services/statistik/interim/statistik-themen/2005/arbeitsmarkt/index.shtml>.

a work permit in order to take up a job in Germany.¹⁰⁶ There are exceptions for certain specific categories, namely students working during their holidays, managers and academics.¹⁰⁷ For all categories of workers a work permit (Arbeitsgenehmigung-EU) must be granted by the German Federal Employment Agency (Bundesagentur für Arbeit).¹⁰⁸ The work permit will initially be in the form of a temporary permit (Arbeiterlaubnis) and, after 12 months of uninterrupted access to the labour market, the worker will receive a permanent work permit (Arbeitsberechtigung)¹⁰⁹ which confers a right of unhindered access to the labour market and which is not linked to the employer. New Member State workers can apply for the permit before or after entering the country. Once a work permit has been granted, the worker may avail himself of his rights as a worker under EU law. This system does not apply to self-employed persons who may move freely between the new Member States and Germany under their rights as EU citizens.

Germany also has a large proportion of new Member State workers who enter the country as seasonal workers. These workers and their employers must apply for a work permit from the Federal Employment Agency under a bilateral agreement signed between Germany and their home Member State. Germany has signed bilateral agreements with all new Member States. Permits of this nature are limited to six months. The system for seasonal workers from the new Member States has not been altered since the European enlargements.¹¹⁰ Posted workers from the new Member States working in construction and related branches, industrial cleaning and interior decoration may only carry out their work in Germany within the framework of a service contract procedure, administered by the Federal Employment Agency. However, Germany's special arrangements for posted workers from the new Member States must be seen within the context of the framework which existed for posted workers from these States prior to the recent European enlargements.

¹⁰⁶ § 284 Abs. 1 Sozialgesetzbuch (SGB) III Arbeitsgenehmigungsrecht-EU.

¹⁰⁷ § 9 Arbeitsgenehmigungsverordnung (ArGV): "Beschäftigung von Führungskräften; Tätigkeit in Wissenschaft, Forschung und Lehre; Ferienbeschäftigungen von Studenten."

¹⁰⁸ For more information see Bundesministerium für Arbeit und Soziales, *Fragen und Antworten zur Beschäftigung ausländischer Arbeitnehmer in Deutschland* available at http://www.bmas.de/portal/31660/property=pdf/2009_03_11_faq_beschaefigung_auslaendischer.pdf.

¹⁰⁹ § 12a Abs. 1 and 4 Arbeitsgenehmigungsverordnung (ArGV).

¹¹⁰ Except for the duration of the permits which was increased from 4 to 6 months in 2009. For more information on the scheme as well as an overview of the legal framework see Bundesministerium für Arbeit und Soziales & Bundesministerium für Ernährung, Landwirtschaft und Verbraucherschutz, *Information zur Beschäftigung ausländischer Saisonarbeitnehmer in der Landwirtschaft*, available at http://www.bmas.de/portal/26138/property=pdf/2008_05_19_saisonarbeit_landwirtschaft.pdf.

Between 1988 and 1993 Germany signed a number of bilateral agreements (bilaterale Werkvertragsabkommen) with a majority of those Central and Eastern European states that joined the European Union in 2004 and 2007.¹¹¹ These agreements provided the framework within which workers could be posted from their home states to work in Germany. Under the agreements, companies from Germany and the CEE states signed service contracts¹¹² (Werkverträge) under the auspices of the German Federal Employment Agency which was responsible for granting a visa and a work permit to the posted workers. Individual CEE states had a basic quota¹¹³ of workers who could be sent to Germany under such a service contract. The quota depended on the needs of the German enterprise which had signed the service contract. There were special quotas, over and above the basic quota, for companies over a certain size as well as for specific industries. Following the end of the contract (usually after two years) the worker had to return to his home state. The employment contracts of the workers were mainly subject to the labour laws and regulations of their home country. However, they were entitled to the minimum standard of pay set down in the applicable German collective agreement. They were not entitled to any benefits under the German social insurance system and, as a result, they were a cheap source of labour for German companies.¹¹⁴ The workers were also not entitled to participate in the German system of co-determination. Thus, they were difficult to integrate into a trade union. In October 1993, 115,000 workers were posted under this scheme.¹¹⁵ A large proportion of these workers were posted in the construction industry. The use of such workers was considered to be a flexible and cheap option. Moreover, the number of workers entering the country could be effectively controlled, making it easier to respond to fluctuations in the market. However, there were also fears, particularly amongst trade unions, that the use of posted workers led to social dumping, illegal employment and conflict between German and foreign workers, particularly in the German construction industry.¹¹⁶

¹¹¹ Faist, Sieveking, Reim & Sandbrink note 75 above: These agreements were signed with Yugoslavia (1988), Hungary (1989, 1992), Poland (1990, 1992), Czechoslovakia (1991), Slovakia and the Czech Republic (1993), Romania (1991), Bulgaria (1991), Latvia (1992) and, in 1993, with Croatia, Slovenia, Bosnia-Herzegovina, Lithuania, Macedonia and Turkey.

¹¹² §§ 631 ff. Bürgerliches Gesetzbuch (BGB).

¹¹³ § 1 Anwerbestoppausnahmereverordnung (ASAV) i.V.m. § 39 Abs. 3 Beschäftigungsverordnung (BeschV).

¹¹⁴ Faist, Sieveking, Reim & Sandbrink note 75 above.

¹¹⁵ Institut der deutschen Wirtschaft, *Die wirtschaftlichen Implikationen der Werkvertragsabkommen für die BRD und die Reformstaaten Mittel- und Osteuropas*, 1993. Also, for more information see Faist, Sieveking, Reim & Sandbrink note 75 above at pp. 189 – 196.

¹¹⁶ Faist, Sieveking, Reim & Sandbrink note 75 above at p. 2: “Die Werkvertragsbeschäftigung ausländischer Arbeitnehmer galt einerseits als flexibler, produktionsgerechter und kostensparender Modus des Arbeitskräftetransfers vom Ausland ins Inland, andererseits jedoch auch als Quelle für illegale Beschäftigungsformen, Wettbewerbsverzerrungen und für neue Formen sozialer Konflikte zwischen deutschen und ausländischen Arbeitnehmern.”

From 1993 onwards, an increasing number of EU workers, mainly from Portugal, entered the construction industry in Germany under the provisions for the free movement of services contained in the EC Treaty. There are estimates that up to 150,000 workers had entered Germany in this way by 1996.¹¹⁷ In response to the high demand, the quotas for workers from the CEE states were significantly reduced. Despite the reduction, this period saw increasing unemployment amongst German workers in the construction industry.¹¹⁸ Treatment of posted workers from the EU did not initially differ from that of workers from the CEE states once they were in Germany. However, EU posted workers did not have to be paid the minimum standard of pay set down in the German collective agreements. In contrast to CEE workers, the German government could not, under EU law, discriminate against EU workers or put into place quotas to restrict their entry. The requirement of visas and work permits also had to be abolished for these workers. There were fears among German workers and trade unions that this system often led to wage undercutting of German workers by EU posted workers.¹¹⁹ As a response, the German Parliament passed the Posted Workers Law (Arbeitnehmerentendegesetz – AEntG)¹²⁰ even before the negotiations for the Posted Workers Directive 96/71 had been completed in order to try to regulate the use of EU posted workers in Germany. The AEntG extends the application of certain terms and conditions, such as a minimum wage and holiday pay, which are contained in collective agreements in certain industries, for example construction, to all posted workers regardless of whether they are from an EU or non-EU country.¹²¹ It also implemented Directive 96/71 after it came into force in 1999.

Following the European enlargements in 2004 and 2007, the transitional measures¹²² provided for the continuing application of the bilateral agreements and, with them, the quotas for posted workers from the new Member States. Posted workers from the new Member States still need a work permit but the requirement for a visa has been abolished.¹²³ Unlike a large

¹¹⁷ Hauptverband der Deutschen Bauindustrie (ed.), *Bauindustrie aktuell*, 12/95-1/96 at p. 5.

¹¹⁸ Faist, Sieveking, Reim & Sandbrink note 75 above at pp. 192 – 193.

¹¹⁹ *Ibid* at p. 201.

¹²⁰ It came into force on 1st March 1996. It was altered in 2009 (BGBl. I 2009, S. 799) to include more industries in its ambit and, more importantly, to implement the judgment by the ECJ in *Rüffert*. This is examined in more detail in chapter three.

¹²¹ Faist, Sieveking, Reim & Sandbrink note 75 above at pp. 206 – 207.

¹²² Gesetz zur Steuerung und Begrenzung der Zuwanderung und zur Regelung des Aufenthalts und der Integration von Unionsbürgern und Ausländern (Zuwanderungs-gesetz) vom 30. Juli 2004 (BGBl. S. 1950)

¹²³ For more detailed information see Bundesagentur für Arbeit, *Beschäftigung ausländischer Arbeitnehmer aus den neuen Mitgliedsstaaten der EU im Rahmen von Werkverträgen in der Bundesrepublik Deutschland*, October

majority of other Member States who have lifted all restrictions, Germany (along with Austria) has notified the Commission that it will continue to apply its national measures, limiting access to the labour market for new Member State workers, until 2011.¹²⁴

The reasons for the imposition of transitional arrangements differ in the UK and Germany. Prior to the enlargements, the number of residents from the new Member States present in old Member States totalled 893,000; this has increased to 1.91million in 2007.¹²⁵ Germany and Austria received approximately 60% of immigration inflows from the countries who acceded in 2004 prior to the enlargements. (See Table 1).¹²⁶

Table 1: Foreign residents from the EU8 in the EU15, 2000 – 2007

Host Country	2000	2001	2002	2003	2004	2005	2006	2007
	<i>In persons</i>							
Austria	n/a	54,797	57,537	60,255	68,933	77,264	83,978	89,940
Belgium	9,667	12,102	14,106	16,151	19,524	25,638	32,199	42,918
Denmark	9,101	9,447	9,805	9,807	11,635	14,282	16,527	22,146
Finland	12,804	13,860	14,712	15,852	16,459	18,266	20,801	23,957
France	37,832	44,946	44,857	33,858	43,138	36,237	44,181	36,971
Germany	434,603	453,110	466,356	480,690	438,828	481,672	525,078	554,372
Greece	12,832	12,695	14,887	16,413	15,194	19,513	18,357	20,257
Ireland	n/a	n/a	n/a	n/a	43,500	94,000	147,900	178,504
Italy	40,433	40,108	41,431	54,665	66,159	77,889	91,318	117,042
Luxembourg	n/a	n/a	1,156	1,574	2,278	3,468	4,217	5,101
Netherlands	10,063	11,152	12,147	13,048	17,814	23,155	28,344	36,317
Portugal	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Spain	19,284	29,998	41,471	46,710	61,830	77,772	100,832	131,118
Sweden	23,884	22,868	21,376	21,147	23,257	26,877	33,757	42,312
United Kingdom	94,792	105,048	93,340	122,465	120,999	219,797	357,468	609,415
EU-15	706,295	755,334	833,181	892,608	949,548	1,195,850	1,504,957	1,910,370

Source: European Integration Consortium, *Labour Mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg, 2009

The prospect of unrestricted access to the German labour market following the enlargements led to fears among German workers and trade unions that ‘social dumping’ would occur if large numbers of Eastern Europeans availed themselves of their rights to free movement.¹²⁷

The restriction of access through the imposition of the transitional arrangements was seen as a

2009 available at <http://www.arbeitsagentur.de/zentraler-Content/Veroeffentlichungen/Merkblatt-Sammlung/MB-16a-Beschaefigung-auslaendischer-AN.pdf>.

¹²⁴ Bundesanzeiger (BAnz.) 2009, S. 1572 f.; BAnz. 2008, S. 4807 f.

¹²⁵ European Integration Consortium, *Labour Mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg, 2009.

¹²⁶ *Ibid.*

¹²⁷ See, for example, DGB, *Mai 2004: Die EU wird größer*, Berlin 2004.

way to combat this fear. The measures were therefore heavily supported by trade unions. The German Federal Ministry for Labour and Social Affairs (Bundesministerium für Arbeit und Soziales) lists a number of other reasons in support of the imposition of transitional arrangements.¹²⁸ First, Germany has a high rate of unemployment which particularly affects low-skilled and unqualified workers. As it was expected that primarily low-skilled and unqualified workers would arrive in Germany from the EU8 and EU2 states, the government foresaw increasing tension and falling wages in the labour market due to increased competition. Also, the proximity between Germany and the EU8 countries led the government to predict a greater influx of EU8 workers to Germany than to countries which are geographically more distant. The restriction of access was meant to give Germany time to adapt its labour market to the challenges of an enlarged Europe. This involved lowering the level of unemployment and introducing a minimum wage to prevent the distortion of competition. On the other hand, it was argued that the time between enlargement (2004) and the lifting of the transitional arrangements (2011) would enable the new Member States of Central and Eastern Europe to improve their economic and social conditions so that they would no longer pose a threat to the labour markets of 'old' Member States, such as Germany.¹²⁹

Following the enlargement in 2004 and the imposition of strict national measures restricting access to the labour market, Germany and Austria were replaced by the UK and Ireland as the main destination of migrants from the new Member States (see Table 1). Approximately 70% of migrants from the new Member States travelled to the UK and Ireland. By the end of 2007, they made up about 1% of the population in the UK.¹³⁰ At the time of the enlargements, both the UK and Ireland experienced "a labour shortage, particularly in sectors such as agriculture, construction, food-processing and hospitality that have a high share of labour-intensive, less-skilled occupations"¹³¹. Even though workers who come to the UK from the new Member States are often highly educated (as described in more detail below), they are willing to 'downgrade' and to work for low wages in low-skill jobs¹³² thus making Ireland and the UK

¹²⁸ Bundesministerium für Arbeit und Soziales, *Verlängerung der Übergangsregelungen bei der Arbeitnehmerfreizügigkeit bis 2009*, 2006.

¹²⁹ DGB note 127 above.

¹³⁰ European Integration Consortium note 125 above at p. 23.

¹³¹ T. Krings, 'A Race to the Bottom? Trade Unions, EU Enlargement and the Free Movement of Labour' (2009) *European Journal of Industrial Relations* 49 at p. 54.

¹³² Equality and Human Rights Commission, *The UK's new Europeans: Progress and challenges five years after accession*, January 2010 at p. 5: 'downgrading' implies that the highly educated migrants are willing to work for low wages in low-skill jobs which means that they have a lower return on their education achievements than other migrant groups.

ideal host countries. Between 2004 and 2008, 1.24 million National Insurance Numbers were allocated to EU8 workers.¹³³ A total of 926,000 applications were approved under the Worker Registration Scheme.¹³⁴ It has been suggested that these figures under-estimated the true position due to limited data availability.¹³⁵ In addition, the data gathered on new Member State workers stems only from the Worker Registration Scheme. This does not cover those workers who have taken up work without fulfilling the registration requirements, nor does it include those workers who do not fall within the category of 'employed'. In addition, the Worker Registration Scheme does not record those workers who leave the UK.¹³⁶ Nonetheless, this development has been described as "almost certainly the largest single wave of in-migration [...] that the [UK] ever experienced."¹³⁷ Since the start of the recession, some migrants have left the UK and it was assumed that more would continue to do so if the economy does not improve.¹³⁸ However, a Polish expert on migration disputes this, saying that Polish research indicates the contrary.¹³⁹

For the most part, new Member State workers have been positively received in the UK. In particular, employers have praised their "strong work ethic"¹⁴⁰. There is "relatively limited evidence that eastern European immigration has brought economic benefits, including greater labour market efficiency and potential increases in average wages."¹⁴¹ However, the Equality and Human Rights Commission reported that "the recent migration may have reduced wages slightly at the bottom end of the labour market, especially for certain groups of vulnerable workers, and there is a risk that it could contribute to a 'low-skill equilibrium' in some economically depressed areas."¹⁴² Research by Anderson and Rogaly found that some EU8 migrants are subject to such levels of exploitation that they fall within the international legal definition of "forced labour"¹⁴³. A Report by the Equality and Human Rights Commission states that "in many cases the new migrants have precarious employment and housing arrangements, are vulnerable to exploitation, or lack support networks and access to

¹³³ Migration Advisory Committee, *Review of the UK's transitional measures for nationals of member states that acceded to the European Union in 2004*, April 2009 at p. 17.

¹³⁴ *Ibid* at p. 17.

¹³⁵ *Ibid* at p. 17.

¹³⁶ Currie note 97 above at p. 6.

¹³⁷ Home Office, *Accession Monitoring Report EU8 Countries May 2004 – June 2007*, London, 2007.

¹³⁸ Equality and Human Rights Commission note 133 above at p. 5.

¹³⁹ BBC News, *Migrant Poles return claim denied*, 25/1/2010 available at <http://news.bbc.co.uk/1/hi/8473869.stm>.

¹⁴⁰ Equality and Human Rights Commission note 132 above at p. 6.

¹⁴¹ *Ibid* at p. 7.

¹⁴² *Ibid* at p. 7.

¹⁴³ B. Anderson & B. Rogaly, *Forced Labour and Migration to the UK*, Study prepared by COMPAS in collaboration with the Trades Union Congress, Oxford, 2005 at p. 7.

information.”¹⁴⁴ There have also been allegations of ‘social dumping’ in some industries¹⁴⁵ and the arrival of large numbers of workers availing themselves of their rights under European law sparked debates on the provision of ‘British Jobs for British Workers’. The Lindsey oil refinery dispute provided the catalyst to this debate. In June 2006, TOTAL UK, the owners of the Lindsey Oil Refinery, awarded a contract for the construction of a new unit at the plant to an American company, Jacobs Engineering Group (Jacobs).¹⁴⁶ Jacobs subcontracted the mechanical and piping work to Shaw Group UK (Shaw Group).¹⁴⁷ After identifying further work which needed to be done on the project, Jacobs and Shaw Group agreed that it would be beneficial to employ an additional sub contractor to complete certain aspects of the project.¹⁴⁸ This decision resulted in Jacobs carrying out a new tender process, in which five UK and two European companies made bids.¹⁴⁹ In December 2008, the additional subcontract was awarded to an Italian company, IREM, which had tendered on the basis that it would use its own permanent workforce of foreign nationals to complete the project. In submitting the tender, IREM had agreed to comply with the terms of employment set out in the National Agreement for the Engineering Construction Industry (NAECI).

The decision of IREM not to use any local labour resulted in approximately 300 workers beginning a series of wildcat strikes at the Lindsey Oil Refinery in January 2009. The number of workers supporting the strikes grew to 1000, as workers at other plants across the country walked out in support of the Lindsey oil refinery dispute over the following days.¹⁵⁰ The unions did not ratify the industrial action as to do so would have left them open to claims for damages.¹⁵¹ The Advisory, Conciliation and Arbitration Service (ACAS) was called upon to

¹⁴⁴ Equality and Human Rights Commission note 132 above at p. 6.

¹⁴⁵ See, for example, the Report of the *Inquiry into recruitment and employment in the meat and poultry processing sector* published by the Equality and Human Rights Commission in March 2010 which examines the preferences of employers as between British and migrant workers. This practice often leads to tensions in the local community.

¹⁴⁶ R. Sharp, *Jacobs to support Refinery Operations for Total*, available at <http://phx.corporate-ir.net/phoenix.zhtml?c=117895&p=irol-newsArticle&ID=876493&highlight>. Articles discussing the dispute have been published by C. Barnard, ‘British Jobs for British Workers’: The Lindsey Oil Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market’ (2009) *Industrial Law Journal* 245 and C. Kilpatrick, ‘British Jobs for British Workers? UK Industrial Action and Free Movement of Services in EU Law’ *LSE Law, Society and Economy Working Paper Series*, WPS 16-2009, July 2009.

¹⁴⁷ ACAS, *Report of an Inquiry into the Circumstances Surrounding the Lindsey Oil Refinery Dispute*, <http://www.acas.org.uk/CHttpHandler.ashx?id=1019&p=0>.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ For more detailed information see, for example, BBC News, *Refinery Strikes spread across UK*, 30/01/2009 available at http://news.bbc.co.uk/2/hi/uk_news/7859968.stm.

¹⁵¹ Under s 226 of the Trade Union and Labour Relations (Consolidation) Act 1992, a trade union will be liable in tort for a strike which it has called if the correct procedure has not been followed. As the strikes in this case did not follow procedure, ratification of the action by the union would have left them open to claims for damages by the employer.

facilitate a settlement. ACAS was also asked to conduct an enquiry by the government “to determine the facts surrounding the IREM contracting arrangements at Lindsey Refinery and publish a report including the current legal context of contracting practices.”¹⁵² The report was published on 16 February 2009.

The deal reached between the unions and TOTAL UK provided for 102 new jobs for British workers which were to be recruited immediately and whose contracts were to last until 31 May 2009. Another company, R Blackett and Charlton, was to act as employer for the new British staff. According to ACAS, the jobs would be “locally sourced”¹⁵³ and were to be advertised through the public employment service. This was to prevent direct discrimination between UK and non-UK nationals applying for the jobs.

The dispute was reignited in June 2009 when Shaw Group proposed to make 51 employees at the refinery redundant. R Blackett and Charlton had, three days prior to this development, hired 61 new workers who were meant to do “exactly the same job” as those put forward for redundancy by Shaw Group.¹⁵⁴ GMB, the union involved in this dispute, claimed that the reason why the contractors refused to transfer the redundant staff to R Blackett and Charlton was because they were not prepared to recommend an “unruly workforce who had taken part in unofficial disputes and who won’t work weekends”.¹⁵⁵ In response to this alleged victimisation, hundreds of workers staged unofficial industrial action on 11th June 2009.¹⁵⁶ Again, there was widespread support in plants across the country and ACAS was asked to facilitate a settlement. However, negotiations stalled and TOTAL UK ordered its contractors to dismiss the 647 staff taking unofficial industrial action. Only those workers who were willing to cross the picket line were allowed to reapply for their jobs. The unions viewed this as an attack on union activists. TOTAL UK eventually dropped its demand and agreed to talks, on the condition that the workers returned to work, which they duly did. A settlement was reached which provided for the reinstatement of all dismissed workers and the reversal of the redundancies of the workers employed by Shaw Group.

¹⁵² ACAS note 147 above at p. 1.

¹⁵³ *Ibid* at p. 6.

¹⁵⁴ GMB, *GMB Accuse Senior Managers Of Provoking The Unofficial Dispute At Lindsay By The Layoff Of Original 51 Workers In Breach Of Agreements*, available at <http://www.gmb.org.uk/Templates/PressItems.asp?NodeID=98719>.

¹⁵⁵ *Ibid*.

¹⁵⁶ BBC News, *Fresh walkout over Refinery jobs*, 11/06/2009 available at <http://news.bbc.co.uk/1/hi/england/humber/8095182.stm>.

The Lindsey oil refinery dispute illustrates that trade unions in the UK are, at present, badly placed to counter the (for them) negative effects of europeanisation. Particular concern was raised in the oil refinery dispute that an Italian firm had been awarded the contract because they were able to supply labour at rates that under-cut the British firms. The industry standard in the UK for conditions of employment and pay in the construction sector is set out in the NAECI. However, union leaders of GMB and Unite had expressed concern about IREM's compliance with the terms of NAECI, specifically with regard to the shift pattern used and the transparency of employment conditions.¹⁵⁷ The managers at IREM assured ACAS of their commitment to adhere to the terms of NAECI.¹⁵⁸ Yet, even ACAS reported that it "inspected the contract documentation which commits IREM to pay the going rate; but IREM was not yet in a position to provide evidence to demonstrate that they were doing this."¹⁵⁹ It called for "an enhanced role for the NAECI independent auditor in both the tendering and project monitoring process."¹⁶⁰ The January 2009 audit had not taken place at the Lindsey oil refinery due to the unofficial strike action, and ACAS was therefore not in a position to verify whether IREM was complying with the terms of NAECI. Overall, ACAS concluded in its report that there was "no evidence that Total, Jacobs Engineering or IREM have broken the law in relation to the use of posted workers or entered into unlawful recruitment practices."¹⁶¹ However, ACAS's chief executive, in a press release, pointed out that "there is a source of tension around the Posted Workers' Directive and its application to construction work and the UK's industrial relations system."¹⁶²

The 'British Jobs for British Workers' debate is a vivid example of how trade unions are struggling in their responses to migrant workers. Following the European Court of Justice's interpretation of the Posted Workers' Directive¹⁶³ in *Laval*¹⁶⁴ IREM was, by law, not obliged to pay the level set in the NAECI agreement but rather it could have restricted itself to the minimum wage.¹⁶⁵ The interpretation of the Directive in this way by the ECJ is problematic

¹⁵⁷ ACAS note 147 above at p. 5.

¹⁵⁸ *Ibid* at p. 5.

¹⁵⁹ *Ibid* at para. 11.

¹⁶⁰ *Ibid* at para. 10.

¹⁶¹ *Ibid* at para. 10.

¹⁶² BBC News, *ACAS backs refinery dispute firm*, 16/02/2009 available at http://news.bbc.co.uk/2/hi/uk_news/7892656.stm.

¹⁶³ Directive 96/71 of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

¹⁶⁴ C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767.

¹⁶⁵ Barnard speculates on the possible explanations as to why IREM agreed to be bound by more onerous requirements than the minimum wage. See C. Barnard, "British Jobs for British Workers": The Lindsey Oil

for the UK for a number of reasons. It has the potential of giving EU contractors a greater competitive advantage over their UK counterparts who are obliged to pay certain (higher) rates under collective agreements. This, as evidenced by the Lindsey strikes, leads to resentment about the process of European integration. The unions involved in the dispute, despite not directly supporting the action, benefited greatly from the anti-European sentiments. They managed to generate a large amount of political and public support which they have been lacking in recent years. This was mainly due to the outcome of the dispute which resulted in the unions brokering a deal between the owner of the refinery and the workers which saw pledges to employ a certain number of British workers on the site. As a result, the unions really did win 'British jobs' for 'British workers'. The high level of public support during the dispute, however, must be seen as an expression of the wider concerns about the impact of European integration. Such disputes are problematic for trade unions who are generally in favour of the European Union. By supporting 'British' workers, trade unions risk alienating migrant workers which then makes it harder to integrate them into their structures.

In response to the large numbers of migrants arriving from the new Member States following the 2004 enlargement, the UK restricted access to its labour market for Romanians and Bulgarians in 2007 to prevent the situation repeating itself. As a result, the numbers of Bulgarians and Romanians who have arrived in the UK since 2007 have been small compared to the migrant flows following the 2004 enlargements. Overall, the number of EU2 residents residing in the old Member States has risen from 279,000 persons in 2000 to 1.86 million at the end of 2007.¹⁶⁶ (See Table 2). The preferred destination of Romanian and Bulgarian workers seems to be Spain and Italy due to the free access (in the case of Spain) or lightly restricted access (in the case of Italy) to the labour markets.¹⁶⁷

Refinery Dispute and the Future of Local Labour Clauses in an Integrated EU Market' (2009) *Industrial Law Journal* 245 at pp. 256 – 257.

¹⁶⁶ European Integration Consortium note 125 above at p. 26.

¹⁶⁷ Migration Advisory Committee, *The labour market impact of relaxing restrictions on employment in the UK of nationals of Bulgarian and Romanian EU member states*, December 2008.

Table 2: Foreign residents from the EU2 in the EU15, 2000 – 2007

Host Country	2000	2001	2002	2003	2004	2005	2006	2007
	<i>In persons</i>							
Austria	n/a	22,387	24,926	26,802	28,367	29,573	29,958	36,792
Belgium	3,435	4,642	5,900	6,831	8,238	10,814	14,095	23,810
Denmark	1,580	1,646	1,746	1,834	1,987	2,200	2,350	3,316
Finland	786	854	873	887	909	970	1,089	1,388
France	5,752	8,761	7,960	8,840	17,282	12,027	39,069	43,652
Germany	124,453	126,245	131,098	133,404	112,532	112,196	112,406	131,402
Greece	12,961	17,344	25,612	30,583	39,220	45,551	49,086	52,567
Ireland	n/a	n/a	n/a	n/a	n/a	n/a	n/a	24,496
Italy	69,020	81,444	102,363	189,279	264,223	315,316	362,124	658,755
Luxembourg	n/a	n/a	477	498	545	700	871	1,085
Netherlands	2,564	3,168	3,720	4,413	4,944	5,082	5,427	11,272
Portugal	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Spain	43,676	97,020	190,185	277,814	410,403	508,776	649,076	828,772
Sweden	3,951	3,300	3,123	3,148	3,170	3,205	3,080	6,280
United Kingdom	10,504	9,739	17,494	17,979	17,118	33,578	37,945	40,023
EU-15	278,682	376,550	515,477	702,312	908,938	1,079,988	1,306,576	1,863,610

Source: European Integration Consortium, *Labour Mobility within the EU in the context of enlargement and the functioning of the transitional arrangements*, Nuremberg, 2009¹⁶⁸

Despite the restrictions on access to its labour markets, Germany remains an attractive destination for new Member State workers. As Krings points out:

Most people from the [new Member States] enter Austria and Germany as part of bilateral agreements signed with a number of [Central and Eastern European] countries in the 1990s to channel the rising migration flows into a more organized system. In Germany the number of these work permits, mainly issued to seasonal workers from Poland, has stayed around 350,000 per year.¹⁶⁹

This seasonal migration has largely been positive for the domestic labour market. However, allegations of wage dumping resulting in the loss of local jobs emerged in sectors like the German meat industry, where there is evidence that service providers from the new Member States often pay their workers wages which are well below the rates paid to Germans.¹⁷⁰ More recently, a German newspaper reported that the German national train company (Deutsche Bahn) was using workers from the new Member States to clear stations and tracks of snow while paying them below the industry standard.¹⁷¹ This development is part of broader allegations that new Member State workers circumvent the transitional measures by being

¹⁶⁸ It should be noted that these figures refer to legal migration only. It is assumed that the figures are, in fact, substantially higher due to illegal migration but reliable figures are missing (European Integration Consortium note 126 above at p. 27).

¹⁶⁹ Krings note 131 above at p. 55.

¹⁷⁰ L. Czommer and G. Worthmann, *Von der Baustelle auf den Schlachthof. Zur Übertragbarkeit des Arbeitnehmer-Entsendegesetzes auf die Deutsche Fleischbranche*, IAT-Report 2005/3, Institut Arbeit und Technik, Gelsenkirchen.

¹⁷¹ U. Ritter, 'Unsaubere Winterdienste – Osteuropäer schippen für Hungerlöhne auf Bahnhöfen Schnee und reinigen Züge der Deutschen Bahn' *Süddeutsche Zeitung*, 16th and 17th January 2010.

sent to work in Germany as posted workers in those sectors where no restrictions apply. In response, there have been calls for the restrictions on posted workers to be extended to other sectors such as the meat industry.¹⁷² However, in total, the number of new Member State workers has not increased dramatically in Germany. It has been estimated that immigration from the new Member States into Germany has “increased by a mere 62,000 persons through Eastern enlargement compared to the pre-enlargement status quo scenario.”¹⁷³ Also, there are indications that the inflow from the EU8 countries, particularly Poland, initially increased in 2004, before dropping in 2005, due to unfavourable labour market conditions.¹⁷⁴ As a result, the share of EU8 and EU2 workers has remained stable in Germany. (See Tables 1 and 2).

In addition to allegations of ‘social dumping’ through posted workers, Germany has reported rapidly growing numbers of EU8 citizens who have registered as self-employed service providers which has been interpreted as a means of circumventing the transitional arrangements.¹⁷⁵ There are fears that, following the lifting of the transitional arrangements in 2011, large numbers of new Member State workers will arrive. Even though these fears are often rejected as unfounded¹⁷⁶, trade unions are looking to developments in the UK in order to prepare themselves for the lifting of the restrictions on access to the labour market. This is examined in more detail in the case studies (below). Thus, both the British and the German labour markets have been affected by the recent European enlargements and both are struggling to accommodate the developments following the enlargements, despite restrictions (to varying degrees) on access to their labour markets.

The new Member State workers¹⁷⁷ have proved problematic for the German and British labour markets and the trade unions operating within them for a number of reasons elaborated upon further in the case studies. It should be noted, at this stage, that the generalisations made regarding new Member State workers are mainly based on information gathered about EU8 workers. EU2 workers have not been analysed in the literature in as much depth as EU8 workers for two reasons: first, the EU2 enlargement is more recent and the available data is

¹⁷² Czommer and Worthmann note 170 above.

¹⁷³ European Integration Consortium note 125 above at p. 83.

¹⁷⁴ K. Tamas & R. Münz, *Labour Migrants Unbound? EU Enlargement, Transitional Measures and Labour Market Effects*, Institute for Future Studies, Stockholm, 2006.

¹⁷⁵ *Ibid.*

¹⁷⁶ M. Heinen & A. Pegels, *EU Expansions and the Free Movement of Workers: Do Continued Restrictions Make Sense for Germany?*, focus Migration Policy Brief, July 2006.

¹⁷⁷ For an overview of the characteristics of new Member State workers see D. Blanchflower & H. Lawton, ‘The Impact of the Recent Expansion of the EU on the UK Labour Market’ 2008 *IZA Discussion Paper* 3695. The Equality and Human Rights Commission’s Report on *The UK’s new Europeans: Progress and challenges five years after accession*, January 2010 also examines this in some detail.

therefore limited; and, second, there have, in comparison, been far fewer numbers of Romanian and Bulgarian workers arriving in Germany and the UK.

The new Member State workers who have arrived in the UK are described, by the Migration Advisory Committee, as “predominantly young, reasonably well educated and in employment.”¹⁷⁸ Approximately 70% of EU8 migrants are between the ages of 18 and 35 and, as a result, have less labour market experience than British workers especially as many appear to be recent graduates.¹⁷⁹ The Labour Force Survey also shows that EU8 migrants are more likely to be in employment than UK-born workers or other migrants.¹⁸⁰ However, “EU8 migrants are disproportionately employed in low-skill occupations despite their relatively high level of qualifications.”¹⁸¹ It has been calculated that half of migrants work in unskilled jobs.¹⁸² Thus, EU8 migrants are “particularly concentrated in elementary occupations and process, plant and machine operative occupations.”¹⁸³ As a result, they receive low wages despite having relatively high levels of education.¹⁸⁴ The geographical distribution of EU8 migrants is “distinctive in comparison to other migrant groups”¹⁸⁵ as they are (in addition to being present in major cities such as London) disproportionately highly represented in rural areas.¹⁸⁶

The 2008 Labour Force Survey recorded 67,000 EU2 migrants living in the UK. This is widely thought to be an under-estimate. However, even if this figure constitutes an under-estimate there are proportionately far less EU2 than EU8 migrants in the UK which can be traced back to the existence of restrictions on access to the labour market for EU2 migrants. Amongst those EU2 workers that have come to the UK, Romanians outnumber Bulgarians. Yet there is evidence that “EU2 nationals are taking opportunities outside of those covered by employer-based permits”¹⁸⁷, which limits the usefulness of the data about their characteristics and role in the labour market, collected through the permit system. However, data collected

¹⁷⁸ Migration Advisory Committee Report, *Review of the UK's transitional measures for nationals of member states that acceded to the European Union in 2004*, April 2009 at p. 18.

¹⁷⁹ Equality and Human Rights Commission note 132 above at p. 16.

¹⁸⁰ Office for National Statistics, *Labour Force Survey*, 2008.

¹⁸¹ Migration Advisory Committee Report note 178 above at p. 19.

¹⁸² Equality and Human Rights Commission note 132 above at p. 16.

¹⁸³ Migration Advisory Committee Report note 178 above at p. 19.

¹⁸⁴ Equality and Human Rights Commission note 132 above at p. 16: On average they have higher education levels than UK-born workers.

¹⁸⁵ Migration Advisory Committee Report note 178 above at p. 19.

¹⁸⁶ Local Government Association, *Where have recent in-migrants gone?*, 2008.

¹⁸⁷ Migration Advisory Committee Report, *The labour market impact of relaxing restrictions on employment in the UK of nationals of Bulgarian and Romanian EU member states*, December 2008 at p. 65.

on those EU2 migrants that apply for permits indicates, first, that they are young (20 – 34 years old), and, second, that they are “proportionally more represented in skilled occupations than the UK-born workforce.”¹⁸⁸ There is a lack of this data for those migrants who are not covered by employer-based permits. EU2 migrants do not, therefore, pose as great a challenge to the labour market and the actors operating therein as EU8 migrants. EU8 migrants have proved problematic for national trade unions for a number of reasons which are elaborated upon below in the case studies conducted in Germany and the UK.

The European enlargements and large flows of new Member State workers come at a time when trade unions are already struggling to adapt to changing regulatory and opportunity structures in their national labour markets. In particular, they are faced with loss of members and an increasing flexibilisation and individualisation of the labour market. This has led to problems of “adaptation to economic changes and challenges of an increasingly service- and knowledge-oriented labour market.”¹⁸⁹ This was examined in more detail in chapter two. The influx of large numbers of new Member State workers has increased these problems for trade unions in Germany and the UK. The characteristics of a majority of the new Member State workers make it difficult to integrate them into traditional trade union structures. This is elaborated upon in more detail in each case study (below). Arguably, therefore, trade unions face similar challenges in Germany and the UK in responding to the European enlargements, despite differing restrictions on access to the national labour markets. Any responses of trade unions must be analysed within the context of their national labour law systems, as set out in chapter two of this thesis, and the European framework (chapter three) which heavily influences their national labour law systems.

E. Concluding Remarks

On the basis of the theoretical framework set out in this and previous chapters, it is possible to draw some general conclusions about how one would expect German and British trade unions to react to the recent European enlargements and the new Member State workers. These

¹⁸⁸ *Ibid* at p. 66.

¹⁸⁹ W. Schroeder, ‘SPD und Gewerkschaften: Vom Wandel einer privilegierten Partnerschaft’ *WSI Mitteilungen* 5/2008 at p. 231: “Aber auch die Gewerkschaften haben an Stärke eingebüßt. Hinzu kommen Mitgliederrückgänge, die Alterung der Mitgliedschaft und eine bis heute nicht gelungene Adaption des wirtschaftlichen Strukturwandels hin zu einer modernen Wissens- und Dienstleistungsökonomie innerhalb der gewerkschaftlichen Mitgliedschaft.”

general conclusions form the background to the case studies which are set out in chapter five. The analysis of the case studies is covered in chapter six. This structure of first setting out the theoretical context and then comparing it with the practical reality, before analysing the responses of trade unions in a final chapter, provides a real understanding of how trade unions are reacting to the European enlargements and the new Member State workers. In addition, this understanding is enhanced by looking at trade unions in two countries – Germany and the UK – as it provides a wider range of responses for analysis. Moreover, it enables the author to suggest whether there is anything that the trade unions could learn from each other.

One can draw a number of conclusions from the literature examined thus far about how trade unions would be expected to respond to the European enlargements and the new Member State workers. First, one would assume that the way in which trade unions respond within, across and around national and European legal frameworks to the challenges of the enlargements would be framed by the role that they adopt in their national legal system. This was set out in more detail in chapter two. For example, the shift towards a political role in the UK should allow trade unions to adopt an active negotiating role between the government and migrant workers. Similarly, the focus on greater involvement of trade unions in the legislative process in Germany should enable them to influence policy regarding migrant workers from the bottom up. Both examples illustrate how trade unions can act within national legal frameworks in order to: (i) integrate migrants into their structures in order to ensure for their representation and protection; and (ii) influence policies relevant at a national level to migrant workers.

Second, one would expect trade unions to act across the national and European legal frameworks by cooperating with trade unions in other Member States. This would allow them to exchange information on how to respond to similar problems. The ETUC can also play a role by, for example, coordinating trade union policy on migrant workers or facilitating an exchange of good practice. In acting across legal frameworks, one would expect trade unions to make use of the opportunities offered to them by the EU's policy of europeanising national labour law systems. This was explored in more detail in chapter three. Europeanisation through Directives, soft law mechanisms and the case law of the European Court of Justice (ECJ) adds an extra layer of complexity to the environment within which trade unions act. As the examples set out in chapter three illustrate, europeanisation undoubtedly poses problems for trade unions which they are struggling with. However, as europeanisation is a two-way

process, it also provides trade unions with new roles and mechanisms to respond to the challenges of enlargement. Thus, one would expect an active involvement of trade unions in the drafting and implementation of EU legislation and soft law mechanisms as well as their strong involvement in the European Trade Union Confederation. The role that trade unions already adopt at a national level could be influential in this regard. Such an involvement could also secure the 'social dimension' of the EU, for which trade unions in Germany and the UK have repeatedly called.

Finally, the historic responses of trade unions to migrant workers and the EU undoubtedly influence the way in which they now react to the challenges of European enlargement. For this reason literature on historic responses has been examined in this chapter as without it an understanding of how trade unions respond within, across and around national and European legal frameworks to the European enlargements and the new Member State workers would be incomplete. Taking into account the literature on trade unions' historic responses to migrant workers, one would expect different responses from German and British trade unions to the new Member State workers. German trade unions have generally been positive towards migrant workers provided that they can be integrated into the labour market structure on equal terms to German workers. Controlled migration such as the Gastarbeiter and posted workers fulfilled such criteria and trade unions adopted measures to secure equality for all workers. German unions did not adopt special structures such as 'self-organisation' to accommodate such workers. British trade unions, on the other hand, have tended to rely on the principle of self-organisation to represent minority groups within the union. One would therefore expect them to adopt such policies in relation to new Member State workers. Trade unions in both countries adopted their respective policies to integrate migrant workers into their structures in order to prevent a 'race to the bottom' in respect of wages and standards of work. In the UK, the additional concern of overt racism towards migrant workers prompted the unions to encourage self-organisation of migrants. Showing solidarity with migrant workers may have informed these debates but they did not dominate them. As Keller pointed out, "solidaristic trade union 'internationalism' has remained purely verbal, and the horizontal and vertical coordination needed to make it a reality is far from being realised."¹⁹⁰ It is therefore questionable whether one can expect trade unions to show solidarity towards the new Member

¹⁹⁰ B. Keller, 'National Industrial Relations and the Prospects for European Collective Bargaining – The view from a German standpoint' in W. Lecher & H.-W. Platzer (eds.), *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, Oxford, 1998 at p. 51.

State workers or whether their responses will be based on purely pragmatic considerations. Whether these expectations are fulfilled in practice remains to be seen. Chapter five explores the responses of one British and one German trade union to the recent European enlargements and the new Member State workers against the background of the theoretical framework set out thus far in this thesis.

CHAPTER FIVE

CASE STUDIES

The purpose of this thesis is to explore how German and British trade unions are responding to the European enlargements and the new Member State workers by operating inside, across and around the national and European legal frameworks which regulate them. This is done with a view to analysing the responses of the trade unions to determine what effect they have on new Member State workers and to assess whether there is anything that trade unions in the two countries can learn from each other. The relevant literature which has been examined in the earlier chapters of this thesis raises certain expectations as to how one would expect trade unions to respond. This chapter describes two case studies which examine how two individual trade unions are reacting, in practice, to the recent European enlargements and the new Member State workers. In combining the case studies with an analysis of the relevant literature, this thesis provides an understanding of how trade unions operate inside, across and around national and European legal frameworks when responding to problems which affect them.

A. Introduction

After anticipating the responses of trade unions to the recent European enlargements and the new Member State workers based on the knowledge gained in the theoretical framework set out in the first part of this thesis, chapter five describes two case studies which were carried out between July 2008 and May 2009. The purpose of chapter five is to illustrate the actual responses of two trade unions to the European enlargements and the new Member State workers: the Vereinte Dienstleistungsgewerkschaft (ver.di) in Germany, and UNISON, the UK public service union. This is done by first explaining the methodology used in gathering information on the two trade unions before setting out, in two individual protocols, the reports on each trade union. Finally, account is taken of the European framework within which both trade unions are acting by explaining the responses of the European Trade Union Confederation (ETUC) and its influence on national policies. Chapter five does not analyse the trade union responses. Instead, the case studies are merely descriptive in nature. Chapter six then analyses the results of the case studies based on the findings of chapters two, three

and four. The data gathered during the case studies does not purport to paint a complete picture of trade union responses to the recent European enlargements and the new Member State workers. It merely intends to serve as a demonstration of the actual responses of trade unions in comparison to what would theoretically be expected of them, as illustrated in chapter four.

B. Case study methodology

The purpose of the case studies is to clarify the responses of two national trade unions to the challenges of European enlargement and how their responses impact on new Member State workers. The methodology used in the case studies is briefly outlined in chapter one and is set out in more detail at this stage.

In order to delimit the scope of the case studies, purposive sampling was seen as an effective method to gather the appropriate data.¹ In the case of trade unions this meant looking at those trade unions which could be expected to contribute most to the topic of research. By looking at, for example, the responses of trade unions within the Trades Union Congress (TUC) in the UK and the Deutscher Gewerkschaftsbund (DGB) in Germany, one can gather qualitative data from within the two largest national trade union confederations which, moreover, have a history of cooperation both within the European Trade Union Confederation and at a national level through the British-German Trade Union Forum.

Research into the affiliated unions within the national confederations led to the conclusion that the two unions upon which it is most appropriate to focus in order to gather the relevant data are the Vereinte Dienstleistungsgewerkschaft (ver.di) in Germany and UNISON, the UK public service union. This selection can be justified in a number of different ways: both trade unions represent large numbers of public service workers across a wide range of professions in their respective countries; and, both unions belong to national confederations that are members of the ETUC and thus cooperate at a European level. This element of cooperation must be taken into account throughout the research as, without an understanding of the level of cooperation, a successful analysis would not be possible. In terms of the objectives that ver.di and UNISON may set for themselves, it is necessary to establish whether these

¹ A. Bryman, *Social Research Methods*, 3rd ed., Oxford University Press, Oxford, 2008 pp. 435 – 471.

objectives are influenced by either a 'top-down' approach from the ETUC, TUC or DGB or policies set out in their cooperation agreement. Finally, the respective policy papers of ver.di and UNISON indicate that their objectives and priorities are of a similar nature therefore making them ideal candidates for comparable case studies. In 2004, ver.di and UNISON signed a Memorandum of Understanding which will enable them to work more closely together "on a range of policy issues, particularly at the European level and [...] to undertake joint action in a number of transnational companies engaged in the provision of public services where the two unions have members."² In addition to the documents mentioned above, it is also necessary to gather information on common policies and objectives of ver.di and UNISON by accessing, for example, the Memorandum of Understanding as well as protocols and decisions of subsequent meetings held between the two unions.

One possible shortcoming is that data gathered from these two large trade unions may not accurately reflect the responses of all trade unions to the challenges of European enlargement, especially not those responses of the smaller, 'a-typical' and more aggressive unions that have recently sprung up in Germany. However, it is submitted that the data gathered provides a typical sample of the way in which the traditional trade unions which represent large numbers of workers in both old Member States are responding to the challenges of enlargement.

Each case study is set out in an individual country protocol. The case studies provide a response to the research questions, i.e. what trade union responses to European enlargement and the challenges surrounding it are, and how trade unions are responding to the new Member State workers. In particular, three themes were identified which are the focus of the case studies:

1. responses to enlargement and the transitional arrangements;
2. responses to new Member State workers in principle and in practice; and,
3. level of cooperation across borders.

There were also a number of country-specific issues which arose and are briefly mentioned in the country protocols as and when they affect the three mentioned themes. The country protocols focus individually on themes one and two after which theme three is elaborated on jointly for ver.di and UNISON. This is followed by general conclusions for each case study.

² UNISON/Ver.di Memorandum of Understanding, 2004 available at http://www.unisonnw.org.uk/documents/general/Ver_di_Memo_of_understanding.pdf.

In order to effectively gauge the responses of trade unions, each case study first clarifies the objectives set by the trade unions for themselves, taking into account whether trade unions have changed and/or reassessed their objectives following the recent enlargements. The objectives are drawn from *inter alia* press releases, position papers and handbooks issued by trade unions. The author of this thesis gained an insight into the objectives of both trade unions by accessing documents online and through contacts at both trade unions.

The objectives are then used as a benchmark against which to measure actual trade union responses for the purposes of answering the research questions. Second, therefore, the protocols look in more detail at the actual reactions of the trade unions which will yield an understanding of how trade unions are responding and whether they are fulfilling the objectives set for themselves. The actual reactions of trade unions are gathered from documents such as newsletters and updates issued by trade unions, as well as interviews conducted with trade union officials as part of the case studies. Eight interviews were conducted in total: three with UNISON³; three with ver.di⁴; and two in Brussels, of which one was with the Confederal Secretary of the ETUC and the other with an official involved in the formulation of European social policy. The subject-matter of the interviews drew upon and clarified the information gathered from trade union documents. An interview guide was prepared in advance to aid the interviewer. It was not distributed to the interviewees.

Due to the comparative nature of the thesis, the same questions were asked of both parties in interviews in order to then analyse and compare the responses on the same basis. In conducting the interviews, it was important to be aware of the gap between the official position taken by trade unions and the oft-concealed policy issues underlying this position. As the purpose of the interviews was to gather information which is not necessarily predictable, there was no need for control over the behaviour of the interviewee.⁵ On the contrary, this would have been counter-productive as it would not have allowed the interviewer to gain a real appreciation of the trade union and the matters in which it is engaged. Questions were semi-structured in order to facilitate a comparison, while, at the same time, leaving sufficient scope for development of an answer by the interviewee. Therefore, the same topics were

³ These were conducted with the National Development Manager for Migrant Workers, the International Officer, and a member responsible for advising and recruiting migrant workers. A telephone conversation also took place with the Head of Policy Development. For more information see Annex I.

⁴ These were conducted with the Europe Officer, the Migration Officer and a member responsible for advising and recruiting migrant workers. For more information see Annex I.

⁵ Bryman note 1 above.

covered in each interview but the structure of the interview was left largely to the interviewee. The interviewer merely guided the session so as to ensure that all relevant topics were covered. Interviews were, on average, one hour in length. They were conducted at the workplace of the interviewee and were recorded and subsequently transcribed. The interviews with ver.di and with the official involved in the formulation of European social policy were conducted in German. The original German quotes can be found in footnotes. All other interviews were conducted in English.

C. UNISON

UNISON, the public service union was founded in 1993 and is the largest affiliate of the Trades Union Congress, the national organisation of British trade unions.⁶ It is the result of a merger of several smaller unions, including the National Union of Public Employees and the Confederation of Health Service Employees. The structure of the union represents the diversity of its members. It has been trying to shed the “traditional white image” of trade unions by pursuing “‘proportionality’, fair representation and self-organisation in the union’s internal government.”⁷ Thus, it has organised sections representing the interests of its women, black, disabled, and gay and lesbian members.⁸ More recently, it has set up a Migrant Workers’ Unit to cater for the special needs of migrant workers.⁹ Overall, UNISON has 1.3 million members¹⁰ who work for “public services, private contractors providing public services and in the essential utilities.”¹¹ Members also include “frontline staff and managers working full or part time in local authorities, the NHS, the police service, colleges and schools, the electricity, gas and water industries, transport and the voluntary sector.”¹² UNISON’s objectives include: recruiting, organising, representing and retaining members; negotiating and bargaining on behalf of members and promoting equality; campaigning and promoting UNISON on behalf of members; and developing an efficient and effective union.¹³ It also aims to maximise its political strength by influencing government policies and

⁶ Encyclopaedia Britannica, *UNISON*, Encyclopaedia Britannica Online available at <http://www.britannica.com/EBchecked/topic/1232242/UNISON>.

⁷ TUC History Outline, *The Union Makes Us Strong*, Part 5 1980-2000 available at http://www.unionhistory.info/timeline/1960_2000_5.php.

⁸ Encyclopaedia Britannica note 6 above.

⁹ For more information see UNISON, *Migrant Workers* available at <http://www.unison.co.uk/migrantworkers/index.asp>.

¹⁰ UNISON, *About Us* available at <http://www.unison.co.uk/about/about.asp>.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ UNISON, *Objectives and Priorities 2010* available at <http://www.unison.org.uk/acrobat/B3008.pdf>.

promoting their objectives within the European Union (EU).¹⁴ The objectives of UNISON (and of ver.di, which are set out below) are further discussed in chapter six when an analysis is undertaken of whether the responses of trade unions to European enlargement as well as to new Member State workers in Germany and the UK differ depending on the role (as defined in chapter two) that the trade unions perceive for themselves in their national contexts.

The case study on UNISON was conducted by establishing their responses to a number of areas linked to the recent European enlargements. Information was gathered first from their press statements, publications and policy papers. This was then clarified in interviews with a number of trade union officials. The results of the case study are detailed below. It should be noted at this stage that the information gathered during interviews with trade union officials, as detailed below, reflects the comments of those officials and does not necessarily represent the views of the author of this thesis.

1. Responses to enlargement and the transitional arrangements

In terms of UNISON's responses to the European enlargements and the transitional arrangements one must distinguish their political responses which are statements in principle and which are broadly in line with the position of the TUC, from their practical responses which are taken at a union level and which focus on situations at work and are targeted at workers.

UNISON's response to the recent European enlargements was taken as a political decision and that decision was not altered between 2004 and 2007. According to this political decision, UNISON supports the principles of free movement inherent in the EU Treaties and it was in favour of the enlargements which took place in 2004 and 2007. In addition, although UNISON realises that there are certain shortcomings in the functioning of the European Union, such as the interpretation of the Posted Workers' Directive by the ECJ as detailed in chapter three, UNISON, like the TUC, is largely in favour of the European Union and of European integration. As the TUC points out in relation to enlargement, "expanding the European Union is a good thing for Britain because it produces more markets for our goods

¹⁴ *Ibid.*

and services and more people to do the jobs the British economy and society need.”¹⁵
Moreover,

it is good for the people of Eastern Europe because it provides them with growth, better jobs and wages, and spreads and deepens European democratic values. Creating a common market means that workers must have rights as well as businesses, and there must be freedom of movement for workers as well as for capital, goods and services.¹⁶

As a result, neither the TUC nor UNISON support the transitional arrangements placed on Romanian and Bulgarian workers. Much of UNISON’s work at a political level now involves representations to the UK government on decisions affecting them. For example, UNISON was heavily involved in the debate surrounding the Gangmasters (Licensing) Act 2004 which seeks to avoid the exploitation of workers (including migrant workers).

At a union level, UNISON is responding to the practical implications of the enlargements, in particular, the arrival of large numbers of new Member State workers. This is examined in more detail below.

2. Responses to new Member State workers

The main challenges for UNISON following the EU enlargements and the transitional arrangements arose due to the large numbers of new Member State workers which arrived in the UK after 1st May 2004. A substantial part of the case study therefore explains the responses of UNISON to the new Member State workers, both in terms of statements of principle and their responses in practice. The focus of the case study was on UNISON at a national level; the activities of individual branches were not looked at due to time constraints.

According to its publications, UNISON has established a number of objectives regarding new Member State workers. Despite the fact that UNISON is not active in those areas in which new Member State workers are particularly noticeable, the union felt, as the largest trade union in the TUC, that it should take on a leadership role in responding to new Member State workers particularly at a political level.¹⁷ This is also due to the fact that UNISON is keen to

¹⁵ TUC, *General Council Statement on EU Migration*, 7 September 2006 available at <http://www.tuc.org.uk/international/tuc-12442-f0.cfm>.

¹⁶ *Ibid.*

¹⁷ Telephone conversation, Head of Policy Development, UNISON, 29/7/08.

raise its profile across a whole range of issues in order to recruit and retain members. Moreover, political engagement:

can be key to protecting and improving members' jobs, pay and conditions, as well as bringing about the broader social and economic changes our members want to see. Through its political organisation and campaigning, the union can act as an important force for a more democratic society.¹⁸

This is also reflected in UNISON's Annual Report 2008/2009 where it claims that UNISON "needs to influence the political agenda."¹⁹ It plans to do this by "influencing government policies, including those of devolved nations [and] promoting our key objectives within the European Union and internationally."²⁰ Thus, UNISON has been actively responding to government consultations, campaigning and collaborating with institutions such as the Association for Public Service Excellence, Compass and the TUC, and allocating substantial funding from its General Political Fund towards policy development and campaign work with a view to increasing its political role.²¹ It has also taken various steps to:

improve its parliamentary influence – including prioritisation of objectives, developing relationships with ministers and special advisers, organising lobbying work around particular bills, briefing potentially friendly MPs, and improving lobbying at a regional level.²²

At a European level, UNISON has focused on close cooperation with the European Federation of Public Service Unions (EPSU), ver.di, the French Public Services Federation (Confédération générale du travail – CGT) and increasingly with the All Poland Alliance of Trade Unions (Ogólnopolskie Porozumienie Związków Zawodowych – OPZZ) in order to influence policy-making.²³ UNISON is also currently conducting a review of the effectiveness of its General Political Fund (GPF). The GPF enables the union to collect money from its members specifically to fund political campaigning work. Unlike Labour Link²⁴, the GPF is not affiliated to any political party.²⁵ Rather, money in the fund is used to support local campaigns, national political campaigns and political advertising. The Review of the GPF seeks to "scrutinise and reform operations and functional processes to ensure the highest levels of transparency, participation and activity." It is due to be completed by June 2010.

¹⁸ UNISON, *Consultation for the review of political fund effectiveness* at p. 4.

¹⁹ UNISON, *A Million Voices for Change*, Annual Report 2008/2009 at p. 33.

²⁰ *Ibid* at p. 13.

²¹ For more details see UNISON note 19 above at pp. 33 – 50.

²² UNISON note 18 above at p. 6.

²³ For more details see UNISON note 19 above at pp. 38 – 39.

²⁴ Labour Link, another fund, enables the union to collect money from its members to fund lobbying within the Labour Party. For more information see UNISON, *Political campaigning* available at <http://www.unison.org.uk/politicalcampaigning/index.asp>.

²⁵ For more information see UNISON *ibid*.

Responding to new Member State workers by adopting a more active political role is one type of a response. It also allows UNISON to promote its campaign against the British National Party (BNP). According to its Annual Report, “the GPF played a key role in promoting UNISON’s anti-racism/anti-BNP campaigning work.”²⁶ Moreover, “a particular effort was made to engage Polish workers [in these campaigns], by advertising in Polish media and on Polish language websites and making direct contact with Polish community groups.”²⁷ It should be noted in this context that one decision that was made early on was not to distinguish between migrants from within the EU and those from outside the EU, even though their legal status is different. Thus, UNISON defines a migrant worker as “someone who has come from abroad to work in the UK.”²⁸

Prior to the enlargements in 2004 and 2007, EU workers were not perceived as a vulnerable group as they were mainly found in highly paid, skilled jobs. However, the new Member State workers that arrived in the UK after 1st May 2004 presented similar problems to non-EU workers. A report by the TUC Commission on Vulnerable Employment, set up in 2007, which looked at the circumstances in which workers are exploited at the workplace, made it clear that new Member State workers are often treated in the same way as non-EU workers.²⁹ This is partly due to the type of employment that they occupy which is usually badly paid and low-skilled. However, in particular, workers from the new Member States were faced with problems of communication due to their often poor grasp of English. As a result, many workers from the new Member States report exploitation in the UK.³⁰ However, EU workers have also been hard to recruit into union membership. According to Brendan Barber, general secretary of the TUC, “the challenge for unions is to find ways of recruiting migrant workers, offering them support and guidance so they become less exploitable and more aware of their rights.”³¹

²⁶ UNISON note 19 above at p. 44.

²⁷ *Ibid* at p. 44.

²⁸ UNISON, *Organising Migrant Workers*, UNISON Branch Handbook at p. 4.

²⁹ *Hard Work, Hidden Lives: The Full Report of the TUC Commission on Vulnerable Employment* available at <http://www.vulnerableworkers.org.uk/2008/05/full-report-of-the-commission-released/>. For an introduction to the report see S. McKay, ‘Employer Motivations for Using Agency Labour: Hard Work, Hidden Lives: The Full Report of the TUC Commission on Vulnerable Employment’ (2008) *Industrial Law Journal* 296.

³⁰ For more information see, for example, TUC, *New EU Members? Migrant Workers’ Challenges and Opportunities to UK Trade Unions: a Polish and Lithuanian Case Study*, 2007 available at <http://www.tuc.org.uk/extras/migrantchallenges.pdf>.

³¹ Trade Union European Information Project, ‘Unions the answer for migrant workers say TUC’ *European Review*, Volume 27, July 2004 at p. 3.

UNISON has responded to the new Member State workers in its statements of principle by focusing on two main objectives:

1. organising migrant workers in UNISON; and,
2. encouraging them to be active.³²

The aim of these objectives is to prevent exploitation and wage undercutting and to integrate migrant workers into the structures of the trade union. Moreover, organising and encouraging migrant workers to become active “will also help build community cohesion by ensuring that migrants become active members of the community and the workplace thereby creating a virtuous circle.”³³ UNISON has outlined a number of initiatives as part of its Migrant Workers Participation Project which it seeks to undertake in order to achieve these objectives. These initiatives include language support, training to familiarise workers with the union, mentoring by workers who are already active, establishing migrant worker activists networks, developing community links, and auditing the union’s structures to ensure that migrant workers are as welcome as possible.³⁴

On a practical level these initiatives have been implemented in the following way. First, UNISON set up a specialist unit (Migration Unit) to work with migrant workers.³⁵ In addition, migrant workers were recognised as a separate category of workers with their own needs.³⁶ Previously they fell under the ambit of black workers. The Migration Unit is staffed by three employees, one of whom has been seconded to UNISON from OPZZ. There is thus a focus, within the Migration Unit, on new Member State workers. This unit encourages migrant workers to get active in the union by publishing a regular migrant workers newsletter (the first issue was published in December 2008) in English, Filipino and Polish, by providing translations of important leaflets into Polish and by organising workshops which seek to encourage migrant worker members of UNISON to become active. In particular, the newsletter details information on events run by the Migration Unit which seek to develop community links to support migrant workers. Members of the Unit hope that this will lead to increasing numbers of migrants, especially new Member State workers, joining UNISON. Thus, for example, the workshops are:

³² UNISON, *Migrant workers participation project*, June 2008.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ The information on the Migration Unit was gathered in an interview on 20/10/2008 with the National Development Manager for Migrant Workers who is the head of the Migration Unit which is based in UNISON Headquarters in London.

³⁶ For example, the UNISON website now has a section dedicated specifically to migrant workers. See UNISON, *Migrant workers* available at <http://www.unison.co.uk/migrantworkers/>.

specifically designed to be accessible to everyone with a focus on doing and talking rather than lots of reading and writing. Some migrants who are active in the union already will be there to act as mentors and role models.³⁷

The workshops took place in different locations across the UK. The two-day workshop in Glasgow which was attended by the author of this thesis as a non-participating observer attracted a number of new Member State workers. In line with UNISON's policy, they were treated in the same way as migrant workers from outside the EU. The content of the workshop focused on encouraging the migrants to become active in the union with a view to moving them to become shop stewards. Tactics on how to actively engage with other workers at their respective workplaces were also discussed. The sessions were chaired by different union representatives who spoke a variety of languages such as English, Polish and Tagalog. Participants were encouraged to exchange their views on topics such as rights at the workplace and anti-racism which the union proposed in advance. As the participants came from a wide variety of different backgrounds an emphasis was placed on their different experiences in their home country and in the UK. The discussions were largely interactive with participants moving about the room to come into contact with other participants. In addition to the author of this thesis, a TUC representative was also present as a non-participating observer.

The Migration Unit has set up a new advice scheme offered by UNISON to its members. The scheme provides free immigration advice by telephone to UNISON members. However, this is limited to migrants from outside the European Union. It is not available to EU8 and EU2 workers.³⁸ New Member State workers can only, therefore, get advice through the usual channels of the union.³⁹ Since June 2009 UNISON has also set up a course for its members who do not speak English as their first language. The absence of such a course was criticised by the head of the Migration Unit in an interview conducted during the course of this case study in October 2008. The course targets migrant workers and is free of charge for UNISON members.

Second, UNISON observes structures like the Overseas Nurses Network based in Glasgow which provides support for migrants working as nurses. The network is not linked to any union and is therefore not actively supported by UNISON. Yet, individual members of

³⁷ UNISON, *Migrant Workers Newsletter*, December 2008.

³⁸ UNISON, *Migrant Workers Newsletter*, March 2009.

³⁹ For more information see UNISON, *Welfare Information Sheet Support for migrant workers* available at <http://www.unison.org.uk/acrobat/B2757.pdf>.

UNISON have expressed an interest in supporting the network.⁴⁰ This network is, in principle, open to new Member State workers, however, there has not been a high attendance by workers from the new Member State with the exception of Romanians and Bulgarians as the network usually helps nurses with visa problems which is not a matter of concern for EU8 workers.⁴¹ UNISON has also tried to forge closer links with ver.di on specific issues. This is examined in more detail below.

Finally, recruitment of new Member State workers is mainly undertaken at regional or local level. To help with recruitment, UNISON established a Migrant Workers' Organising Knowledge Bank which aims to share information and good practice amongst branches.⁴² Interviews at the Migration Unit clarified that targeted recruitment of new Member State workers is occurring.⁴³ In particular, UNISON commissioned the Working Lives Research Institute to try to map migrants.⁴⁴ However, the union does not keep a record as to how many members are migrants so it is difficult to evaluate the success of measures.⁴⁵

D. Ver.di

The Vereinte Dienstleistungsgewerkschaft (ver.di), a “multi-service trade union”⁴⁶, was founded in 2001 as the result of a merger between the German Salaried Employees' Union (Deutsche Angestellten Gewerkschaft – DAG), the Trade, Banks and Insurances Union (Gewerkschaft Handel, Banken und Versicherungen – HBV), the German Postal Workers' Union (Deutsche Postgewerkschaften – DPG), the Public Services, Transport and Traffic Union (Gewerkschaft Öffentliche Dienste, Transport und Verkehr – ÖTV), and the Media and Industrial Union (Industriegewerkschaft Medien, Druck und Papier - IG Medien).⁴⁷ Following a number of mergers amongst German trade unions between 1995 and 2001⁴⁸, ver.di was

⁴⁰ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

⁴¹ Telephone interview with the organiser of the Overseas Nurses Network (Interviewee 1), 4/11/08.

⁴² UNISON, *Organising Migrant Workers*, UNISON Branch Handbook.

⁴³ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ Ver.di, *Unity means Strength* available at http://international.verdi.de/ver.di_fremdsprachig/was_ist_ver.di_-_eine_einfuehrung_auf_englisch.

⁴⁷ For more information on the process of merger see Ver.di, *Ver.di-Gründung: Aus 5 wird 1 – So fing alles an mit ver.di* available at <http://geschichte.verdi.de/aus5>.

⁴⁸ B. Keller, ‘Ver.di – quo vadis?’ *WSI Mitteilungen* 9/2007. The number of trade union affiliates in the DGB shrunk from 16 to 8 between 1995 and 2001.

considered to be a unique experiment for the following reasons: it was a ‘mega merger’ of five rather than two trade unions which makes it the largest merger in German trade union history; it intended to create one trade union for the private and public service sector with a heterogenous organisational structure; it was meant to become a merger of equal partners rather than, as had been the case in previous mergers, an acquisition of a smaller trade union by a larger one; it was meant to become a trade union with multiple branches instead of following the traditional German model of ‘one industry, one union’ (‘ein Betrieb, eine Gewerkschaft’); and, it has a matrix structure to reflect the principle of “unity in diversity”.⁴⁹ In particular, the matrix structure was supposed to enable ver.di to successfully represent the diverse interests of its members. However, it has been argued that the structure has instead led to friction between the different sections of the trade union.⁵⁰

Ver.di has 2.3 million members and is one of the largest affiliates of the national confederation of trade unions, DGB.⁵¹ The primary reason behind the merger of five trade unions was to create a big union which would be capable of responding to the challenges facing traditional trade union structures in the German labour market. Accordingly, ver.di aims to:

use the united strength of the services sector itself [...]. Instead of wasting our energy competing with each other, we join forces in recruiting new members and profit from our joint experience and competence. Thus we draft, and fight for, modern answers to social change.⁵²

In doing so, ver.di emphasises that it acts independently of political parties.⁵³ The structure of ver.di is “anchored in the tradition of the trade union movement”⁵⁴ and consists of four levels (national, regional, district, and local) and 13 sectors. In addition, special interest groups such as women, youth, civil servants, and the unemployed, are grouped into their own

⁴⁹ *Ibid* at p. 467: “Im Mittelpunkt dieser drastischen Veränderungen steht ver.di, die in mehrfacher Hinsicht ein Experiment darstellt, unter anderem: als mega merger von nicht nur zwei, sondern insgesamt fünf vormals unabhängigen Einzelgewerkschaften und damit als größter Zusammenschluss in der Geschichte der deutschen Gewerkschaftsbewegung; als umfassende Gewerkschaft der privaten und öffentlichen Dienstleistungssektoren mit entsprechend heterogenen Organisationsstrukturen und Interessenlagen; durch den Charakter eines Zusammenschlusses gleichberechtigter Partner zu einer neuen Organisation (merger), trotz erheblicher Größenunterschiede, anstatt der Übernahme (acquisition) einer kleineren durch eine größere Organisation; durch den Übergang vom Prinzip des Industrieverbandes zu dem der Multibranchengewerkschaft; durch die Entscheidung für die Matrixstruktur (‘Einheit in der Vielfalt’) als einer für Gewerkschaften ungewöhnlichen Organisationsform.”

⁵⁰ *Ibid* at p. 467.

⁵¹ Ver.di note 46 above.

⁵² *Ibid.*

⁵³ *Ibid.*

⁵⁴ *Ibid.*

organisational units.⁵⁵ To date, migrant workers have not been recognised as a special interest group. Instead, they are given the opportunity of promoting their interests in working groups. In addition to providing support for members in the workplace, ver.di also offers help outside the immediate workplace. Thus, they “provide consultancy, career assistance and training.”⁵⁶ Finally, they offer support and training to representatives of works councils and personnel boards.

The case study on ver.di was conducted by establishing their responses to a number of areas linked to the recent European enlargements. Information was gathered first from their press statements, publications and policy papers. This was then clarified in interviews with a number of trade union officials. The results of the case study are detailed below. It should be noted at this stage that the information gathered during interviews with trade union officials, as detailed below, reflects the comments of those officials and does not necessarily represent the views of the author of this thesis.

1. Responses to enlargement and the transitional arrangements

Ver.di’s official policy on the European Union and European enlargement largely follows that of the DGB. Most interviewees at ver.di did not, therefore, comment on this area. Only ver.di’s Europe Officer stated that ver.di is in general in favour of the European Union but it is also increasingly sceptical towards the European Union which, for them, focuses too much on competition and social dumping. Ver.di does not feel that it can be supportive of a Europe of competition between Member States.⁵⁷ In its statements, the DGB is in favour of the European Union and of European integration provided it accords a central role to a European social policy to counteract the perceived negative effects of the internal market. The DGB also made it clear as early as 1999⁵⁸ that it was, in principle, in favour of the European enlargements in 2004 and 2007. However, it recognised that it may not be possible to

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*

⁵⁷ Interview, Europe Officer, Ver.di Headquarters, Berlin, 29/1/2009: “Ver.di möchte Europa aber nicht dieses Europa dem wir zunehmend skeptisch gegenüber stehen. Dieses Europa heisst, das Europa in dem Wettbewerb, Lohndumping und Marktregeln Vorrang beanspruchen. [...] Diesen Staatenwettbewerb wollen wir nicht und dieses Europa wollen wir auch nicht.”

⁵⁸ DGB Bundesvorstand, AK Migration, *EU-Erweiterung: Arbeitnehmerfreizügigkeit, Dienstleistungsfreiheit, Grenzgängerbeschäftigung*, 25/5/1999 at p. 1: “Der Deutsche Gewerkschaftsbund unterstützt die EU-Kommission, den EU-Ministerrat und die Bundesregierung in ihrem Bestreben, die mittel- und osteuropäischen Reformstaaten in die Europäische Union aufzunehmen.”

guarantee all free movement rights to all states immediately upon accession. This could only be done once the new Member States have fulfilled all conditions so as to reduce the negative impact of free moving workers upon the host Member State.⁵⁹

More recently, according to the DGB, “at the beginning of the 21st century, large enterprises are benefiting from the internal market in order to play off workers against each other.”⁶⁰ To counteract this development, the DGB calls for a European social contract (europäischer Sozialvertrag) but it realises, that in order to achieve this, trade unions must europeanise their policies and fields of action.⁶¹ In practice, this europeanisation means according a more central role to European and cross-border issues. Similarly, the DGB is in favour of the recent European enlargements: “despite all the problems associated with the enlargements, the positive elements outweigh the negative ones.”⁶² Furthermore, it states that “the German trade unions are in favour of European integration and are actively working towards their aim that all people should benefit from the enlargements.”⁶³ Ver.di confirms, in a position paper, that trade unions “have always been in favour of the internal market as it has created a framework for the continuing development of the European economy and society.”⁶⁴ However, the internal market lacks a social dimension and ver.di therefore calls for the EU to orientate itself towards being a social market economy.⁶⁵ There is no evidence that ver.di has started to europeanise its policies in line with the proposal by the DGB. The author of this study has, however, noticed an increasing number of position papers on topics related to the European Union. For example, ver.di, in October 2008, published a manifesto on a social Europe⁶⁶ which will be referred to in more detail below. In this manifesto, ver.di also confirmed that the European Union is growing in importance for European citizens, however, it is “in

⁵⁹ *Ibid* at pp. 3 – 4: “Generell kann festgehalten werden, dass die Möglichkeit der Freizügigkeit der Arbeitnehmer und Arbeitnehmerinnen aus den neuen Beitrittsländern sicherzustellen ist. Dies bedeutet jedoch nicht, dass diese Chance allen Beitrittskandidaten zur gleichen Zeit geboten werden muss. Dieses Recht soll erst zuerkannt werden, nachdem das betreffende Land die allgemeinen und konkreten Voraussetzungen erfüllt hat, welche ermöglichen, dass sowohl im Entsendestaat als auch im Aufnahmeland die Vorteile maximal zur Geltung kommen und die Nachteile auf ein Mindestmaß reduziert werden.”

⁶⁰ *Ein europäischer Sozialvertrag für das 21. Jahrhundert*, Sechs Thesen von Michael Sommer, Berlin 7/4/2005: “Am Beginn des 21. Jahrhunderts nutzen vor allem Großunternehmen die Entgrenzung der einst nationalen Wirtschaftsräume, um Belegschaften [...] gegen einander auszuspielen.”

⁶¹ *Ibid*.

⁶² DGB, *EU Erweiterung* available at http://www.dgb.de/themen/europa/eu_erweiterung/eu_erweiterung.htm: “Trotz aller damit verbundenen Probleme überwiegen die positiven Aspekte.”

⁶³ *Ibid*: “Die deutschen Gewerkschaften bekennen sich zur europäischen Integration und setzen sich dafür ein, dass alle Menschen von der Erweiterung der Union profitieren.”

⁶⁴ Ver.di, *Binnenmarkt-Strategie der Kommission* available at http://www.verdi.de/international/archiv/binnenmarkt_der_eu: “Der europäische Binnenmarkt schafft einen förderlichen Rahmen für das Weiterentwickeln der europäischen Wirtschaft und Gesellschaft. Deshalb waren die Gewerkschaften immer für diesen Binnenmarkt.”

⁶⁵ *Ibid*.

⁶⁶ Ver.di, *Einem sozialen Europa Zukunft geben: Manifest zur Europapolitik*, Berlin, October 2008.

desperate need of an alternative economic and social model.”⁶⁷ Following the recent enlargements, ver.di lists a number of problems such as a lack of trade union structures in new Member States and the threat of large numbers of services providers and workers from the new Member States availing themselves of their rights under the European Treaties. However, it concludes that the reaction to the enlargements should “not be less but more Europe but in a different form”⁶⁸ thus again alluding to the lack of a social dimension to the European Union. In theory, therefore, ver.di seems to be in favour of the recent European enlargements. However, with regard to the transitional provisions a different picture emerges.

The DGB and ver.di were in favour of the imposition of transitional measures for the full period that is allowed under EU Law. According to the DGB, “a harmonious assimilation of the different regions is necessary for the continued existence of the European Union so trade unions are in favour of the transitional measures in order to avoid social dumping.”⁶⁹ Moreover, there was a fear that a lack of transitional measures would lead to large numbers of new Member State workers and service providers entering the German labour market. The DGB and ver.di did not feel able to effectively respond to these potential developments at the time of the enlargement. As a result, ver.di adopted a lobbying role to push for the imposition and continuation of the transitional measures whenever they were under review. According to ver.di’s Europe Officer, there were disagreements between the government and the social partners as to whether the transitional measures should be extended following the initial period. Ver.di decided not to actively participate in the discussions but they were not opposed to such an extension.⁷⁰

Since 2004, the DGB has set itself the goal of establishing close relationships with trade unions in the new Member States.⁷¹ Some founding members of ver.di were also in favour of such a policy. However, this has not been a priority for the union as a whole. There also seem to be indications that the different founding members of ver.di have different opinions on this issue. One founding member, in particular, had strategically established strong contacts to

⁶⁷ *Ibid* at p.1: “Die EU braucht dringend ein alternatives Wirtschafts- und Sozialmodell.”

⁶⁸ *Ibid* at p. 33: “Nicht weniger Europa, sondern mehr, aber anders!”

⁶⁹ DGB, *Mai 2004: Die EU wird größer* at p. 16: “Da jedoch ein harmonisches Zusammenwachsen der Regionen Grundvoraussetzung für den Zusammenhalt in der EU ist, drängten u.a. die Gewerkschaften darauf, Übergangsfristen für die Arbeitnehmerinnenfreizügigkeit einzuführen und die Dienstleistungsfreiheit zu beschränken, um Sozial- und Lohndumping zu vermeiden.”

⁷⁰ Interview, Europe Officer, Ver.di Headquarters, Berlin, 29/1/2009: “Die Übergangsfristen als solche wurden weitgehend von allen unterstützt, da es klar war, dass es nicht übergangslos gehen kann. Streit brach aus, als es um die Verlängerung ging. Ver.di hat sich nicht lautstark positioniert, aber tendenziell waren wir dafür, da wir meinten, dass wir noch zwei Jahre brauchen.“

⁷¹ DGB, *Mai 2004: Die EU wird größer*, Berlin, 2004.

Eastern European unions. Ver.di has not continued to develop these strong links and, as a result, they have dwindled. Only sporadic and individual contact is now made with trade unions in the new Member States, as and when it is necessary. Ver.di seems to focus, to a greater extent, on national rather than European issues. One exception is the Migration Unit within ver.di. For example, in September 2009, the Migration Unit at ver.di organised a conference to assess the implications of the end of the transitional provisions in 2011 on trade union policy. However, the outcome of the conference is so far unclear. The activities of the Migration Unit are examined in more depth in relation to new Member State workers below.

2. Responses to new Member State workers

Due to the existence of transitional measures in Germany which restrict access to the labour market for workers and certain service providers, ver.di has not developed an official policy on its response to the new Member State workers. According to the Europe Officer, ver.di does not yet know how to recruit new Member State workers as the union does not have any experience with such types of workers.⁷² Instead, it has said that they need to find ways of offering “advice, help and orientation”⁷³ to those new Member State workers that may come to Germany after the lifting of the transitional arrangements in 2011. Yet at the moment, according to the Europe Officer, new Member State workers do not pose a problem for ver.di as there has not been an increase in the number of new arrivals in those sectors in which ver.di is active.⁷⁴ The Europe Officer recognised that there may be a high number of irregular new Member State workers in the care industry where ver.di is the main trade union but as there are no official figures ver.di has not developed a strategy in this area.⁷⁵ As a result, ver.di has not elaborated any statements of principle in its policy papers on the new Member State workers. The only policy that has been influenced by the European enlargements is that of a minimum wage. Germany does not have a statutory minimum wage and there has been an intense political debate as to the benefits and disadvantages of a minimum wage. The trade unions, and particularly ver.di⁷⁶, support the introduction of a statutory minimum wage

⁷² Interview, Europe Officer, Ver.di Headquarters, Berlin, 29/1/2009: “Wie ver.di sie [Arbeiter aus den neuen Mitgliedsstaaten] rekrutieren wird, wissen wir noch nicht. So eine Strategie muss noch entwickelt werden. Damit haben wir bisher keine Erfahrung.”

⁷³ E. Hannack, ‘Mehr als traditionelle Gastarbeiter-Politik’, *Migration*, ver.di, November 2008.

⁷⁴ Interview, Europe Officer, Ver.di Headquarters, Berlin 29/1/2009.

⁷⁵ *Ibid.*

⁷⁶ For their policy see Ver.di, *Stimmen für den Mindestlohn* available at <http://www.mindestlohn09.de/>.

especially with a view to the lifting of the transitional measures in 2011.⁷⁷ A minimum wage is seen as a mechanism of defence to protect against social dumping by those workers from the new Member States who can avail themselves of the free movement provisions in the Treaty on the Functioning of the European Union (TFEU) from 2011 onwards. Ver.di initially had great difficulty in supporting the idea of a minimum wage as it implied that collective agreements were no longer sufficient to regulate industrial relations. It also meant that ver.di had to accept state involvement in the sphere of industrial relations; an area where regulation is usually left to the social partners and the courts. However, due to the decline in trade union strength through falling membership numbers and the increase in industries that are not covered by a collective agreement, ver.di has recognised the importance of a statutory minimum wage. Ver.di now sees itself as the “driver” of the campaign for a minimum wage.⁷⁸

A different perspective is given by the Migration Officer at ver.di who recognised in an interview that “increased numbers of EU8 workers have arrived in Germany since 2004 but it is difficult to estimate how many have come.”⁷⁹ A large number work as seasonal workers or service providers in industries that are not covered by the transitional measures. However, there are also indications that “many work illegally for limited periods of time due to the geographical proximity of Germany to the new Member States”⁸⁰, thus making them harder to integrate into a trade union. As a result, the Migration Unit has started to pursue a number of strategies in practice.

First, ver.di’s Migration Unit, which has existed since the founding of ver.di, has started to cooperate with the Migration Unit in UNISON on strategies for the integration of new Member State workers. It has also taken part in an e-learning initiative through the DGB with representatives from Poland, the Czech Republic, Latvia, France and the UK, which helps migrant workers to integrate “into life and work in Germany.”⁸¹ Second, the Migration Unit opened a drop-in centre (Migrar) in Hamburg in May 2008, which provides advice and support for illegal migrant workers.⁸² The centre is staffed by volunteers and support from the union was initially lacking but it is now, following the success of the project, very strong. The

⁷⁷ Interview, Europe Officer, Ver.di Headquarters, Berlin, 29/1/2009.

⁷⁸ *Ibid.*: “Es war auch ein schwerer Schritt, zu akzeptieren, dass man den Staat in diesem Bereich um Hilfe bitten muss, da man sich damit auch eingesteht, dass es Bereiche gibt, wo der Tarifvertrag es nicht mehr schafft. [...] Ver.di ist in Deutschland von den Gewerkschaften der Motor der Mindestlohnkampagne.“

⁷⁹ Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

⁸⁰ *Ibid.*

⁸¹ For more information see Ver.di, *Epitome – Leben und Arbeiten in Deutschland* available at <http://epitome.verdi.de>:

⁸² Ver.di, *Migration*, November 2008.

centre was the first of its kind in Germany where a trade union offered advice to *illegal* migrants. Another centre has since opened in Berlin.⁸³ Migrar offers advice in ten languages for those illegal migrants who have been deprived of their rights at their place of work. It does not offer immigration advice. Migrants who avail themselves of Migrar's service are then required to become members of ver.di.⁸⁴ Migrar is mainly used by non-European nationals. Migrar is also prepared to provide advice to new Member State nationals even though they are not usually residing illegally in the country. However, due to the transitional measures in place they have also had difficulty enforcing their labour rights and, as a result, Migrar has offered its services to them.⁸⁵

It should be noted at this stage that ver.di does not generally distinguish between German and migrant workers⁸⁶, but it recognises that different groups of workers may have different needs. This has become particularly evident in the case of migrant workers in recent years. As a result, ver.di has recently accorded migrant workers a special status which recognises their interests within ver.di with a view to encouraging migrant workers to become more active in the union.⁸⁷ Yet this falls short of granting them a separate group status. Ver.di has included the following categories of people within their definition of a 'migrant':

- members who do not have German citizenship;
- migrants who have been naturalised as Germans;
- children of migrants where at least one parent was not born in Germany; and,
- migrants who are defined by law as 'ethnic Germans'.

According to the Migration Officer, the union tries to target their recruitment of these migrants by encouraging migrant members to become active. Moreover, ver.di particularly encourages young migrants to join the union and targets publications at groups of migrant workers. To date, the Migration Unit has not come across language problems in the recruitment of these workers. Also, the Migration Officer interviewed at ver.di did not feel that trade unions should be offering language courses in the case of language problems.⁸⁸ For the Officer, ver.di is not a service provider but an organisation which represents the collective interests of workers. The provision of language courses does not therefore fall within their area of responsibility.

⁸³ However, this only offers advice to domestic workers. Interview, Interviewee 2, Ver.di, Hamburg, 13/3/2009.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ Especially as the Betriebsverfassungsgesetz (Works Constitution Act) from 1972 allowed migrants to stand as candidates for elections to works councils. Prior to this, they only had the right to vote, not the right to be elected. The change in the law meant that migrant workers were equal to German workers in the workplace.

⁸⁷ Hannack note 73 above.

⁸⁸ Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

In their attitude towards migrant workers, ver.di has departed from the policy that it adopted in relation to the Gastarbeiter. The Gastarbeiter were treated in the same way and accorded the same rights as German workers.⁸⁹ As the Gastarbeiter were given easy access to the German labour market they were employed in their industrial sectors in the same way as German workers. Moreover, the Gastarbeiter came from countries which had a trade union tradition and they were thus easy to integrate into German trade unions. The Gastarbeiter who stayed in Germany were also less problematic to organise in a trade union than the posted workers who came to Germany under bilateral agreements with the Central and Eastern European (CEE) states in the early 1990s, as Gastarbeiter were usually in Germany on a permanent basis.

Current migrants, and especially those from the new Member States, do not have the same political background as the Gastarbeiter and are much harder to integrate into a trade union. As a result, ver.di is slowly deciding to adopt a different policy targeted specifically at migrant workers.⁹⁰ This means recognising that their needs are different from German workers yet at the same time fighting for equal treatment with German workers. Granting migrants a special status within ver.di is a first step in this direction.⁹¹ There have also been calls for ver.di to employ more migrants in order to “make migration visible.”⁹² In April 2009, only 20 out of 3500 employees had a migrant background.⁹³

Finally, the Migration Unit hosted a conference entitled ‘Open Labour Markets in Europe in 2011’ at ver.di in September 2009. The delegates were meant to discuss possible trade union responses to the lifting of the transitional measures in 2011. Delegates from other Member States such as the UK, Ireland and the Scandinavian countries were meant to describe their experiences following the enlargements in 2004. Neither the author of this thesis nor a UNISON representative were invited to the conference. The outcome of the conference is not yet clear. However, the hosting of such a conference demonstrates that ver.di is slowly preparing itself for the abolition of the transitional measures in 2011.

⁸⁹ This was decided as trade union policy by the DGB at a meeting in 1971 for all its affiliates: DGB Bundesvorstand, *Die deutschen Gewerkschaften und die ausländischen Arbeitnehmer*, 2/11/1971.

⁹⁰ For more information on the theoretical position of ver.di towards migrants in general see Ver.di, *Richtlinienband*, 2000 at pp. 67 – 72. However, as there is no specific policy on new Member State workers this is not developed further in this thesis.

⁹¹ The information in this paragraph was gained in an interview with ver.di’s Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

⁹² Quoting S. Sayin in ‘Der Migration Gesicht geben’, *ver.di News*, 4th April 2009.

⁹³ *Ibid.*

E. Level of Cooperation

1. Ver.di – UNISON

The third theme which was examined was the level of cross-border cooperation among trade unions. This was considered to be important as external factors, particularly the European Union's policy of europeanising national legal systems which is discussed in chapter three, have the potential to influence the way in which trade unions act. Moreover, cooperation across borders may open up new possibilities for trade unions facing similar challenges. In the case studies the main focus was on cooperation between ver.di and UNISON. The influence of the European Trade Union Confederation was also touched upon to explore whether it is trying to coordinate national trade unions and what role national trade unions perceive for the ETUC. Other aspects such as cooperation with civil society groups, other trade unions, and the role of the European Federation of Public Service Unions⁹⁴ and Public Services International (PSI) were mentioned in interviews. However, these aspects were not explored in any detail as the focus of this thesis is a comparison of ver.di's and UNISON's responses to the European enlargements with a view to ascertaining whether the unions are cooperating with each other. It was, therefore, not necessary to elaborate on other types of cooperation. The ETUC, rather than EPSU, was chosen as it is involved in the European social dialogue and therefore has the potential to be influential in the European legislative process.

UNISON and ver.di signed a Memorandum of Understanding in October 2004⁹⁵ with a view to coordinating key aspects of their work. In particular, the unions believed that:

[b]y working more closely together [they] can considerably enhance the conditions of workers in both the private and public sector. The two unions will also work more closely on a range of policy issues, particularly at the European level and intend to undertake joint action in a number of transnational companies engaged in the provision of public services where the two unions have members.⁹⁶

Cooperation between ver.di and UNISON was meant to take the form of “developing common policies for public services [...], joint recruitment activity, joint negotiating and

⁹⁴ It should be noted that the European Federation of Public Service Unions published a report in March 2010 in association with the Labour Research Department entitled *Unions in national, regional and local government facing the challenges of migration: a survey of EPSU affiliates*. This report surveyed *inter alia* the responses of ver.di and UNISON to migrant workers. The results confirm the findings of the case studies in this thesis despite not distinguishing between migrant workers from inside and outside the European Union.

⁹⁵ Memorandum of Understanding, available at http://www.unisonnw.org.uk/documents/general/Ver_di_Memo_of_understanding.pdf.

⁹⁶ *Ibid.*

bargaining and joint campaigning.”⁹⁷ In practice, cooperation has taken place in a number of areas. There have been exchanges of a number of letters between the President of ver.di and the General Secretary of UNISON conveying support for their respective national campaigns. In addition, an interview with UNISON clarified that UNISON “works very closely with ver.di on policy at an international level.”⁹⁸ UNISON and ver.di also published a discussion document together on “The Future of Public Services in Europe” and ver.di has invited the General Secretary of UNISON to its National Congress in the past. However, the practical work seems to have been limited to certain regions⁹⁹ or through cooperation in European Works Councils.¹⁰⁰ More recently, ver.di has increasingly been citing the UK’s approach to the minimum wage as an example for Germany.¹⁰¹

In relation to migrant workers, there is limited cooperation between the Migration Unit at UNISON and the Officer responsible for migrant workers at ver.di. UNISON is very keen to expand cooperation in this area.¹⁰² In particular, UNISON is interested in the German trade unions’ history of engaging with migrant workers during the period of the Gastarbeiter scheme as they feel that the German unions’ experience may help them to integrate new Member State workers into UNISON. Ver.di is also interested in greater cooperation in the area of migration but it is not sure how that cooperation should progress. There seem to be stark differences in the approaches to migrant workers between UNISON and ver.di and the Migration Unit at ver.di is unclear as to UNISON’s position in this area.¹⁰³

2. Within and through the ETUC

The ETUC is in favour of :

a Europe which is both ‘more’ and ‘better’; a Europe which is integrated around rights and values including peace, liberty, democracy, fundamental rights, equality, sustainable development, full employment and decent work, social dialogue, the

⁹⁷ *Ibid.*

⁹⁸ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

⁹⁹ For example UNISON’s Greater London Region has set up a twinning agreement with Ver.di’s Berlin/Brandenburg region.

¹⁰⁰ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

¹⁰¹ See, for example, Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

¹⁰² Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

¹⁰³ Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

protection of minorities, universal and equal access to high quality public services, and a successful economy which supports social progress and employment protection.¹⁰⁴

However, in relation to the free movement of new Member State workers, the ETUC delegates to national level affiliates as to whether the transitional measures are necessary. At the same time, they are of the opinion that “such measures should not only be adopted or continued to ‘buy time’ and to postpone to a later date the moment at which free movement of workers will have to be a fact”¹⁰⁵, as this means that Member States which have transitional measures are not able to “properly analyse the underlying problems and to develop more sustainable policies to address them.”¹⁰⁶ As was pointed out in interviews, “the ETUC adopted a careful position [on the transitional measures]”¹⁰⁷ as national trade unions could not agree on a common position. Moreover, the ETUC’s Confederal Secretary emphasised that the ETUC is not against free movement *per se*, but it feels that the conditions are not present in all Member States to allow complete free movement following the European enlargements.¹⁰⁸ Above all, Germany and Austria were against the ETUC calling for a progressive abolition of the transitional measures, whereas the UK representatives supported the ETUC’s position.¹⁰⁹ In addition, in its position on the transitional measures the ETUC has repeatedly stressed the need to consult its national affiliates.¹¹⁰ The difficulty is, however, that the members of the ETUC are national confederations, rather than individual trade unions, so it is hard to judge whether consultation and information is passed on to a national level. Large cultural differences between members also make communication difficult.¹¹¹ The ETUC does encourage and facilitate an exchange of good practice in terms of recruitment of new Member State workers, but this has not been easy as

a lot of trade union structures are too static. They are made for long-term relationships but increasingly workers fall outside this category.¹¹²

Instead, there have been suggestions that unions should be more service-oriented.¹¹³

From UNISON’s point of view, the ETUC has not, so far, taken on a strong coordinating role in the area of migration. However, this is due to the different policies adopted at national level

¹⁰⁴ ETUC, *The Seville Manifesto*, 2007.

¹⁰⁵ ETUC, *Towards free movement of workers in an enlarged European Union*, Resolution adopted by the ETUC Executive Committee in their meeting held in Brussels on 5 – 6 December 2005.

¹⁰⁶ *Ibid.*

¹⁰⁷ Interview, Confederal Secretary ETUC, ETUC Headquarters, Brussels, 25/2/2009.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ ETUC, note 105 above.

¹¹¹ Interview, Confederal Secretary ETUC, ETUC Headquarters, Brussels, 25/2/2009.

¹¹² *Ibid.*

¹¹³ *Ibid.*

which make it difficult for the ETUC to adopt a single, clear policy.¹¹⁴ In other areas, for example the negotiation of the parental leave agreement, the ETUC actively consulted national trade unions. UNISON was very interested in this and felt it to be an effective process.¹¹⁵ Ver.di also recognises that the ETUC has attempted to coordinate national trade union policy in the area of migration and it welcomes the initiatives of the ETUC. However, there is scope for more to be done.¹¹⁶ In particular, the Europe Officer at ver.di criticises that ETUC positions and policies are usually based on the lowest common denominator amongst the affiliates. As a result, they are often not very effective.¹¹⁷ Again, this is due to the cultural differences between ETUC affiliates. The criticisms of ver.di and UNISON show that there is a desire for the ETUC to increase its level of coordination and consultation amongst national trade unions.

F. Conclusion

This chapter set out to describe two case studies which illustrate how trade unions in Germany and the UK are responding to the recent European enlargements and new Member State workers who avail themselves of their free movement rights under the Treaty on the Functioning of the European Union. In doing so, the chapter provides an insight into and understanding of how trade unions operate inside, across and around the national and European legal frameworks which regulate them. The case studies show that trade unions in Germany and the UK are in favour of the European Union and the European enlargements. However, they recognise that the new Member State workers pose a problem for them, as they do not fit neatly into existing structures targeted at migrant workers. This makes it difficult to appeal to new Member State workers, as they possess characteristics which distinguish them from the ‘typical’ migrant worker that trade unions in Germany and the UK were accustomed to integrating into their structures. It is clear that, in their reactions to the new Member State workers, trade unions are influenced by their traditional responses to migrant workers. These traditional responses are explained in chapter four.

¹¹⁴ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

¹¹⁵ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

¹¹⁶ Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

¹¹⁷ Interview, Europe Officer, Ver.di Headquarters, Berlin, 29/1/2009: “Daher [wegen der kulturellen Unterschiede] ist es auch sehr schwer, eine Debatte beim europäischen Gewerkschaftsbund zu Ende zu führen, da sie immer auf dem kleinsten gemeinsamen Nenner endet, der aber oft so klein ist, dass er nicht mehr viel Wert ist.“

There is evidence that trade union responses are heavily influenced by the role that they adopt within their national legal systems. These are elaborated in chapter two. Thus, for example, both UNISON and ver.di adopt a strong governmental role in order to make their voices heard. However, despite adopting various roles, the responses of both UNISON and ver.di focus largely on a national level. This is a natural development as both unions act at a national level. However, it is also symptomatic of the fact that trade unions often struggle to avail themselves of the mechanisms that the EU offers. Chapter three sets out a number of examples of europeanisation which influence the environment within which trade unions act. Thus, as europeanisation is a two-way process, ver.di and UNISON could become involved to a much greater extent in the implementation of legislation or the exchange of information through the ETUC or the Open Method of Coordination (OMC). This could help them in their responses to the European enlargements and the new Member State workers. Equally, the case studies show that UNISON and ver.di could learn from each others' experiences. Indeed, both trade unions would welcome such an exchange of information. However, to date, there has been a lack of cross-border interaction. This is mainly due to the historic differences between the national labour law systems and the trade unions' structures, which makes it difficult to understand each others' policies. These differences are slowly being eroded and there is scope for trade unions in both countries to learn from each others' experiences. Finally, the ETUC has the potential to play a much stronger role in coordinating, influencing and helping trade unions at a national level. In doing so, it could provide a link between the national and European level and it could support trade unions when they are acting inside, across and around the European legal framework. Both ver.di and UNISON are, in principle, in favour of the ETUC adopting such a role. However, due to the cultural differences between national affiliates and the problems that this creates, it is not clear how the ETUC could aid national trade unions in responding to the European enlargements and the new Member State workers. Chapter six analyses the case studies set out in this chapter against the background of the theoretical framework which is found in the first part of this thesis, in order to provide an answer to the following research questions: firstly, how have trade unions responded to the challenges of European enlargement? Following on from this, secondly, how have trade unions responded to, and what impact has their responses had, on the new Member State workers

CHAPTER SIX

ANALYSIS OF GERMAN AND BRITISH TRADE UNION RESPONSES

The purpose of this thesis is to explore the reactions of German and British trade unions to the European enlargements and the new Member State workers with a view to demonstrating the way in which trade unions operate inside, across and around the national and European legal frameworks which regulate them. Suggestions are made on this basis as to how trade unions could respond in order to integrate new Member State workers into their structures. The final chapter of this thesis uses the information set out in previous chapters in order to undertake a contextualised comparison of trade union behaviour in responding to the changing regulatory and opportunity structures which present themselves following the recent European enlargements. Thus, this chapter analyses the responses of UNISON and ver.di in light of the different legal frameworks across, around and within which they operate. This is done with a view to suggesting ways in which trade unions could react so as to benefit from the opportunities presented to them.

A. Introduction

German and British trade unions are rooted in different legal and industrial relations systems. However, increasingly, the differences between the two systems are being eroded and more and more similarities are becoming evident. The European Union's (EU) policy of europeanising national labour law systems has undoubtedly played a role in this process. Prior to the European enlargements in 2004 and 2007, trade unions were facing a number of problems. As Mückenberger et al. point out, "far-reaching technical, economic and socio-cultural changes have been threatening the foundations of all European trade unions since the 1970s."¹ According to trade unions, this has led to increasingly individualistic societies.² Yet

¹ U. Mückenberger, C. Stroh & R. Zoll, 'Einleitung: Die Modernisierung der Gewerkschaften in der Europäischen Union' in U. Mückenberger, E. Schmidt & R. Zoll (eds.), *Die Modernisierung der Gewerkschaften in Europa*, Verlag Westfälisches Dampfboot, Münster, 1996 at p. 9: "Seit den 70er Jahren bringen tiefgreifende technische, ökonomische und soziokulturelle Veränderungen die Fundamente der Gewerkschaften aller europäischen Länder ins Wanken."

² D. Esslinger, 'Teilzeit und Leiharbeit fressen Demokratie auf' *Süddeutsche Zeitung* 14/4/2010.

Mückenberger et al. argue that this is merely “an excuse”³. In their opinion, trade unions should focus on the wider problems of societal change. For them, “the nature of work and lifestyle as well as the generational and gender make-up of society are undergoing a process of change.”⁴ Traditional trade union structures are no longer appealing to members and trade unions who often do not know how to react to “explosive questions on work and identity, the environment, occupational skills, health and safety at work, and migration.”⁵

For trade unions in Germany and the UK, these developments are reflected in a strong decline in membership figures which have far-reaching consequences. As membership is a strong indicator of workers’ capacity for collective action⁶, a fall in membership points to a decline in union strength. Membership levels are obviously not the only means by which union strength or weakness can be measured. One could also, for example, look at the coverage of collective agreements. However, “union density – membership as a proportion of all wage and salary earners – is the most readily available indicator for measuring the strength of a union movement.”⁷ In both Germany and the UK this has declined starkly over the last two decades and trade unions in both countries are concerned about the implications of this decline. In addition, “the transition from an industrial to a service economy erodes the basis for union organisation.”⁸ Thus, trade unions in Germany and the UK are threatened by the increasing “privatisation, down-sizing and outsourcing of the labour market.”⁹ This has been partly driven by government reforms in Germany and the UK to change the structure of the traditional welfare state, of which trade unions in both countries were an integral part in order to improve the competitiveness of their respective economies. The traditional employer-employee relationship, which was characterised as being “permanent, continuous and full-time in a medium-sized or large enterprise”¹⁰ and which was at the heart of trade union

³ Mückenberger, Stroh & Zoll note 1 above at p. 9: “Gewerkschaften und Gewerkschafter nennen häufig die wachsenden Individualisierungstendenzen als einen wichtigen Grund für die gegenwärtige gewerkschaftliche Krise. Unserer Auffassung nach ist diese Betrachtungsweise jedoch lediglich ein Vorwand zur Umgehung eines radikalen Wandels innerhalb der Gewerkschaften.”

⁴ Mückenberger, Stroh & Zoll note 1 above at p. 9: “Lebens- und Arbeitsstile verändern sich, das Geschlechterverhältnis und das Generationenverhältnis sind im Umbruch.”

⁵ Mückenberger, Stroh & Zoll note 1 above at p. 9: “Auf viele gesellschaftlich brisante Fragen in Bereichen wie Arbeit und Identität, Ökologie, berufliche Qualifikation, Arbeits- und Gesundheitsschutz und Arbeitsmigration haben die Gewerkschaften keine schlüssigen Antworten.”

⁶ B. Ebbinghaus and J. Visser, ‘When Institutions Matter – Union Growth and Decline in Western Europe’ (1999) *European Sociological Review* 135.

⁷ *Ibid* at p. 135.

⁸ *Ibid* at p. 141.

⁹ *Ibid* at p. 141.

¹⁰ Mückenberger, Stroh & Zoll note 1 above at p. 11: “Das Normalarbeitsverhältnis als dauerhaftes, kontinuierliches, qualifiziertes Vollzeitverhältnis in einem mittleren oder größeren Betrieb war auch Bezugspunkt gewerkschaftlicher Politik.”

policy, has also slowly been eroded. Trade unions have often failed to adapt their structures to these changing employment relationships. According to Mückenberger et al, trade union structures in Europe are traditionally characterised by a certain amount of “democratic centralism: trade union leaders had broad competencies whereas the members who showed a high degree of willingness to comply, delegated representation of their interests to the trade union structures.”¹¹ These structures are no longer able to effectively respond to first, “the new work patterns which have replaced dying industries” and, second, “workers who have become economically specialised and culturally differentiated.”¹²

Apart from developments at a national level, such as the privatisation or decline of industries, unions are also facing the threat of businesses outsourcing work to countries with lower production costs. Thus, globalisation has played a role in the demise of traditional trade union structures. Moreover, “changes in social values and expectations of workers towards unions”¹³ has forced unions to reassess their traditional role as worker associations. It was argued even before the recent European enlargements that trade unions needed to modernise their organisational structures and their political interests in order to survive. In light of the increasing influence of the European Union and globalisation on national labour law systems, they need to “bridge the gap between supranational economic spheres and national politics.”¹⁴ However, this can only be done through “a decentralisation of their organisational structures thus linking the trade union to the world of its (actual and potential) members.”¹⁵

Following the European enlargements in 2004 and 2007, some of the problems facing trade unions have been aggravated. For example, the provisions in the Treaty establishing the European Community providing for free movement of workers and services allowed new Member State workers and businesses to move to Germany and the UK thus increasing the existing problems for trade unions in both countries. As a result, trade unions in both

¹¹ Mückenberger, Stroh & Zoll note 1 above at p. 12: “Eine wie auch immer geartete Form von “demokratischem Zentralismus” entwickelte sich in allen europäischen Gewerkschaften: Die Führung war mit umfassenden Kompetenzen ausgestattet, während die Mitglieder ihre Interessenvertretung an den Apparat delegierten und sich durch hohe Folgebereitschaft auszeichneten.”

¹² *Ibid* at p. 17: “Arbeiter haben sich wirtschaftlich spezialisiert und kulturell differenziert, alte Industriezweige und Berufe sterben [...] im Dienstleistungs- und Informationsbereich entstehen völlig neue Berufsbilder.”

¹³ Ebbinghaus and Visser note 6 above at p. 143.

¹⁴ Mückenberger, Stroh & Zoll note 1 above at p. 24: “Sie müssen ihre Modernisierung durch Internationalisierung (und zunächst Europäisierung) ihrer Organisationsstrukturen und Interessenpolitik betreiben und somit die Kluft zwischen supranationalen Wirtschaftsräumen und nationaler Interessenpolitik schließen.”

¹⁵ *Ibid* at p. 24: “Sie müssen ihre Organisationsstrukturen dezentralisieren und so die Kluft zwischen hochzentralisierten Organisationsstrukturen und der Lebenswelt ihrer (aktuellen und potentiellen) Mitglieder überbrücken.”

countries are struggling to find ways to respond to changing regulatory and opportunity structures in their respective countries. The purpose of this thesis is to explore the reactions of German and British trade unions to the European enlargements and the new Member State workers. In doing so, the thesis provides a structure for analysing the conduct of trade unions in their responses to the challenges of European enlargement. The significance of different legal frameworks at a national and European level is taken into account in order to explain the ways in which trade unions respond to enlargement and the new Member State workers. The conduct of trade unions manifests itself in a variety of ways. First, trade unions traditionally focus on operating *within* a national legal system which is, however, increasingly being affected by the process of europeanisation. Second, trade unions are slowly beginning to operate *across* national legal frameworks by, for example, cooperating with unions in other countries who are facing similar problems. Finally, trade unions can respond to the challenges of European enlargement by involving themselves in, for example, the process of europeanisation in order to operate *around* legal systems. On the basis of the analysis of trade union conduct, suggestions are made about how trade unions could respond to the challenges of European enlargement in order to integrate new Member State workers into their structures. So far, this thesis has examined the legal frameworks at a national level and European level which influence trade union behaviour. Following an exploration of trade unions' historic approaches to migrant workers and the European Union, this thesis then examined two practical case studies which illustrate how trade unions are reacting, in practice, to the European enlargements and the new Member State workers. All of this information forms the background to this chapter which undertakes a contextualised comparison of trade union responses to the changing regulatory and opportunity structures which present themselves following the recent European enlargements.

B. Structure of analysis

As a first step, this chapter analyses and compares the results of the case studies on the responses of UNISON and ver.di to the European enlargements and the new Member State workers. It also places the case studies within the context of the theoretical framework expounded in the earlier chapters of this thesis. After focusing on UNISON and ver.di's responses as evidenced by the case studies, this chapter then contextually analyses and compares those responses in light of the legal structures within and across which the two trade

unions operate. At this stage, the trade unions' practical responses are also measured against the expectations set for them at the end of chapter four. This chapter looks separately at what role national legal systems and the European legal framework play in trade union responses. Suggestions are also made throughout as to the types of responses available to trade unions facing the challenge of adapting to the changing opportunity and regulatory structures in Germany and the UK, coupled with the pressures of an enlarged European Union. Even though the focus is largely on two specific trade unions, general conclusions can be drawn about how trade unions operate inside, around and across national and European legal frameworks in responding to changing regulatory and opportunity structures. This thesis therefore develops a new model of comparative European labour law in order to provide a contextualised understanding of trade union behaviour.

C. Analysis of the case studies

Trade unions have often faced a dilemma in both Germany and the UK on how to react to migrant workers. The brief introduction to historical trade union responses to migrant workers given in chapter four illustrates this. According to Penninx and Roosblad¹⁶, one of the major problems for trade unions is whether special policies, services and facilities should be established for migrants and ethnic minority workers. The case studies in chapter five demonstrated that British and German trade unions have reacted in different ways in this area. In particular, British trade unions have focused, to a much greater extent than their German counterparts, on the ethnic origin of workers. This has led them to adopt specific policies for different ethnic groups. UNISON and ver.di's current responses to the new Member State workers build on these historic structures. Before comparing and analysing their responses, it is necessary to first explain and distinguish them in order to achieve clarity in relation to their responses. This will enable a preliminary comparison of their responses using the material gained in the case studies. Moreover, it allows an assessment of whether ver.di and UNISON are reacting to the European enlargements and the new Member State workers in the ways in which one would expect them to react, as set out at the end of chapter four.

¹⁶ R. Penninx and J. Roosblad (eds.), *Trade Unions, Immigration, and Migrants in Europe 1960-1993*, Berghahn Books, Oxford, 2000.

In Penninx and Roosblad's work, John Wrench¹⁷ suggests five ways in which British trade unions react (and have reacted in the past) to migrant workers: racial exclusion, incorporation, partial autonomy, race and class perspective, and separatist. These categories are explained in more detail in chapter four. Wrench's classification provides a useful overview of trade union policies towards migrant workers and it is used in this chapter as a guide to clarify German and British trade union responses. There are certain disadvantages in using Wrench's approach. First, the classification was established with British trade unions in mind. It was not intended to serve as a generic classification of trade union responses to migrant workers. This could make it difficult to apply the approach to German trade unions. However, the results of the case study on ver.di demonstrate that the union can also be classified within Wrench's categories. The justification for this assertion is set out in the analysis of the case studies (below). Second, Wrench's categories do not take into account discrepancies in approaches to migrant workers that may exist between different levels and branches of the trade union. This lack of differentiation seems to be a recurring problem in the literature on trade unions and migrant workers.¹⁸ However, in its analysis, this chapter focuses on the policies of trade unions at a national level. The absence of any distinction between national and regional-level policies of trade unions in Wrench's approach is not, therefore, problematic. Despite the difficulties, Wrench's classification provides a useful tool for the analysis of trade union attitudes to migrant workers. In particular, Wrench moves beyond Penninx and Roosblad's¹⁹ description of trade union responses to migrant workers by providing a variety of categories which can be used to describe trade union behaviour. These categories can guide an analysis of trade union reactions to migrant workers, as they provide a step-by-step distinction of the different levels of integration of migrant workers into trade union structures. Despite the criticisms of Wrench's classification, the categories can therefore achieve clarity in relation to UNISON and ver.di's responses in order to successfully analyse their reactions to migrant workers.

¹⁷ J. Wrench, 'British Unions and Racism: Organisational Dilemmas in an Unsympathetic Climate' in R. Penninx and J. Roosblad (eds.), *Trade Unions, Immigration, and Migrants in Europe 1960-1993*, Berghahn Books, Oxford, 2000 at pp. 149 – 152.

¹⁸ This criticism has been voiced by Lunn in K. Lunn, 'Complex Encounters: Trade Unions, Immigration and Racism' in J. McIlroy, N. Fishman & A. Campbell (eds.), *British Trade Unions and Industrial Politics: The High Tide of Trade Unionism, 1964 – 1979*, vol. 2, Ashgate, Surrey, 1999.

¹⁹ Penninx and Roosblad note 16 above at pp. 4 – 12: Penninx and Roosblad explain that trade unions must first decide whether they support or oppose migration; second, they must find ways to recruit migrants; and, third, they must decide whether to devise special policies for recruited migrants that meet their particular concerns.

1. UNISON

The responses of UNISON to the new Member State workers fall within the third category of Wrench's classification: they have adopted union rules, structures and policies to allow for the experiences of exclusion and racism of the migrant workers membership. The internal structure of UNISON represents the diversity of its members by having organised sections representing the interests of its women, black, disabled, and gay and lesbian members.²⁰ After initially being quite hostile towards migrant workers, the union relied heavily on the principle of 'self-organisation' in order to ensure for fair representation of its members. Migrant workers were historically represented within the category of 'black workers' as the majority of workers, with the exception of the European Voluntary Workers, who arrived in the UK after the end of the Second World War, were of a black ethnic background. Adapting union structures and policies to allow for the experiences of exclusion and racism of the minority black membership led to the creation of black members committees which strived to represent migrant workers.

The term 'black' in this context is now used by the union as a political term to reflect discrimination, rather than as a racial expression which reflects the ethnic origin of workers.²¹ The black workers/members committees, which UNISON has set up at a branch, regional and national level²² with a view to gaining equality in the workplace, now have a wide scope. As a result of redefining the term 'black' to reflect discrimination rather than race, any disadvantaged worker could, in theory, consider themselves as a 'black' member.²³ Hypothetically, women or gay workers could fall under the definition of a 'black' member. This was not deemed a satisfactory solution because women and gay workers struggle with issues which differ from those of black ethnic workers. UNISON has extended the principle of self-organisation to cover other groups of workers such as women, disabled and gay members. However, for migrant workers irrespective of their ethnic background, the first point of reference remains the 'black' workers/members committees. There is no general body responsible for migrant workers. This implies that a new Member State worker will fall under the ambit of the black workers/members committees. This is a concept which is

²⁰ Encyclopaedia Britannica, *UNISON*, Encyclopaedia Britannica, Encyclopaedia Britannica Online available at <http://www.britannica.com/EBchecked/topic/1232242/UNISON>.

²¹ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

²² For more information see UNISON, *Black Members* available at <http://www.unison.co.uk/blackmembers/index.asp>.

²³ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

difficult to convey to workers from the new Member States, the majority of whom are not of a black ethnic background. They also have different characteristics to the migrant workers²⁴ who arrived in the UK from outside the European Union for whom the black workers committees were originally set up. The International Officer at UNISON recognised this problem by focusing on the problem “that most migrants who come from Europe do not define themselves as ‘black’ so they do not fit neatly into the union’s structures.”²⁵ This was confirmed by the National Development Manager for Migrant Workers at UNISON who argued that “self-organisation is not seen as adequate for white migrants.”²⁶ Instead, therefore, the Migration Unit is focusing on other techniques such as language courses or workshops, outlined in more detail in chapter five. Whether these mechanisms to organise new Member State workers will prove successful remains to be seen. It is difficult to assess the success of UNISON’s policies regarding new Member State workers as a lot of them have only recently been implemented. Moreover, UNISON does not keep a record of those members who are migrants.

The concept of black workers/members committees is also alien to many continental European workers and trade unions. In Germany, as shown in chapter four, unions did not historically differentiate in their integration of migrant and indigenous workers. This was mainly due to the fact that the Gastarbeiter and the posted workers who constituted the majority of migrants entering the country, only had controlled access to the labour market and had to abide by the applicable collective agreements. They did not therefore pose a threat to the authority of trade unions by potentially undercutting German workers’ wages. For British trade unions, migrants could historically be distinguished mainly by their ethnic origin as well as the type of discrimination (racial exclusion) that they suffered. New Member State workers pose different problems for German and British trade unions. Unlike the Gastarbeiter and the posted workers, new Member State workers will have free access to the German labour market as European citizens from 2011 onwards. Trade unions cannot, therefore, control their presence in the same way as they did with the Gastarbeiter. In the UK, new Member State workers face discrimination but this is not usually based on their ethnic origin. Instead they pose different problems such as the language barrier which makes them hard to recruit. In

²⁴ This was explored in more detail in chapter four.

²⁵ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

²⁶ Interview, International Officer and National Development Manager for Migrant Workers, UNISON Headquarters, London, 28/5/2009.

both countries, trade union structures are, so far, not able to accommodate these ‘new’ migrant workers.

Based on the literature which is examined in chapter four, one would expect UNISON to extend the principle of self-organisation to new Member State workers in order to incorporate them into its existing structures. Yet it has been recognised by UNISON that its current structure is not adequate to deal with the large numbers of workers from Central and Eastern Europe that have arrived in the UK following the recent European enlargements.²⁷ Under its current structure, the black members committees would have been responsible for integrating and representing new Member State workers. However, new Member State workers possess different characteristics to those migrants for whom the black members committees were originally set up. UNISON’s structure for representing migrant workers is therefore no longer adequate to respond to the consequences of the European enlargements. Alternative solutions are gradually being examined. In particular, UNISON is considering reopening the discussion on the usefulness of ‘self-organisation’. Thus, UNISON may be moving to incorporating migrant workers without providing special organisational advantages to them. The recently established Migrant Workers’ Unit which caters for the special needs of migrant workers²⁸ as a whole and new Member State workers in particular, illustrates this point. The policies adopted by the union, such as the Migrant Workers Participation Project which is discussed in more detail in chapter five, further illustrate that UNISON is attempting to change its approach to migrant workers.

Overall, the findings on UNISON’s responses to European enlargement and the new Member State workers have been positive. Based on British trade unions’ historic attitudes to the EU one would have expected UNISON to adopt a positive approach to the EU and the recent enlargements. This matches the position in principle which UNISON adopted on a number of issues and which has largely been followed in practice. In line with this, UNISON supported the decision not to impose transitional measures for the 2004 enlargements and the union is against the ongoing transitional measures which were placed on Romanian and Bulgarian workers in 2007.

²⁷ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

²⁸ For more information see UNISON, *Migrant workers* available at <http://www.unison.co.uk/migrantworkers/index.asp>.

In their responses to migrant workers a more differentiated picture emerges when one compares their statements in principle and their practical reactions. UNISON set itself a number of goals under the framework of the Migrant Workers Participation Project regarding the recruitment and organisation of new Member State workers. A lot of these policies have been implemented at a practical level. Above all, 2009 witnessed a surge in the number of measures adopted to facilitate the recruitment, organisation and integration of new Member State workers. There seem to be two main reasons behind the union's efforts to recruit migrant workers. First, as a result of the numerous reports on the exploitation of new Member State workers in the UK, UNISON wishes to integrate the workers into its structures in order to prevent wage-undercutting of its members. Second, UNISON is seeking support for its campaign against the BNP by recruiting migrant workers. To an extent, therefore, UNISON is showing solidarity with migrant workers. This seems to be a conscious decision as UNISON is aware of the fact that British trade unions were not always welcoming of migrant workers. However, UNISON also faced a dilemma as to whether to support 'British' or migrant workers during the debate surrounding the 'British Jobs for British Workers' dispute in 2009. This is discussed in more detail in chapter four. While UNISON has therefore begun the active recruitment, organisation and integration of new Member State workers into its structures, not all proposed policies have actually been implemented. For example, the advice scheme offered by the union is not yet open to migrants from the new Member States, despite the fact that UNISON defines a migrant worker as "someone who has come from abroad to work in the UK."²⁹ Even though UNISON took the decision not to distinguish between workers from inside and outside the EU, it does so for the advice scheme.

Thus, the specific problems facing new Member State workers, such as exploitation in the workplace, can only be dealt with through the traditional trade union structures, even though they face similar problems to non-EU workers. This may be a further indication that UNISON is trying to move away from the principle of 'self-organisation'. Yet as a union that has always emphasised the need to provide structures for disadvantaged groups of workers, UNISON fails, in this respect, to adequately accommodate migrant workers from the new Member States.

The workshop which was organised to encourage migrant worker members of UNISON to become active was well attended by new Member State workers. There have also been signs

²⁹ UNISON, *Organising Migrant Workers*, UNISON Branch Handbook at p. 4.

that other policies have been positively received by migrant workers.³⁰ However, the International Officer at UNISON suggested that the union may need to engage in a wider debate on how to organise and communicate with migrant workers whether European or non-European in the future.³¹ As such a debate lies in the future, it is not possible to analyse it in more detail at present. However, the policies of UNISON show that methods of treating new Member State workers as a separate category to 'British' workers and of providing for their special needs reflect the historical attitude of British trade unions to migrant workers. This is what one would have expected based on the literature examined in chapter four. The concerns about the merits of 'self organisation' are a new development in British trade union responses to migrant workers. Thus, their reactions do not entirely conform with expectations.

2. Ver.di

It is difficult to classify ver.di's responses to the new Member State workers due to the existence of the transitional measures in Germany which have been heavily supported by the trade unions. These prevent large numbers of new Member State workers from entering the labour market. Like the regime which applied to the Gastarbeiter and the posted workers, the transitional measures only permit those new Member State workers who are needed in the labour market to enter the country in order to work. By imposing transitional measures Germany has prolonged the period during which it can control access to its labour market.

Historically, German trade unions fell under the second category of Wrench's classification. They extended union membership to migrant workers, but the basis of inclusion went no further than the level which was consistent with a traditional trade union class analysis. Thus, no special measures were adopted to distinguish between different types of workers. In response to the Gastarbeiter, trade unions followed this approach, by extending union membership to the workers who arrived under the scheme with no further inclusion. While the unions did provide language courses and advice on specific immigration issues, they did not give migrant workers a separate voice within the union. One would expect ver.di to adopt a similar policy with regard to the new Member State workers. Yet there are indications that this old approach may be changing and ver.di has explicitly decided to depart from the policy it adopted in relation to the Gastarbeiter. The main reason for this seems to lie in the nature of

³⁰ See the Migrant Workers Newsletter published by the Migration Unit for examples.

³¹ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

the new Member State workers. Unlike the Gastarbeiter, they are often not covered by a collective agreement and may be used to undercut wages. Moreover, their residence in Germany as European Union citizens is not dependent on their employment. They will therefore be able to remain in Germany for as long as they please provided they fulfil the relevant requirements under EU law. Trade unions fear that they will not be able to prevent collective agreements being undercut following the end of the transitional arrangements. This is partly due to the lack of a statutory minimum wage in Germany which is discussed in more detail later in this section. In addition, unions are facing challenges to their strength which make it difficult to organise workers. Yet migrant workers are an untapped resource for the union and by organising them one can prevent the undercutting of collective agreements.

The Migration Unit within ver.di has begun to focus on special policies for new Member State workers. The main example is the advice centre which has opened in Hamburg, but there are also signs that more may be forthcoming following the conference which discussed trade union responses to the lifting of the transitional measures in 2011. Ver.di has also started the process of establishing special structures for migrants in order to integrate them into the labour market and to ensure for equal rights with German workers. The calls to make migrants more visible within the union are a step in this direction. However, the union as a whole has not been active in changing the traditional policy of refraining from adopting special measures for migrant workers. The Europe Officer confirmed this in an interview and even the Migration Officer doubted the usefulness of special measures by clarifying that “the main purpose of a trade union was and is the achievement of equality within the workplace whether there are migrants involved or not.”³² Thus, official trade union policy is not expected to change and there is only a very limited debate within ver.di as to the usefulness of the adoption of special measures for migrant workers.³³ Overall there seems to be some confusion as to whether ver.di should focus on its traditional policy of reacting to migrant workers by not providing for special structures – which one would have expected on the basis of the relevant literature – or whether it should change its policy to move towards self-organisation of migrant workers.

The main policy of ver.di concentrates on the adoption of a statutory minimum wage by 2011 in order to minimise competition between ‘German’ and new Member State workers. In contrast to UNISON, therefore, ver.di has been much less active in pursuing practical policies

³² Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009.

³³ *Ibid.*

for the recruitment, organisation and integration of new Member State workers. This is likely to be due to the fact that Germany has not opened its labour market to EU8 workers. Ver.di has thus not been faced with large numbers of new Member State workers in the same way as UNISON. However, there is still a fear that new Member State workers may enter the labour market following the lifting of the transitional provisions in 2011. Campaigning for the introduction of a minimum wage is one form of a response. The Migration Unit within ver.di has been involved in organising special policies for migrant workers along similar lines, but on a much smaller scale to UNISON. However, the union as a whole is not actively pursuing such policies.

Arguably, therefore, ver.di is still rooted in the traditional German trade union response to migrant workers which involved extending trade union membership to migrant workers but not adopting special measures which could benefit them. Based on the literature set out in chapter four, this approach conforms with the present author's expectations for ver.di.

Finally, ver.di's responses to the European Union have been positive as one would have expected, in light of the literature set out in chapter four. A more nuanced picture emerges regarding the recent enlargements. Overall, German trade unions seem to have been in favour of an expanding European Union, provided the social dimension is considered. This aspect has become very clear in ver.di's and the DGB's reactions to the most recent enlargements. Both organisations seem to be in favour of the enlargements in principle. However, they actively supported the imposition of the transitional arrangements for the full period in order to safeguard the German labour market. The unions seem to be focusing to a greater extent in practice on the social dimension of the European Union than they may have done in the past. Historically, German trade unions merely criticised the absence of a social dimension of the EU. Yet now they seem to act on their criticism by supporting measures like the transitional arrangements.

Following on from the overview of UNISON's and ver.di's responses as evidenced by the case studies, this chapter goes on to analyse and compare UNISON's and ver.di's responses to the European enlargements and the new Member State workers in light of the legal structures within and across which they operate. Suggestions are also made as to the range of responses available to trade unions facing the challenge of adapting to the changing opportunity and regulatory structures in Germany and the UK, coupled with the pressures of an enlarged

European Union. The interaction between ver.di and UNISON and the involvement of the ETUC, as set out in the case studies, is discussed at this stage. Overall, the comparison and analysis of the responses of trade unions enables one to determine the impact that trade union responses may have on new Member State workers. It also provides an understanding and explanation of the behaviour of trade unions in their responses to the European enlargements and the new Member State workers

D. Analysis in the context of the national legal frameworks

One can draw a number of conclusions from the literature examined so far on how trade unions would be expected to respond to the European enlargements and the new Member State workers. Initially, one would assume that the way in which trade unions respond within, across and around national and European legal frameworks to the challenges of the enlargements would be determined by the role that they adopt in their national legal system. Those roles are examined in detail in chapter two. For example, the shift towards a political role in the UK should allow trade unions to adopt an active negotiating role between the government and migrant workers. Similarly, the focus on greater involvement of trade unions in the legislative process in Germany should enable them to influence policy regarding migrant workers from the bottom up. Both examples illustrate how trade unions act within national legal frameworks in order to integrate migrants into their structures in order to ensure for their representation and protection and to influence policies relevant at a national level to migrant workers. This section considers whether the expectations that trade union responses are determined by the role which they adopt within their national legal systems holds true for both trade unions.

1. UNISON

The British labour law system is a common law system which has historically been characterised by a lack of state intervention in industrial relations. This is examined in more detail in chapter two. As a result of this system of ‘collective laissez-faire’, British trade

unions, according to Ewing³⁴, adopted certain roles. Particularly in recent years, trade unions have developed a service function and a government function. There has also been:

a shift in the level of regulation from the collective sphere to that of the individual relationship. This has been accompanied by a certain change of emphasis in the role of unions, from co-regulators of terms and conditions of employment, to monitors and enforcers of employees' legal rights.³⁵

The responses of UNISON to new Member State workers are heavily influenced by the role that they perceive for themselves in the British labour law system. In addition, the role that UNISON adopts at a national level also illustrates how the union operates inside and across the national legal framework.

In its responses to new Member State workers, UNISON has focused on organising migrant workers into the union and encouraging them to become active in order to prevent exploitation and undercutting. This has been attempted mainly through UNISON's Migrant Workers Participation Project.³⁶ The goal of this project is to integrate migrant workers into the union structure. This is done by providing certain services to migrant workers such as language training and newsletters with information on available courses. This approach demonstrates the service function of trade unions in the British labour law system. As shown in chapter five, the European Trade Union Confederation (ETUC) suggests that national trade unions should adopt a service function in order to adapt to the changing opportunity and regulatory structures in the labour markets. UNISON seems to realise this and the Migration Unit's move towards a service function is a step in this direction.

There is also a strong emphasis on providing migrants with information so that they can enforce their rights at the workplace. However, in its material for migrant workers the union does not mention its potential role in negotiating workers' rights through collective bargaining. While this may be an obvious role for the union to play it is not 'advertised' to migrant workers whom UNISON wishes to recruit. Thus, in preventing exploitation and undercutting, UNISON focuses heavily on the services that it can provide to new Member State workers but it does not mention its regulatory function. Arguably, this is proof that there has been a "change of emphasis in the role of unions, from co-regulators of terms and

³⁴ K.D. Ewing, 'The Function of Trade Unions' (2005) *Industrial Law Journal* 1.

³⁵ P. Davies, K.D. Ewing & M. Freedland (eds.), *The Law of the Labour Market: Industrialisation, Employment and Legal Evolution*, Oxford University Press, Oxford, 2005 at p. 333.

³⁶ UNISON, *Migrant workers participation project*, June 2008.

conditions of employment, to monitors and enforcers of employees' legal rights."³⁷ UNISON places a lot of emphasis on reports, such as the report by the TUC's Commission on Vulnerable Employment which looked at the circumstances in which workers are exploited at the workplace³⁸, and uses these reports to strengthen its campaign for the enforcement of employment rights. Yet, again, no mention is made, for example in leaflets targeting migrant workers, of the union's potential to regulate terms and conditions of employment through collective bargaining. Thus, there has been a strong shift away from the trade union's regulatory role. Ewing recognised this in his classification on trade union functions outlined in chapter two and the responses of UNISON to new Member State workers confirm this at a practical level.

To an extent, one can see that "as the direct regulatory role of trade unions by collective bargaining retreats, so the importance of trade union political action increases."³⁹ Thus, UNISON decided, following the recent European enlargements, to take on a leading political role on new Member State workers even though it, as a public service trade union, is not as affected by new Member State workers as other trade unions. Chapter five explains that this is also due to the fact that UNISON is keen to raise its profile across a whole range of issues in order to recruit and retain members. Moreover, political engagement:

can be key to protecting and improving members' jobs, pay and conditions, as well as bringing about the broader social and economic changes our members want to see. Through its political organisation and campaigning, the union can act as an important force for a more democratic society.⁴⁰

As a prerequisite for political engagement on behalf of new Member State workers, UNISON clarified its position on the European enlargements as being in favour of the accession of the new Member States. On that basis, it went on to push for legislative measures to integrate new Member State workers into the British labour market. The Gangmasters (Licensing) Act 2004⁴¹ is a prime example of legislation resulting from such political activities. It also illustrates that trade unions can no longer rely on their regulatory function to prevent exploitation of workers. Instead, there has been a shift towards a government function where

³⁷ Davies, Ewing & Freedland note 35 above at p. 333.

³⁸ *Hard Work, Hidden Lives: The Full Report of the TUC Commission on Vulnerable Employment* available at <http://www.vulnerableworkers.org.uk/2008/05/full-report-of-the-commission-released/>.

³⁹ Ewing note 34 above at p. 15.

⁴⁰ UNISON, *Consultation for the review of political fund effectiveness* at p. 4.

⁴¹ The Gangmasters (Licensing) Act 2004 came into force on 8th July 2004. It makes provision for "the licensing of activities involving the supply or use of workers in connection with agricultural work, the gathering of wild creatures and wild plants, the harvesting of fish from fish farms, and certain processing and packaging; and for connected purposes." (Preamble)

trade unions, and in this case UNISON, push for legislative intervention in order to achieve their goals. This would have been unheard of in previous decades, when trade unions in the UK were opposed to interference by the state. Particularly in the sphere of migrant workers, trade unions tried to prevent state intervention. As Castles and Kosack explain in relation to discrimination of migrant workers:

[d]uring the second half of the sixties, evidence accumulated that discrimination in employment was not disappearing – that if anything it was increasing. The ‘laissez-faire’ approach had clearly failed, and there was growing pressure to extend the 1965 Race Relations Act to cover discrimination in employment. During this period, the policies of the TUC seem to have been less concerned with preventing discrimination than with keeping the Government out of its traditional sphere – industrial relations. [...] It may have been feared that to give way in one area might have opened the door for state intervention elsewhere.⁴²

State intervention has become a dominant feature of British industrial relations and trade unions have to rely on other mechanisms to further their policies. As noted in chapter two, the idea of “partnership at work” has become increasingly important. Thus, unions need to find a way of achieving “a recognised status within the workplace as the means for expressing collective employee ‘voice’”⁴³. With the decline in the strength of trade unions in the UK, the government function may become increasingly important for trade unions when responding to the changing regulatory and opportunity structures which have arisen following the enlargements.

At a practical level and in line with its ‘new’ function, UNISON regularly publishes press statements on political issues to demonstrate that it has taken on a leading political role on the topic of new Member State workers. The National Development Manager for Migrant Workers at UNISON also suggested that the trade union would be well placed to communicate between new Member State workers and the government.⁴⁴ This may be one way in which UNISON could express a collective employee ‘voice’. It could also help the union to “bridge the gap between supranational economic spheres and national politics”⁴⁵, thereby taking on the position of a ‘partner’ at work. With the unions’ regulatory role declining due to a lack of support for collective bargaining at a national level, a role as

⁴² S. Castles & G. Kosack, *Migrant Workers and Class Structure in Western Europe*, Oxford University Press, Oxford, 1973 at p. 141.

⁴³ S. Deakin & G. Morris, *Labour Law*, 5th ed., Hart Publishing, Oxford, 2009 at p. 39.

⁴⁴ Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

⁴⁵ Mückenberger, Stroh & Zoll note 1 above at p. 24: “Sie müssen ihre Modernisierung durch Internationalisierung (und zunächst Europäisierung) ihrer Organisationsstrukturen und Interessenpolitik betreiben und somit die Kluft zwischen supranationalen Wirtschaftsräumen und nationaler Interessenpolitik schließen.”

'mediator' between workers and the government may be one way for unions to redefine their function in industrial relations. So far, UNISON has only had limited success in pursuing such a role when it comes to new Member State workers, but this may be one of the responses available to trade unions when reacting to migrant workers. Cooperation with ver.di through the Memorandum of Understanding which was signed in 2004 is also an example of the increasing importance of political action for UNISON at a national and European level. Keller bemoans that, hitherto, "solidaristic trade union 'internationalism' has remained purely verbal, and the horizontal and vertical coordination needed to make it a reality is far from being realised."⁴⁶ Ebbinghaus and Visser argue that trade unions are too embedded in national-level political economic institutions.⁴⁷ The Memorandum of Understanding could provide the framework for trade unions to act across national and European legal frameworks when seeking solutions to similar problems.

Overall, the responses of UNISON to the European enlargements and the new Member State workers are heavily determined by the role that they perceive for themselves at a national level. As Ewing observed, there has been a shift in the UK in the roles that trade unions adopt. Emphasis is now placed on a service and government function rather than a regulatory function. Unions are also focusing on monitoring and enforcing workers' rights. UNISON, in its responses to the European enlargements and the new Member State workers, illustrates this shift and demonstrates how a trade union can operate in a national legal framework when responding to external pressures. Its responses are rooted in a common law system which has historically been characterised by an absence of state intervention. Increasingly, trade unions are recognising the need to alter their roles due to the changes in the national regulatory system. UNISON's responses which focus on the service and government function of trade unions are examples of this slow change. Equally, the more general move from granting migrant workers partial autonomy to potentially incorporating them into the union (according to Wrench's classification above) illustrates that UNISON is seeking to redefine its role in the integration of new Member State workers into the labour market.

⁴⁶ B. Keller, 'National Industrial Relations and the Prospects for European Collective Bargaining – The view from a German standpoint' in W. Lecher & H-W. Platzer (eds.), *European Union – European Industrial Relations? Global challenges, national developments and transnational dynamics*, Routledge, Oxford, 1998 at p. 51.

⁴⁷ B. Ebbinghaus & J. Visser, 'European labor and transnational solidarity: challenges, pathways and barriers' in J. Klausen and L. Tilly (eds.), *European integration in social and historical perspective. 1850 to the present*, Rowman & Littlefield, Lanham, MD, 1997.

2. Ver.di

A similar picture to that of UNISON can be painted of ver.di's responses. The German legal system is rooted in the civil law tradition even though German labour law is characterised by a lack of codification. This gives it a certain degree of flexibility which is not dissimilar to the British system of industrial relations especially with increasing state intervention in the UK. Due to the increasing similarity between the legal systems, the comparative framework in this thesis makes it possible to suggest ways in which the trade unions may be able to learn from each other.

Trade unions in Germany play a strong role at various levels in the regulation of the labour law system, ranging from collective bargaining to co-determination. This is examined in more detail in chapter two. German trade unions have mainly adopted a service, regulation and representation role, whereby the regulatory function is by far the most important. This is also evidenced by the results of the case study. Even though ver.di has not yet responded to the new Member State workers on the same scale as UNISON, their policies to date demonstrate that they are keen to maintain their regulatory function. For example, ver.di repeatedly emphasises that migrant workers must be integrated into a trade union in order to prevent the undercutting of collectively agreed wages. They also stress that their power to negotiate collective agreements should not be undermined by new Member State workers. Ver.di's regulatory function is therefore central to any policy. This can be traced back to Wrench's classification of the German trade union position that migrants should be incorporated into a trade union but should not be treated any differently to German workers. However, this is slowly changing as ver.di recognises that migrant workers should be 'visible' and may have different needs to German workers. There is thus a shift to partial autonomy. Their regulatory function may also be declining as evidenced by the campaign for a statutory minimum wage. If ver.di was able to effectively regulate wages through collective bargaining then it would not pursue a statutory minimum wage with such determination.

Despite emphasis by the participants of the case study on ver.di that a trade union is not first and foremost a service provider but a representative of collective interests, the service function of ver.di is arguably increasingly at the forefront of their response to new Member State workers. Like UNISON, ver.di is recognising the need to widen its functions to include

a service function, as the European Trade Union Confederation (ETUC) suggests, in order to effectively respond to the European enlargements and the new Member State workers.

The drop-in centre 'Migrar' which was opened in Hamburg is one way in which ver.di is performing a service role. Equally, the e-learning initiative demonstrates that ver.di is building upon its service function in order to integrate new Member State workers into the German labour market. In its basic strategies, ver.di is not dissimilar to UNISON despite the fact that it has not been affected by new Member State workers to such a great extent. Like UNISON, ver.di is seeking to redefine its role in the changing national labour market. It has so far been protected from large numbers of new Member State workers entering the labour market through the transitional measures which it actively supported. However, ver.di faces similar structural problems to those of UNISON. For ver.di, migrant workers such as the Gastarbeiter had the same status in the workplace as German workers. Thus, special policies for their integration into the union were not needed. The posted workers that arrived in Germany under the bilateral agreements were very different to the Gastarbeiter and the trade unions concentrated on their political role to ensure that they would not undercut the wages of German workers. However, they did not develop a policy to integrate the posted workers into the trade union structure as they were in Germany on a temporary basis. The new Member State workers possess characteristics which are far more similar to the posted workers than the Gastarbeiter.⁴⁸ However, German trade union structures still provide for migrant workers to be treated in the same way as German workers. This approach does not cater effectively for the needs of new Member State workers. Therefore, if ver.di is to appeal to new Member State workers they must reconsider their structures and policies for migrants. Even though ver.di and UNISON have very different structures, they face similar problems in that their structures for the integration of migrant workers do not respond to the needs of new Member State workers.

There is evidence that the roles of the two trade unions are also becoming increasingly similar. Ver.di is starting to play a stronger governmental role following the European enlargements in 2004. Particularly with regards to the transitional measures, the German trade unions took on a political role by calling for the imposition of the measures. They repeatedly lobbied the government for the imposition of such measures. The campaign for a statutory

⁴⁸ It should be noted that this is difficult to assess for Germany as the transitional provisions have prevented the arrival of large numbers of new Member State workers. Thus, the characteristics of the workers in the UK are used for this argument.

minimum wage is another such example.⁴⁹ The union has, for example, been gathering political support amongst politicians for legislation on a minimum wage. It has also generated a lot of publicity on the benefits of a statutory minimum wage through posters and the participation of trade unionists in televised political debates. Finally, the union has commissioned research and held a conference on the advantages of a statutory minimum wage drawing on the experience of, for example, the UK.⁵⁰ Due to the shifting role of trade unions in Germany from one of regulation to one of political partnership, as a result of the changing labour market, the political activities of ver.di are likely to gain in importance.

Overall, the case studies illustrated that trade unions in Germany and the UK are struggling to adapt to new Member State workers. New Member State workers are not benefiting from their employment rights in Germany and the UK. Trade unions have not so far been able to effectively integrate them in order to provide protection from exploitation. UNISON and ver.di recognise that their traditional methods of responding to migrant workers do not, for various reasons, result in the successful organisation of new Member State workers. In altering the way in which they respond to migrant workers, UNISON and ver.di seem to be moving towards each other. Thus, despite the inherent differences in the legal systems between Germany and the UK, ver.di's function in the labour market is beginning to resemble that of UNISON. Although ver.di still has a greater regulatory function than its British counterpart, both trade unions are focusing on their service and government functions in their responses to the European enlargements and the new Member State workers. Similarly, their responses to migrant workers using Wrench's classification are moving towards each other; whereas UNISON is recognising the benefits of incorporation as opposed to partial autonomy, ver.di is starting to grant migrants partial autonomy rather than merely incorporating them into the union. As the roles and responses of both trade unions become increasingly similar, there is greater scope for exchange of information between the two organisations. As the case studies show, there is evidence that some exchange of ideas is already taking place; however, this is not systematic. Yet ver.di, in particular, could benefit from UNISON's experience of responding to new Member State workers, as it prepares for the lifting of the transitional measures in 2011. UNISON officials have recognised in interviews that it would be beneficial for them to gain an insight into ver.di's policies. However, to do so, they must cooperate closely to facilitate an active exchange of ideas.

⁴⁹ For more information see Ver.di, *Stimmen für den Mindestlohn* available at <http://www.mindestlohn09.de/>.

⁵⁰ See *Mindestlohn: Positive Ergebnisse aus Großbritannien* available at <http://www.mindestlohn.de/meldung/mindestlohn-iza-konferenz/>.

At a national level, trade unions are already focusing on developing a strong political role for themselves. This helps them to influence policy and legislation and aids them in securing their position within the labour market. However, despite responding within national legal frameworks, trade unions are continuously faced with problems such as the decline in membership. Finding an effective way to respond to the new Member State workers by learning from each other would enable them to combat this phenomenon, as new Member State workers are an untapped pool of potential trade union members. Keller describes this as organising in the “trade union desert” (“gewerkschaftliche Wüste”)⁵¹. Trade unions recognise that they must reassess the roles which they have adopted at a national level in order to secure their continued relevance in the national labour law systems. UNISON suggests that trade unions could facilitate communication between migrant workers and the state. This example of trade unions acting around national legal frameworks is a sensible idea. As trade unions are present in the workplace, they have first hand experience of the problems facing migrant workers. They also have the ability to interact with the government on issues of concern to migrant workers. This idea of trade unions acting as a link between migrant workers and the state could therefore be a starting point for a reassessment of the roles that trade unions can adopt at a national level in order to facilitate the integration of migrant workers in the national labour law systems.

E. Analysis of the effects and opportunities of europeanisation

Europeanisation through Directives, soft law mechanisms and the case law of the European Court of Justice adds an extra layer of complexity to the environment within which trade unions act. Ladrech explains that “the policy output of the European Union has the potential to trigger responses from domestic interest groups and social movements because they are either threatened by the proposed policy or else they perceive opportunities for advancing the goals.”⁵² Europeanisation was defined in chapter three as a process of domestic change that can be attributed to European integration. This process of change can originate from the European and the national level. Europeanisation is, therefore, a two-way process. For trade unions this means that they must take account of case law, policies and legal instruments that originate from a European level. However, they can also influence the process of

⁵¹ B. Keller, ‘Ver.di – quo vadis?’ *WSI Mitteilungen* 9/2007 at p. 469.

⁵² R. Ladrech, *Europeanization and National Politics*, Palgrave, Basingstoke, 2010 at p. 151.

Europeanisation at a national level through an active involvement in the drafting and implementation of EU legislation and soft law mechanisms as well as a strong involvement in the European Trade Union Confederation. The role that trade unions already adopt at a national level could be influential in this regard. Besides providing trade unions with new roles and mechanisms to respond to the challenges of enlargement, such an involvement could also secure the 'social dimension' of the EU which trade unions in Germany and the UK have repeatedly called for. In order to present a thorough analysis, this section looks first at the effects of Europeanisation on trade unions in order to demonstrate how trade unions act across and around national and European systems in responding to the European enlargements and the new Member State workers. Second, this section discusses what opportunities Europeanisation offers trade unions responding to the challenges of European enlargement.

The examples – hard and soft law mechanisms as well as the case law of the European Court of Justice (ECJ) – that are given in chapter three as illustrations of Europeanisation have had various effects on UNISON and ver.di. 'European Labour Law' – defined in chapter three as comprising hard and soft law mechanisms originating from a European level which aim to approximate national labour law systems – has provided a number of Directives which have influenced UNISON and ver.di's actions. UNISON, in particular, welcomed the development of European Labour Law through Directives during the 1980s and 1990s as it was, in their view, the only form of positive social legislation in the UK. Consultation at a national level on the implementation of Directives has the potential to give the union a role in the formulation of legislation. Thus, Europeanisation can aid trade unions to develop their regulatory and government functions at a national level. However, the case study on UNISON demonstrated that the union does not feel properly consulted on such matters.⁵³ In Germany, Directives are frequently implemented through collective agreements. This gives ver.di, as a regulator, an opportunity to play an important role in the implementation of Directives under the banner of 'European Labour Law'. For both trade unions, the development of a strong regulatory and governmental role has characterised their response to the changing regulatory and opportunity structures that exist following the recent European enlargements. Yet apart from strengthening the regulatory role of trade unions in their national labour law systems, an adequate consultation of trade unions on the implementation of Directives could also improve the successfulness of Directives in altering the 'Rechtswirklichkeit' in the Member States. As Bercusson points out,

⁵³ Interview, International Officer, UNISON Headquarters, London, 28/5/2009.

compared to administrative officials or judges, the social partners are much less remote from the site of enforcement of labour law. Their proximity means that they have the potential to be effective guarantors of the application of the rules.⁵⁴

In chapter three, Directive 94/45 on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees and Directive 96/71 concerning the posting of workers in the framework of the provision of services are given as successful and unsuccessful examples of europeanisation. Directive 94/45 has been very positive for ver.di and UNISON. As the case studies illustrate, European Works Councils are used as a basis for closer cooperation between the two trade unions. They give trade unions a structure which allows them to act around and across national and European legal systems. In addition, UNISON has, through participation in a European Works Council, come into contact with a system of co-determination which did not previously exist in the UK. The main reason for the success of the Directive is that it “provides the framework, but it is the negotiations between the social partners which determine the final outcome.”⁵⁵ Pipkorn echoes this when he writes that: “The Directive is characteristic of the original principle of subsidiarity, i.e. the differentiation between the sphere of influence of the State and that of non-state actors who, within their confines can effectively develop an economic and social order.”⁵⁶ The importance of the involvement of the social partners in Directive 94/45 was also recognised during the process of the revision of the Directive. Laulom writes that:

It is then that, on the fringes of the classic decision-making process, the EU social partners were [...] invited to participate by the French Presidency in order to achieve rapid adoption of the new directive. The social partners issued a joint opinion amending the text proposed by the Commission and were thereafter associated with the legislative process informally.⁵⁷

While the consultation of the social partners has been criticised as, first, limiting the powers of the European Parliament and, second, as leading to the adoption of an ambiguous text, it is

⁵⁴ B. Bercusson, *European Labour Law*, Cambridge University Press, Cambridge, 2009 at p. 450.

⁵⁵ *Ibid* at p. 22.

⁵⁶ J. Pipkorn, ‘Europäische Aspekte der Informations- und Mitwirkungsrechte der Arbeitnehmer’ in O. Due (ed.), *Festschrift für Ulrich Everling*, Bd. II, Nomos, Baden-Baden, 1995 at p. 1127: “[Sie] ist eine Ausprägung des Subsidiaritätsprinzips in seiner ursprünglichen Ausformung, nämlich der Abgrenzung der staatlichen Sphäre von derjenigen, in der nichtstaatliche Organisationen und gesellschaftliche Kräfte wirksam die Wirtschafts- und Sozialordnung gestalten können.”

⁵⁷ S. Laulom, ‘The Flawed Revision of the European Works Council Directive’ (2010) *Industrial Law Journal* 202 at p. 203 also citing J.P. Lhernould, ‘La nouvelle directive CE européen: une victoire française ... quelle victoire?’ (2009) *Revue de Jurisprudence Sociale* 101.

recognised that “intervention by the social partners certainly contributed to a rapid adoption of the directive.”⁵⁸

Directive 96/71 has not been as successful. It is a clear example of a clash between a national system of labour law regulation and European legislation. As noted in chapter three, the implementation of the Directive has proved problematic, due to the diverse interpretation of the provisions in national labour law systems. Account is not taken of the diversity in national industrial relations systems and trade unions are not given a clear role in the implementation of the provisions contained in the Directive. As a result, there have been repeated calls for the revision of the Directive as effective national implementation is lacking. According a greater role to the social partners in the revision or implementation of the Directive could alleviate some of these problems as the social partners would be well placed to appreciate the diversity of national industrial relations systems. A revised Directive may therefore lessen some of the difficulties facing national trade unions who are struggling to respond to the challenges of the European enlargements. Overall, therefore, the examples of Directive 94/45 and Directive 96/71 illustrate that a strengthened regulatory role for trade unions at a national level could improve the success of the European Union’s policy of europeanising national labour law systems.

In recent years the EU has moved away from the development of hard law and, as a consequence, soft law mechanisms such as the Open Method of Coordination (OMC) have been used to europeanise national labour law systems. In chapter three, soft law mechanisms are criticised as inadequate in europeanising national labour law systems due to the absence of time constraints on implementation or enforcement mechanisms to ensure compliance.⁵⁹ However, the OMC could give trade unions the potential to influence policy-making at a European level if it were effectively implemented. As Barnard writes, there is provision for the social partners to play a significant role in “modernising the European social model [and to be] actively involved in this OMC, especially benchmarking practices, using variable forms of partnership.”⁶⁰ Involving trade unions in the active exchange of ideas between Member States could give them a role to play at a national level in the two-way process of europeanisation. Yet both ver.di and UNISON reported a lack of involvement in and

⁵⁸ *Ibid* at p. 203.

⁵⁹ For examples see V. Hatzopoulos, ‘Why the Open Method of Coordination is Bad For You: A letter to the EU’ (2007) *European Law Journal* 309.

⁶⁰ C. Barnard, ‘The Social Partners and the Governance Agenda’ (2002) *European Law Journal* 80 at p. 84.

knowledge of the workings of the OMC. Thus, the OMC is not a useful tool, at present, for trade unions responding to the recent European enlargements and the new Member State workers. However, the OMC could aid trade unions in acting around national and European legal frameworks if there were a formalised structure at a European and national level which involved national trade unions.

Finally, the ECJ has the potential to play a major role in europeanising national labour law systems through the preliminary rulings procedure. Indeed, the Heads of the Migration Units at ver.di and UNISON argued that the ECJ could support trade unions in responding to the influx of new Member State workers following the EU's enlargements.⁶¹ However, the interpretation of Directive 96/71 by the ECJ in *Laval* and *Rüffert*⁶² adds to the difficulties facing trade unions. In *Laval* and *Rüffert* the ECJ had the opportunity to provide clarity on the context within which trade unions must respond to the European enlargements and the new Member State workers, through its interpretation of the provisions of Directive 96/71. Instead, the interpretation of the Directive by the ECJ has raised concerns about the future shape and form of a 'social Europe'.⁶³

In the UK, the Lindsey oil refinery dispute on 'British Jobs for British Workers' which took place in January and June 2009 highlighted trade union concern about the application of Directive 96/71 following the ECJ's judgments in the UK. The dispute is outlined in more detail in chapter four. Even though the dispute does not directly affect UNISON, it is a vivid example of how trade unions are struggling with the europeanisation of their national labour market.

UNISON's position on the strike action was one of solidarity with the workers at the oil refinery even though they emphasised, along with the TUC and other British unions, that "the issue for them is not foreign workers, but access to jobs and fair pay for all workers."⁶⁴ In response, they called on the EU and Governments to "end the unfairness of the Posted

⁶¹ Interview, Migration Officer, Ver.di Headquarters, Berlin, 29/1/2009; Interview, National Development Manager for Migrant Workers, UNISON Headquarters, London, 20/10/2008.

⁶² C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundets avd. 1, Byggettan, Svenska Elektrikerförbundet* [2007] ECR I-11767; Case C-346/06 *Dirk Rüffert, in his capacity as liquidator of the assets of Objekt und Bauregie GmbH & Co. KG v Land Niedersachsen* [2008] ECR I-01989.

⁶³ ETUC, *ETUC presents its position on the Laval and Viking cases at the hearing of the European Parliament*, 26/2/08 available at <http://www.etuc.org/a/4627>.

⁶⁴ G. Thomson, *United Kingdom: A Total dispute*, 15/2/2009, UNISON.

Workers' Directive."⁶⁵ However, UNISON was unable to suggest solutions for the trade unions' inability to counteract the negative effects of europeanisation. It did not recognise that the problems in the dispute stem in part from a lack of successful europeanisation of the British labour law system. UNISON, through its various roles at a national level, could play an active part in europeanising British labour law by availing itself of the mechanisms that europeanisation has to offer.

In Germany, the outcome of the *Rüffert* case led to similar calls for a revision of the Directive, even though an explosive situation like that of the Lindsey oil refinery dispute has not occurred there. In the absence of a national minimum wage, the majority of workers in Germany are covered by collective agreements which, if they are not declared universally applicable, fall foul of the ECJ's interpretation of the Directive. The lack of europeanisation of the German labour law system therefore leads to difficulties for the trade unions. Following the judgment in *Rüffert*, the German system of collective bargaining which is the backbone of German trade unions must be altered or it will be undermined by the ECJ's interpretation of the Directive. Alternatively, a statutory minimum wage could be introduced. Neither of these options has been implemented so far even though the law implementing Directive 96/71 has been amended. Also, ver.di has begun to actively campaign for a statutory minimum wage. Whether this solves the problems highlighted by the judgment remains to be seen. Ver.di has responded to the judgment by stating that "it will refuse such a Europe"⁶⁶ and that it "says no to a European Union which steers such a course."⁶⁷ Yet apart from its campaign for a minimum wage, it did not call for a revision of the German labour law system, nor did it develop strategies to alleviate the negative effects of europeanisation. At present, therefore, German trade unions, like their British counterparts, are badly placed to counteract developments at a European level such as the outcome in the *Rüffert* case.

Overall, ver.di and UNISON are struggling to adapt to the effects of europeanisation on their national labour law systems. Some general conclusions are drawn at the end of chapter four on how one would expect trade unions to react to the European enlargements and the new Member State workers. Few of the expectations set out in chapter four have been met. While

⁶⁵ *Ibid.*

⁶⁶ M. Kniesburges, 'Europa ja. Aber nicht so!', *ver.di-Publik*, May 2008: "Ver.di [wird] sich einem solchen Europa verweigern."

⁶⁷ Ver.di, *Letter by Frank Bsirske (General Secretary of ver.di) to the German chancellor*, 16/6/2008 available at https://international.verdi.de/europapolitik/eugh/ver.di-vorsitzender_fordert_bundeschkanzlerin_zum_handeln_auf/data/briefanmerkmal19052008.pdf: "Zu einer Europäischen Union, die einen solchen Kurs steuert, können wir nur Nein sagen!"

trade unions in Germany and the UK are sometimes involved in the implementation and drafting of European legislation, the extent and level of their involvement varies. There is also a potential role for trade unions in the OMC, but again the practical results seem to be limited. The case law of the ECJ has increased the difficulties facing trade unions, rather than supporting them in their attempts to respond to the challenges of European enlargement. As the reactions to the Lindsey oil refinery dispute and the *Rüffert* case illustrate, trade unions are failing to adequately respond to such developments. However, while the effects of europeanisation may not always be positive for trade unions, they provide unions with mechanisms to act within, across and around national and European legal frameworks.

Recently, UNISON and ver.di have focused much of their reactions to the effects of europeanisation on calling for a more 'social Europe'. Ladrech writes that "europeanisation involves interest groups' response to a perception that the EU level is or will generate potential changes in their specific operating environment."⁶⁸ The calls by the unions for a more 'social Europe' are an example of such a perception. As trade unions in Germany and the UK are struggling to maintain their influence in the social sphere in their national legal systems, they call for the involvement of the European Union in order to secure social rights. This development is not new. Historically, German trade unions were in favour of the European project, as European integration opened up new opportunities for German unions who were losing influence in their national political field.⁶⁹ Similarly, British trade unions, who, for a long time, had an ambivalent outlook on the EU, only decided to support the UK's membership of the EU once they began to lose influence in their domestic labour law system. As Hyman writes, "the 'social dimension' of the EU became far preferable to the market liberalism of the Thatcher government."⁷⁰

However, reacting to what one perceives the EU may change, is not the most effective way of dealing with the consequences of europeanisation. The recent judgments of the ECJ demonstrate that a European social contract (europäischer Sozialvertrag)⁷¹ is not a realistic prospect. According to the General Secretary of the DGB, Michael Sommer, a European

⁶⁸ Ladrech note 52 above at p. 154.

⁶⁹ T. Schulten, 'Gewerkschaften und europäische Integration – Aktuelle Facetten eines ambivalenten Verhältnisses' in J. Beerhorst & H.-J. Urban (eds.), *Handlungsfeld europäischer Integration*, VSA-Verlag, Hamburg, 2005 at p. 23: "Die europäische Integration wurde für die Gewerkschaften immer mehr zum politischen Hoffnungsträger, um das auf nationaler Ebene verloren gegangene arbeits- und sozialpolitische Terrain durch supranationale Regelungen auf europäischer Ebene wieder zurück zu gewinnen."

⁷⁰ R. Hyman, 'Trade Unions and "Europe": Are the Members out of Step?' *LEQS Paper* No 14/2009, November 2009 at p. 26.

⁷¹ *Ein europäischer Sozialvertrag für das 21. Jahrhundert*, Sechs Thesen von Michael Sommer, Berlin 7/4/2005.

social contract would allow trade unions to “socially regulate capitalism”⁷² in the European Union. European integration necessitates “change in lifestyles and labour markets”⁷³. In order for workers to benefit from this change, “European trade unions need to ensure that information and consultation in enterprises, as well as autonomous collective bargaining, become one of the pillars of a democratic and social European Union.”⁷⁴ The development of the process of europeanisation so far, especially the recent lack of hard law mechanisms in the regulation of European Labour Law, indicates that an institutionalised European social contract is a European trade union dream that is unlikely to be realised in the near future. Trade unions should instead concentrate on strengthening their continuous involvement in the process of the europeanisation of national labour law systems. This can be done through engagement at a national and a European level.

The DGB seemed to recognise this when it called for trade unions to ‘europeanise’ their policies.⁷⁵ This is defined as according a more central role to European and cross-border issues. If the definition of europeanisation used in this thesis is applied to the DGB’s suggestion to ‘europeanise’ policies, then it follows that trade unions must find ways to act within a process of domestic change due to European integration. As europeanisation is a two-way process, there are opportunities for trade unions to play a role at a national level through consultation on and implementation of European legislation, and also at a European level through involvement in the OMC and with the help of the ETUC. To date, this is not sufficiently utilised. Kriesi et al. observe that “the salience and accessibility of the decision-making process of the EU is much lower than that at the national level, which explains why they [domestic actors] are still predominantly focused on influencing the national political process.”⁷⁶ This is the case, even though they could play a much more active role in the European process of decision-making. The necessity of this is recognised by Rödl when he writes that “there are two opposing models: either labour relations will continue to be a national matter or they will become a matter to be developed and structured in a European

⁷² *Ibid* at p. 1: Die Gewerkschaften müssen “den Kapitalismus sozial regulieren.”

⁷³ *Ibid* at p. 1: “Die Integration Europas führt zu einem Wandel der Lebenswelten wie der Arbeitsmärkte.”

⁷⁴ *Ibid* at p. 1: “Es ist Aufgabe der europäischen Gewerkschaften, die Mitbestimmung in Unternehmen und Betrieben wie die Tarifautonomie zu einer tragenden Säule einer demokratisch und sozial verfassten Europäischen Union zu machen.”

⁷⁵ *Ibid* at p. 4.

⁷⁶ H. Kriesi, A. Tresch & M. Jochum, ‘Going Public in the European Union: Action Repertoires of Western European Collective Political Actors’ (2007) *Comparative Political Studies* 48 at p. 69.

context.”⁷⁷ However, this can only be achieved if trade unions leave behind “the period of vague suggestions.”⁷⁸ How should national trade unions conduct themselves in responding to the recent European enlargements and the new Member State workers?

First, trade unions could adopt an active role in the process of europeanisation. At a national level, a strengthening of the regulatory and governmental role of trade unions could secure a voice for trade unions in the implementation process of Directives. This would not only allow trade unions to influence the process of europeanisation in order to produce legislative measures which match their aims and goals, it could also improve the success of Directives overall. However, there has been a lack of europeanisation through hard law mechanisms in the sphere of labour law in recent years. Therefore, an interest and involvement in the OMC seems necessary if trade unions are to secure a role in the process of europeanisation. Without time constraints on implementation or enforcement mechanisms to ensure compliance⁷⁹, the OMC may not be as successful at europeanising national labour law systems as Directives which have a visible ability to alter the ‘Rechtswirklichkeit’ in the Member States. Nonetheless, an exchange of best practice between trade unions in different Member States could provide answers to similar problems. The ver.di/UNISON Memorandum of Understanding is a first, formalised step in this direction. Moreover, the sporadic cooperation between the Migration Units of both unions enables an exchange of experiences. However, there still seems to be confusion as to what each union is doing and despite regional cooperation between the unions on certain issues, a systematic exchange of information is not taking place.

Apart from the Memorandum of Understanding, there is a general lack of cross-border engagement between European trade unions. UNISON recognised that the absence of systematic links with unions in the new Member States was a weakness. Similarly, some members of ver.di see this as a failure of trade union policy. As a result of this lack of communication, trade unions are struggling to effectively act across national and European legal frameworks. This could change if knowledge exchange on, for example, techniques for

⁷⁷ F. Rödl, ‘Bleierne Zeiten für die Arbeitsbeziehungen’, *Mitbestimmung* 3/2009 at p. 10: “Zwei Modelle stehen sich gegenüber: Entweder werden die Arbeitsbeziehungen (weiter) im nationalen oder sie werden (künftig) im europäischen Rahmen gestaltet.”

⁷⁸ *Ibid* at p. 14: “Diesmal sind realistische Entwürfe gefragt, die Folgendes in Rechnung stellen: den beschränkten politischen Einfluss der Gewerkschaften auf europäischer Ebene; die hohen Konsenserfordernisse europäischer Politik; die sozio-ökonomische Heterogenität der Mitgliedsstaaten und die Differenz der nationalen Systeme der Arbeitsbeziehungen, die sich immer wieder auch als Wettbewerbsvorteile niederschlagen. Die Phase vager Ausblicke sollten die Gewerkschaften endlich hinter sich lassen.”

⁷⁹ For examples see Hatzopoulos note 59 above.

integrating new Member State workers, were to take place systematically, as it already does between national and regional levels within UNISON. Increased cooperation between UNISON and ver.di could not only facilitate the integration of new Member State workers, it could also lead to transnational labour market coordination within the EU. The OMC could lay the groundwork for such coordination which would enable trade unions to effectively respond to the challenges of the European enlargement by acting within, around and across national and European legal frameworks. As Rödl explains,

transnational labour market coordination would be the way in which trade unions could facilitate an opening of national labour markets. This way, cross-border competition which leads to a lowering of labour standards could be effectively combated. In addition, it could enable trade unions to strengthen their political role at a European level.⁸⁰

Trade unions could also strengthen their political role at a European level through an active involvement in the ETUC. The difficulty that often arises is that trade unions, particularly in the UK, lack the strength at a national level to influence policy-making. There is thus limited scope for their involvement in the European decision-making process if they rely solely on their national strength. Yet this could be resolved if the ETUC were to take on a stronger role. As both ver.di and UNISON are large trade unions, they are powerful enough to have a strong influence within the ETUC. The case studies illustrate that both unions would welcome it if the ETUC were to take on a stronger negotiating and coordinating role, as it would provide them with a voice at a European level. As ver.di and UNISON are unsure about how to react to the process of europeanisation, the ETUC could serve as the medium through which the unions influence the formulation of European policies and legislation. This role for the ETUC has been recognised in the literature by Mückenberger et al. who encourage European trade unions to “become organisations for discourse and communication in order to find general subjects of interest”⁸¹ which would, for them, be a positive development to ensure for the survival of trade unions.

However, to date, the ETUC is often not able to coordinate national trade unions. While there are situations such as the negotiation of the Parental Leave Directive where the ETUC has

⁸⁰ Rödl note 77 above at p. 15: “Es wäre der Weg einer von den Gewerkschaften kontrollierten transnationalen Öffnung der nationalen Arbeitsbeziehungen. Nur so lässt sich wahrscheinlich der drückenden transnationalen Lohnkonkurrenz jenseits von Arbeitnehmer-Entsendung effektiv begegnen. Mittelfristig bestünde die Aussicht, die gesellschaftliche Macht der Gewerkschaften auf europäischer Ebene auch politisch zur Geltung zu bringen.”

⁸¹ Mückenberger, Stroh & Zoll note 1 above at p. 24: “Die europäischen Gewerkschaften könnten jedoch im positiven Fall zu Diskursorganisationen werden, die aus vielen kommunikativen Foren zusammengesetzt sind, in denen sich die subjektiven Bedürfnisse der Betroffenen zu verallgemeinerten Interessen ausbilden.”

effectively consulted its affiliates, there is scope for more to be done. In particular, the regular and ongoing consultation of national affiliates has been criticised for lacking depth and scope. However, the European enlargements and the influx of new Member State workers are prime examples of situations where the ETUC could play an effective role in supporting national trade unions in their efforts to integrate new Member State workers into the labour market. The case studies illustrate that the ETUC has begun to develop initiatives such as an exchange of good practice for the recruitment of new Member State workers, yet there is room for improvement on the part of the affiliates and the ETUC. The Confederal Secretary of the ETUC pointed out that large cultural differences between members makes communication between the unions difficult. Small-scale cooperation such as the Memorandum of Understanding between ver.di and UNISON, which could lead to regular and structured cooperation, may help to bridge the cultural differences between unions and, in turn, enhance the role of the ETUC.

There is thus a strong argument in favour of more consultation within and a stronger role for the ETUC. However, the effectiveness of the ETUC does not just depend on it consulting its affiliates; national trade unions must recognise the importance of trade union representation at a European level. The ETUC cannot be effective if it does not receive the active cooperation of its affiliates. Yet trade unions still seem to focus too much of their attention on the national level. Trade unions need to accord a central position to European affairs if they are to react effectively to the changes of europeanisation. To date, European matters are dealt with by UNISON and ver.di as a sub-category of 'International affairs', even though the unions have the potential to play a much stronger role within the EU than at an international level. If trade unions were to accord greater importance to European and cross-border issues, they could work to strengthen their role, not only in the implementation process of European law at a national level, but also in their national labour markets as a whole. This could also lead to a successful europeanisation of their national labour law systems so that scenarios such as those in *Laval* and *Riiffert* could be avoided in the future. The best example of such a policy can be found in the British trade unions' attitude to the European Union under the Thatcherite government. As Bercusson explains,

[t]he doubtless unintended consequence of the UK government policy of decollectivisation of industrial relations at domestic level was the huge advance in collectivisation of industrial relations at EU level. Deregulation of collective bargaining in the UK produced regulation through social dialogue at EU level. While the British trade unions (TUC) and employers (CBI) were ignored in London, they

were engaged in the process of negotiating EU level collective agreements in Brussels.⁸²

Yet on the whole, trade unions are struggling to integrate the European dimension into their policies and actions. This is understandable as the European Union's policy of europeanising national labour law systems takes many different forms and has a number of effects on trade unions acting within their national systems. However, europeanisation also gives trade unions mechanisms which could aid them in responding to the new Member State workers and the European enlargements. As the effects of europeanisation are unlikely to disappear, trade unions would benefit from a reorientation of their policies and strategies in order not only to take account of the process of europeanisation, but also to play an active role in determining its outcomes.

F. Concluding Remarks

The aim of this thesis is to provide substantive answers to the research questions which it poses at the outset: firstly, how have trade unions responded to the challenges of European enlargement? Following on from this, secondly, how have trade unions responded to, and what impact has their responses had, on the new Member State workers? The finding is that trade unions are struggling to adapt to the changing opportunity and regulatory structures which prevail following the recent European enlargements. In responding, they have used strategies from past experience, but they have also attempted to develop new methods to cope with the unprecedented state of affairs following the enlargements. The roles that they adopt in their national legal systems strongly pre-determine their reactions to the new Member State workers and the enlargements. They have not yet managed to shift their attention from a purely national playing field to one governed by a complex legal framework of national and European influences. As a result, they are finding it difficult to respond to the European Union's policy of europeanising national labour law systems and they are often unable to avail themselves of the mechanisms, such as an involvement in the consultation and implementation of European legislation, that europeanisation offers them.

Europeanisation is a complex process which is difficult to define. This thesis expounds a general definition and provides a number of examples to illustrate the definition. Such an

⁸² Bercusson note 54 above at p. 17.

approach provides an understanding of how europeanisation affects trade unions and how they may use it to their benefit. The effects of europeanisation on national legal systems lead to tensions that trade unions struggle to deal with. The results of this thesis illustrate that trade unions in Germany and the UK could benefit from each other, as they are facing similar problems and have started to look for solutions in different ways. However, cross-border dialogue does not regularly take place even though there are positive signs that trade unions are becoming more aware of the benefits of cooperation. The ETUC also has a potentially strong role to play in helping trade unions respond to the challenges of enlargement. However, the ETUC has not, so far, managed to adopt such a role. Overall, therefore, trade unions could be responding to the challenges of enlargement by acting within, across and around national and European legal frameworks in order to maximise the benefits that the regulatory structures have to offer them. Yet, for the most part they have focused their attention on using the methods which they have become accustomed to. Thus, they concentrate on the roles that they adopt in their national legal system in order to respond to migrant workers, instead of availing themselves of the mechanisms that europeanisation provides. Consequently, trade unions struggle to integrate new Member State workers into their structures and their impact upon those workers has been somewhat limited.

Apart from answering the research questions, this thesis makes a number of original contributions. First, it adds to the general literature on trade unions and migrant workers by placing new Member State workers within the context of that literature. Comparatively few works in Germany and the UK examine the subject of trade union reactions to migrant workers in any detail. Those that do, often limit themselves to an analysis of trade union reactions to postwar migration. Moreover, there is a lack of literature examining trade union responses to new flows of migrants such as the new Member State workers. The relatively brief overview that this thesis gives of British and German trade union reactions to migrant workers provides a picture of the historical context which has shaped trade union responses to the new Member State workers. The analysis then moves beyond the literature by demonstrating how trade unions are changing their reactions to migrant workers, a development that has not yet been the focus of much debate in the literature on trade unions and migrant workers. The thesis therefore continues the historical overview of trade union responses to migrant workers by focusing on new Member State workers, their characteristics, and trade union reactions to them. The account in this thesis of trade union reactions to new Member State workers within the context of the relevant literature is also a first step towards a

reinterpretation of trade union responses to migrant workers, following recent developments such as the European enlargements, in order to provide an understanding of the challenges facing trade unions.

Second, in order to understand the consequences and effects of europeanisation on national trade unions, this thesis develops a new model for studying the effects of europeanisation in the field of collective labour law. The model systematically breaks down the concept of europeanisation by expounding four different examples of how europeanisation has been attempted. In each of these examples, europeanisation is seen as a two-way process thereby recognising that the European and national levels each play a role in its development. The examples cover hard and soft law mechanisms as well as the case law of the ECJ. A framework is also developed to assess the successfulness of Directives in europeanising national labour law systems. Overall, this achieves clarity on the extent of europeanisation. The framework is then used to assess the effects of europeanisation on national trade unions. The analysis of these effects raises certain expectations about how one would expect trade unions to react to the challenges of europeanisation. The comparison of the reactions of trade unions in practice with these expectations enables the mechanisms that europeanisation may offer trade unions in their responses to the effects of the recent European enlargements to be assessed. Suggestions are made, on this basis, as to how trade unions could use the process of europeanisation to their advantage in order to adapt to the challenges of the recent European enlargements. The method allows a comprehensive study of certain aspects of europeanisation, namely the effects of hard and soft law mechanisms, as well as the case law of the ECJ, on national trade unions and vice versa. This achieves clarity regarding the content, scope and consequences of europeanisation and allows for the study of its effects on national actors. The usefulness of this new method is not just limited to the subject-matter of this thesis; it can be used more widely to understand the effects of europeanisation on non-state actors.

Finally, the overall structure of the thesis provides a novel approach to understanding how trade unions are responding to developments at a national and a European level. Chapter two clarifies the national framework in Germany and the UK within which trade unions operate. Due to the increasing influence of European regulation on national labour law systems through the European Union's policy on the europeanisation of national social and legal systems, chapter three explores the European influence on national labour law systems to add

to the law and policy context within which trade unions operate. Chapter four completes the theoretical framework by examining the literature on trade union responses to migrant workers and the European Union in order to provide a background to their current reactions. This historical context is easily ignored in an analysis of trade union responses to the challenges that they are facing. However, without this information one cannot fully understand the reactions of trade unions and how these could be improved upon. Based on this theoretical framework, suggestions are made about how one would expect trade unions to respond to the European enlargements and the new Member State workers. Two case studies, one on a German trade union and another on a British one, are set out in chapter five. The purpose of the case studies is to link the theory elaborated in earlier chapters with the actual responses of two particular trade unions. Chapter six draws together theory and practice to analyse how trade unions are responding to the new Member State workers and the recent European enlargements.

Overall, the combination of looking at law and policy in theory and in practice through an examination of the literature and a focus on specific trade unions through the case studies provides a thorough examination of how trade unions are responding to the challenges of European enlargement. The broad structure of the thesis provides a real understanding of how trade unions operate inside, across and around national and European legal frameworks. In addition, the contextualised use of the comparative method contributes to this understanding of trade union reactions. The comparative method used in this thesis also serves as a new model for comparative European labour law. It uses the traditional literature on comparative labour law as a context for a comparison. In doing so, the method ensures that sufficient distance is achieved from the systems which are to be compared. Moreover, account is taken of the socio-historical background of each national system in order to gain a clear understanding of the context within which trade unions operate. Finally, the national systems are seen in their European context in order to ensure for a thorough comparison. The structure adopted in this thesis therefore provides an understanding of the responses of trade unions to the European enlargements and the new Member State workers which enables the author to make suggestions from the analysis of the responses about what trade unions could improve, in order to facilitate the integration of new Member State workers into their host labour markets in Germany and the UK.

ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
AEEU	Amalgamated Engineering and Electrical Union
AentG	Arbeitnehmerentendegesetz (Posted Workers Law)
ArGV	Arbeitsgenehmigungsverordnung (Work Permit Regulation)
ASAV	Anwerbestoppausnahmeverordnung
BAG	Bundesarbeitsgericht (Federal Labour Court)
BAnz.	Bundesanzeiger (Federal Gazette)
BeschV	Beschäftigungsverordnung
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BNP	British National Party
BVFG	Bundesvertriebenengesetz (German Federal Expellees Act)
CAC	Central Arbitration Committee
CBI	Confederation of British Industry
CEE	Central and Eastern European States
CGT	Confédération générale du travail (French Public Services Federation)
COHSE	Confederation of Health Service Employees
DAG	Deutsche Angestellten Gewerkschaft (German Salaried Employees' Union)
DBB	Deutscher Beamtenbund und Tarifunion (German Civil Service Association)
DGB	Deutscher Gewerkschaftsbund (Confederation of Germany Trade Unions)
DPG	Deutsche Postgewerkschaften (German Postal Workers' Union)
EC	European Community
ECJ	European Court of Justice
EEC	European Economic Community
EMU	Economic and Monetary Union
EPA 1975	Employment Protection Act 1975
EPSU	European Federation of Public Service Unions
ETUC	European Trade Union Confederation
EU	European Union
EU2	New Member State workers from Romania and Bulgaria
EU8	New Member State workers from the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia
EVW	European Voluntary Worker
EWC	European Works Council
FDGB	Freier Deutscher Gewerkschaftsbund (Free German Trade Union Federation)
FSU	Finnish Seaman's Union
GMB	General, Municipal, Boilermakers' and Allied Trade Union – Britain's General Union
GPF	General Political Fund
GPMU	Graphical, Paper and Media Union
HBV	Gewerkschaft Handel, Banken und Versicherungen (Trade, Banks and Insurances Union)
ICP	Information and Consultation Procedure

IG Medien	Industriegewerkschaft Medien, Druck und Papier (Media Industrial Union)
ITF	International Transport Workers' Federation
MSF	Manufacturing, Science and Finance Union
NAECI	National Agreement for the Engineering Construction Industry
NALGO	National and Local Government Officers Association
NUPE	National Union of Public Employees
OECD	Organisation for Economic Cooperation and Development
OMC	Open Method of Coordination
OPZZ	Ogólnopolskie Porozumienie Związków Zawodowych (All Poland Alliance of Trade Unions)
ÖTV	Gewerkschaft Öffentliche Dienste, Transport und Verkehr (Public Services, Transport and Traffic Union)
PSI	Public Services International
SGB	Sozialgesetzbuch (German Social Code)
SPD	Sozialdemokratische Partei Deutschlands (Social Democratic Party of Germany)
TFEU	Treaty on the Functioning of the European Union
TGWU	Transport and General Workers Union
TUC	Trades Union Congress
TULRCA 1992	Trade Union and Labour Relations (Consolidation Act) 1992
Unifi	Union for the finance industry
UNISON	Public Service Union
Ver.di	Vereinte Dienstleistungsgewerkschaft (United Service Union of Germany)
WRS	Worker Registration Scheme

ANNEX I

CASE STUDY INTERVIEWS

A. Subject Matter of the Interviews

The purpose of the case studies was to clarify the responses of two national trade unions to the challenges of European enlargement and how their responses impact on new Member State workers. The studies focused on the responses of the Vereinte Dienstleistungsgewerkschaft (ver.di) in Germany and UNISON, the UK public service union. In order to clarify the responses of the two unions, interviews were conducted with the National Development Manager for Migrant Workers, the International Officer, and a member responsible for advising and recruiting migrant workers (Interviewee 1) at UNISON; and with the Officer responsible for Migration, the Europe Officer, and a member responsible for advising and recruiting migrant workers (Interviewee 2) at ver.di. A telephone conversation was also conducted with the Head of Policy Development at UNISON. It should be noted that UNISON's National Development Manager for Migrant Workers participated in part of the interview with UNISON's International Officer. Two interview dates are therefore listed for the National Development Manager for Migrant Workers in the interview table (below).

In particular, three themes were identified which were the focus of the interviews:

1. responses to enlargement and the transitional arrangements;
2. responses to new Member State workers in principle and in practice; and,
3. level of cooperation across borders.

In order to fully understand the level of cooperation across borders, interviews were also conducted with the Confederal Secretary of the European Trade Union Confederation (ETUC) and with the trade union representative to the German Permanent Representation to the European Union in Brussels (Interviewee 3).

B. Overview of Interviews Conducted

Due to the comparative nature of the thesis, the same questions were asked of both parties in interviews. As the purpose of the interviews was to gather information which is not necessarily predictable, there was no need for control over the behaviour of the interviewee. Questions asked were semi-structured in order to facilitate a comparison while, at the same time, leaving sufficient scope for development of an answer by the interviewee. Therefore, the same topics were covered in each interview but the structure of the interview was left largely to the interviewee. The interviewer merely guided the session so as to ensure that all relevant topics were covered. The interview participants were informed of the subject-matter of the interviews in advance however they were not given an interview guide. Interviews were, on average, one hour in length. Apart from the telephone interviews, the interviews took place at the workplace of the interviewee and were recorded and subsequently transcribed. The interviews with ver.di and with Interviewee 3 were conducted in German. All other interviews were conducted in English.

<u>Interviewee</u>	<u>Place and Date</u>
<u>UNISON</u>	
Head of Policy Development	Telephone Conversation, 29/7/08
International Officer	UNISON Headquarters, London, 28/5/2009
Interviewee 1	Telephone Interview, 4/11/08
National Development Manager for Migrant Workers	UNISON Headquarters, London, 20/10/08 and 28/5/2009 (together with the International Officer)
<u>Ver.di</u>	
Europe Officer	Ver.di Headquarters, Berlin, 29/1/2009
Interviewee 2	Ver.di, Hamburg, 13/3/2009
Migration Officer	Ver.di Headquarters, Berlin, 29/1/2009
Confederal Secretary, ETUC	ETUC Headquarters, Brussels, 25/2/2009
Interviewee 3	German Permanent Representation, Brussels, 24/2/2009

C. Sample questions

This is a list of the types of questions asked in each interview. They were varied in order to fit the relevant organisation. As the interviews were semi-structured, the interviewee ensured that all topics listed in the sample questions were covered. However, the exact nature and depth of the questions asked depended on the course of the interview.

1. What is the trade union's reaction to the European Union and the recent European enlargement?
2. Why is the trade union against/in favour of the transitional measures?
3. What is the trade union's position on new Member State workers?
4. Are the workers seen as a separate category to indigenous and/or 'traditional' migrant workers?
5. How is the trade union reacting to the new Member State workers in principle and in practice?
6. Does the trade union cooperate with other trade unions in other European Member States and/or through and within the ETUC?
7. How useful is cooperation across borders? Could it be improved?
8. How does the trade union react to recent European Court of Justice case law and/or soft law mechanisms such as the Open Method of Coordination?

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