# Labour Law and the Global Market for Manpower

Samuel Engblom
Legal advisor, PhD
TCO – The Swedish Confederation for Professional Employees
Stockholm
Sweden

Email: samuel.engblom@tco.se
July 2012

# Labour Law and the Global Market for Manpower

Samuel Engblom

## 1. The Market for Manpower

A company or an organization with a task that needs to be performed (*user company*), and that wishes to be able that to some degree coordinate that work with the rest of its organization, has several different options.[1] It can choose to hire new *employees* (on fixed-term or indefinite term contracts) or reassign existing staff to the new task or it can choose to turn to another company and have its employees perform the task. In the latter case, it is necessary to distinguish between *temporary work agencies* – which tends to be subject to special regulation – and other forms of *labour subcontracting*, such as consultancies, cleaning services, and in construction. A further option is to contract with a *self-employed worker*. In the following, these will be referred to as the user company's *manpower options*.

Depending on the manpower option chosen, the relationship between the user enterprise and the person performing the work will be governed by different combinations of labour law and commercial law. Further, the responsibility for paying non-wage labour costs such as social security contributions and taxes will vary, as will the level of those dues.

The divide between relationships governed by labour law and those governed by commercial law is often perceived as more or less binary. If the work is performed by the company's own employees, it is governed by labour law while all the other manpower options fall under commercial law. In reality, the distinction is much less clear cut. While the relationships between the user company and its own employees fall fully under labour law, most other manpower options are governed by a mix of commercial and labour law. Typically, the user company has some responsibility for the occupational health and safety of employees of other companies or self-employed that work on their premises. Anti-discrimination legislation also tends to have a broader personal scope, covering some self-employed workers and obliging user companies to prevent e.g. harassment of the employees of other companies working on their premises.

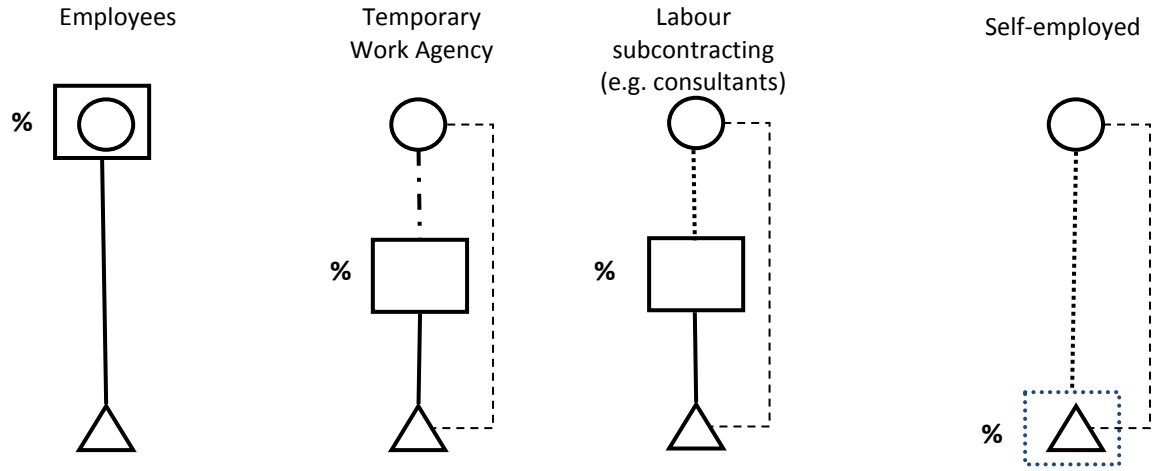
The manpower option that shows the most complex mix of labour law and commercial law provisions is temporary agency work. Apart from the already mentioned extensions of the personal scope of health and safety and anti-discrimination legislation, equal treatment provisions, such as the one found in Art. 5 of the EU directive on temporary agency work (2008/104/EC), may apply. In addition, temporary work agencies are often subject to other restrictions in order to have the right to operate as such.

[1] This excludes situations where the user company subcontracts production or lets go of an entire part of its business, e.g. through spinning off the sales organisation of a company or when a public entity leaves the running of a school or a health centre to a private company.

This means that the concept traditionally used to describe the selling and buying of labour – *the labour market* – no longer is sufficient to describe the options available to companies. Instead, we have a *market for manpower* which encompasses both the traditional labour market and a large section of the market for services, with a variety of manpower options. As the regulatory mix determines internal flexibility, external flexibility, the allocation of responsibilities and labour costs, it exercises great influence over user companies' choice of manpower option.

Figure 1 is an attempt to describe the manpower options and the regulatory mix they are typically subject to in an industrialised country graphically. The *triangle* symbolises the person performing the work and *circle* the user company. The *rectangle* indicates the employer in those cases where an employer-employee relationship is involved. A *solid line* indicates a contract of employment fully covered by labour law, while a *dotted line* indicates a contract fully outside of the realm of labour law. A *thin line of dashes* indicates that the user company has some labour law responsibilities vis-à-vis the person performing the work, despite not being that person's employer. The *line of mixed dashes and dots* between the temporary work agency and the user enterprise symbolises that this relationship frequently is subjected to some special regulation in labour law. The *star-dotted rectangle* around the self-employed worker indicates the potential presence of e.g. a limited company that then formally employs the person performing the work. As the figure shows, all manpower options are to some extent affected by labour law. Finally, the percentage sign (%) indicates the allocation for the responsibility for paying taxes and contributions. Most commonly, this is the responsibility of the employer, but there are countries where the employees pay all or part of their social security contributions.

*Figure 1. The Manpower Options*




This paper's focus is on the *international dimension* of the market for manpower – situations where the user company can choose to look for manpower in another country than the country where the work ultimately will be performed. That employers look for workers abroad is a far from new phenomenon. Developments in recent decades have nonetheless added a new dimension. Improved communications, higher education standards in source countries,

technological change, and demographic developments, have increased the possibilities, attractiveness and need of recruiting and procuring manpower from other countries.[2] In these situations, the mixes of labour law, commercial law, taxation, and social security regulations become even more complex as it becomes necessary to consider which country's regulations will apply. As will become evident, this is not an easy task, as these matters tend to be decided not by international conventions creating more or less uniform rules, but by each country's own tax codes and social security legislation sometimes informed by bilateral double taxation agreements or agreements on the co-ordination of social security systems. In the case of labour law, the answer is more complicated and takes the route over private international law. Private international law is the set of rules that determine who has jurisdiction and which country's law should apply in cross-border situations. Each country has its own private international law, with the effect that it varies from country to country.

In the format of a single paper, the ambition can therefore not go beyond providing an overview, and a graphic expression, based on the main rules that would typically apply to cross-border manpower mobility into a high-income industrialised country. It will then go on to discuss how these different factors can affect user companies' decisions to look for manpower abroad and national governments possibility to uphold their social- and economic models. The assumption is that country of origin of the migrant worker or foreign service provider and the country of work, where the user company is located, do not belong to the same organisation for regional economic integration (such as the EU, NAFTA, Mercosur) within which special rules can apply. Both home countries and countries of work are, however, assumed to be members of the ILO and the WTO.[3] There are, nonetheless, several references to European Union law. These are mainly due to the fact that the EU, with its high degree of market integration, is where some of the issues dealt with in the paper have materialised.

## 2. Cross-Border Manpower Mobility

In the global market for manpower, not only the manpower option is important, but the form of mobility as well. In this paper a typology consisting of three categories of mobility will be used: *labour migration of employees*, *entrepreneur migration*, and *trade in services mobility*. These do not correspond to any recognised legal categories, but are an attempt to make a complex legal situation more legible.

*Labour migration of employees* is the rather straight forward situation where a person moves from country A (country of origin) to country B (country of work) to work as an employee for an employer that is established in country B. *Entrepreneur migration* refers to the migration of a person from country A to country B to establish him- or herself as a self-employed entrepreneur in the latter. *Trade in services mobility* is, as will be evident below, somewhat more complicated. The persons involved can be either employees or self-employed. The

[2] See for example the report of the Global Commission on International Migration (2005). Münz (2011) describes how the demographic development increases the necessity for many European countries to attract more migrants.
[3] At the time of writing, in February 2012, the ILO had 183 members and the WTO 153 members. Not all WTO members are independent countries.

common denominator is that they maintain a strong link to an economic entity in their country of origin.[4]

Depending on the category of mobility, different rules apply not just for migration but for labour law, social security, and taxation as well. Further, they raise different issues of e.g. private international law, countries' obligation under ILO conventions, and WTO-law that affect the legal rights of migrant workers and the incentives for employers to look for labour abroad.

### *2.1 Labour migration of employees*

The most common form of labour migration is that of employees – persons moving from one country (country of origin) to another country to work as an employee for a company established in the latter country for a longer or shorter period. Typically, this requires a work permit which in turn is subject to conditions. In an empirical analysis of labour immigration programs of 46 high- and middle- income countries, Ruhs describes how countries try to govern labour migration through regulating *openness* (the number of migrants to be admitted e.g. quotas, labour market tests, fees) *selection* (e.g. by skills, nationality) and *rights* (what rights to grant migrants after admission e.g. free choice of employment, access to the welfare state, temporary or permanent residence, family reunion).[5]

As the migrating employee's employer is a company or an organisation established in the country where the work is performed (country of work) the main rule is that the labour law of the country of work applies fully. This follows from the mandatory nature of national labour law making it applicable to all employees and not just citizens (below 3.1) as well as from private international law (below 2.2). There are nonetheless examples of countries that deny migrant employees certain rights, such as the right to form and join trade unions, or where provisions such as minimum wages are lower or non-existent for migrant workers.[6]

The reality of many migrant workers is less rosy. In a 2010 report on labour migration, the ILO pointed to poor or even dangerous working conditions, low wages that are often not paid in full, denial of the freedom of association, discrimination and xenophobia as some of the hardships facing many migrant workers. The ILO identified, as one of the factors affecting the working conditions of migrant workers, their migration status. "The more tenuous the worker's migration status, the more barriers there are to seeking redress for unfavourable treatment"[7].

Often, labour immigration programmes grant work permits on the condition that the job in question fulfils requirements on wages and other working conditions. The conditions can be formulated in several different ways. Employers may be required to fulfil minimum standards

[4] In this paper, the issue of *cross-border commuters* – persons who live in one country and commute to work in another country – will not be considered.
[5] Ruhs (2011) p. 1.
[6] This is the case in several of the Gulf States see Ruhs (2011) pp. 11 and 18.
[7] ILO (2010) p. 77

such as paying the legal minimum wage (if such exist), pay the "prevailing wage" or offer wages and other working conditions at the level of applicable collective agreements.[8]

When it comes to *social security* – such as unemployment benefits, sickness benefits, and pensions – the access of labour migrants is often dependent on the duration of their stay in the country of work with temporary migrants having significantly less rights than those that come under labour immigration programmes aimed at permanent migration.[9] In welfare systems with employment based benefits, the rights of temporary migrants may be restricted initially as it will take some time before they fulfil eligibility requirements. From a market for manpower perspective, more interesting still is the duty of employers to pay employers' contributions. Restricted rights of migrants do not necessarily lead to restrictions of their employer´s duty to pay social security contributions.

Employers established in the country of work naturally pay corporate taxes there too, as does migrant employees that take up residence in the country of work. If the length of their stay is below a certain threshold, for example six months during one year, special rates often apply. In addition, many high-tax countries have also introduced special tax concessions for mobile high-skilled (or high-earning) workers. Some of these schemes also include reductions of social security contributions.[10]

### *2.2 Entrepreneur migration*

Migration of entrepreneurs can be defined as a person moving from country A (country of origin) to country B (country of work) to establish a business. Residence permits for entrepreneurs are not always labelled work permits but are, like these, subject to conditions. As in the case of labour migration of employees, many countries operate several different schemes for migrating entrepreneurs.[11] Some countries distinguish between the migration of the self-employed and the migration of investors, where the former are distinguished by their personal involvement in managing the business. Common requirements are experience in managing a business, a business plan, an estimated number of jobs to be created, a certain amount of capital, proof that the entrepreneur can support himself or herself and family members for an initial period, and proficiency in the country of work language or in English. Some countries do not grant residence permits to self-employed workers in certain sectors, typically regulated professions, or condition permits on consultations with professional or other bodies. There are also examples of countries that give preference to entrepreneurs wishing to invest or start a business in less developed parts of the country of work.

The fact that the entrepreneur establishes himself or herself in the country of work normally means that his or her business falls under the labour law, the social security law and the tax law of that country. They may nonetheless have limited access to social security at least initially.[12]

[8] Ruhs (2011) p. 11.
[9] Ruhs (2011) p. 43.
[10] OECD (2011) pp. 125ff.
[11] OECD (2010) pp. 63ff gives a good overview of these programmes in OECD-countries.
[12] OECD (2010) p. 73.

The migration of an entrepreneur is most likely not a very common solution when a user enterprise locks for manpower. It must nonetheless be included in order to make the picture complete, and to provide a contrast with employee migration and trade in services mobility, but it will be treated in less detail.

### *2.3 Trade in services mobility*

Trade in services between countries that are members of the World Trade Organisation (WTO) is, at least in a formal sense, governed by the WTO's *General Agreement on Trade in Services* (GATS). The definition of trade in services found in Article I of the GATS is commonly described as the four modes of trade in services.

- *Mode 1 – Cross-border supply,* is the supply of a service from the territory of one Member into the territory of any other Member, e.g. services rendered over a telephone line or the Internet.
- *Mode 2 – Consumption abroad*, is the supply of a service in the territory of one Member to the service consumer of any other Member e.g. tourism.
- *Mode 3 – Commercial presence,* is the supply of a service by a service supplier of one Member, through commercial presence in the territory of any other Member, e.g. the setting up of a branch of a company in another country.
- *Mode 4 – Presence of natural persons,* is the supply of a service by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member, e.g. non-nationals on consultancy or construction tasks.

"Services" here include any service in any sector except services supplied "in the exercise of governmental authority," defined as "any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers".[13] In the context of the market for manpower, the two modes of interest are Mode 3 and Mode 4, in particular the latter, as they involve the cross border mobility of employees and entrepreneurs.

The basis for the GATS order is the principle of *most-favoured-nation* (MFN) treatment (Article II). Under MFN, Members are obliged to "accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country". The MFN in the GATS is less strong than that of the GATT, as it is qualified by the possibility of derogation. MFN rules apply only if no exemption has been notified. The possibility to make exemptions is, however, limited. Importantly, it is meant in the positive, as a possibility to treat some trading partners better than others.[14] This is also the spirit of the two articles that specifically allows for *economic integration* through free-trade areas such as the European Union (Article V) and *labour market integration agreements* (Article V bis) between a limited number of countries where at least one is a WTO member. Article V bis was inserted at a late stage in the negotiations and has been seen as an expression of the contracting parties' "willingness to limit the possible impact

[13] GATS Article I:3 litt. b and c
[14] Stoll and Schorkopf (2006) p. 190.

on domestic immigration regimes resulting from the wide definition, in Art. I:2, of the modes of service supply, in particular mode 4"[15]. In order to prevent abuse of this possibility, the standard set for an agreement to qualify as a labour market integration agreement is rather high. To qualify, the agreement must establish "full integration of the labour markets between or among the parties" and "exempt citizens of parties to the agreement from requirements concerning residency and work permits" (Article V bis). So far, only one labour market integration agreement has been notified to the WTO: the Common Nordic Labour Market covering Denmark, Iceland, Norway, Sweden and Finland.

The GATS also contains rules on *market access* (Article XVI). GATS does not grant market access to all services as a general right. Instead, members can chose to open specific service sectors through specific commitments. Once opened up, GATS members must grant access as specified to service suppliers and services for all other Members.

Under Article XVII "each Member shall accord to services and service suppliers of any other Member, in respect to all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers"*(*N*ational treatment)*. There is no general guarantee of national treatment and it is not an obligation applicable to all trade in services, but only to areas where specific commitments have been made. Members are obliged to treat all foreign services or service suppliers equally, but these do not have a general right to be treated equally to domestic services or service suppliers. National treatment can be secured by treatment which is formally identical or formally different, as long as it does not distort competition.[16]

Further, Articles XIX-XXI contains provisions on *progressive liberalisation*. These mandate new rounds of negotiations on the liberalisation of the entire sector every five years. The progressive liberalisation provisions have been described as the GATS' "built in agenda"[17].

To sum up, the GATS approach is 'positive listing', in which market access is liberalised and national treatment granted only to the extent to which WTO members have entered commitments into their schedule.[18] The Members enter into commitments for each of the four different modes of service, which together make up their "schedule of commitments". If a WTO member decides to modify their schedule, e.g. by retracting a commitment or re-introduce a barrier to market access, and the modification has an adverse effect on trade, it must compensate all other WTO members by offering commitments in another sector or mode of supply (Article XXI).

*GATS Mode 3 Commercial Presence*

[15] Wolfrum et al (2008) p. 154
[16] Stoll and Schorkopf (2006) p. 191.
[17] Stoll and Schorkopf (2006) p. 197.
[18] Panizzon (2010) p. 12.

As mentioned above, GATS Mode 3 is the supply of a service by a service supplier of one Member, through *commercial presence* in the territory of any other member, for example through an agency, branch, subsidiary or joint venture.

GATS Mode 3 can involve cross border manpower mobility in different ways. If the company establishing itself is in fact a self-employed worker or if the establishment involves an owner of the business moving to the country of work, the situation is the same as in the category *entrepreneur migration*. An interesting question, which still begs for an answer, is whether all migration of entrepreneurs between WTO Members are covered by GATS Mode 3 or not.

Mode 3 can also lead to manpower mobility if the company establishing itself brings one or several of its employees. If these become employed by the entity in the country of work their movement falls in the category *labour migration of employees*, and the labour, social security and tax law of the country of work typically applies. If they stay employed by a company in the country of origin the rules for GATS Mode 4 Presence of natural persons as described below apply. In both cases, as the company is established in the country of work, In fact, in WTO members' schedules of commitments, movement of natural persons under GATS Mode 4 is more often than not linked to Mode 3.[19] This means that Mode 4 movements in the form of *intra-corporate transferees*, *business visitors*, *executives, managers and specialists* (see below) are conditioned on foreign direct investments under Mode 3.

*GATS Mode 4 Presence of Natural Persons*

GATS defines Mode 4 as the supply of a service "by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member." Most commonly, this means that a company in country A (the service supplier) sends one or more of its employees (natural persons) to country B to deliver a service. Another variant is that a self-employed worker from country A goes to deliver a service in country B. Both country A and country B must be WTO members and the natural persons involved must be nationals or permanent residents of a WTO member other than the country of work B. The concept resembles but is not identical to *posting of workers* in EU law.[20]

GATS Mode 4 distinguishes itself from labour migration of employees by the fact that the person performing the work is employed by a service supplier in one country while carrying out work in another country. If the person instead is employed by a company in the same country where the work is performed, he or she falls in the category of labour migration of employees. The crucial point is thus the location of the employer. This view can find additional support in the *Annex on Movement of Natural Persons Supplying Services under the Agreement* attached to GATS, where the second paragraph states that the agreement "shall not apply to measures affecting natural persons seeking access to the employment market of a Member". This has been interpreted as implying that the employment of foreigners by employers established in the country of work, that is the labour migration of employees, falls outside the scope of GATS

[19] Panizzon (2010) p. 17.
[20] *Directive 96/71/EC on the posting of workers*.

Mode 4.[21] As already explained, the location of the employer has great consequences for the application of labour law and the duty to pay taxes and social security contributions.

Another important distinction is whether the cross-border movement is *temporary* or *permanent*. In trying to distinguish trade in services from labour migration of employees, this is not a very useful distinction, as much labour migration of employees also is temporary in nature. But for self-employed workers, the distinction makes more sense, as a self-employed person who establishes himself or herself in the country of work would fall under migration of entrepreneurs and GATS Mode 3.

From a GATS perspective, the distinction between temporary and permanent is, nonetheless, highly relevant. The second part of the above mentioned second paragraph of the *Annex on Movement of Natural Persons Supplying Services under the Agreement* stipulates that the agreement shall not apply to "measures regarding citizenship, residence or employment on a permanent basis." Neither the agreement nor the annex specifies any time frame to determine what might constitute temporary presence. Instead, the Members have, in their schedules of specific commitments, indicated the permitted duration of stay for the different categories of natural persons. In practical terms, the provision means that members are free to define the mentioned aspects of their labour migration policy.

When it comes to temporary stays in their territory, however, the freedom of the Members is more limited. According to paragraph four of the Annex, "the Agreement should not prevent a Member from applying measures to regulate the entry of natural persons into, or their temporary stay in, its territory […] provided that such measures are not applied in such a manner as to nullify or impair benefits accruing to any Member under the terms of a specific commitment." In a footnote, it is said that "the sole fact of requiring a visa for natural persons of certain Members and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment".

Taken together, this means that WTO members are allowed to require that natural persons who enter their territory to supply a service have a work permit, but that these requirements must not be used in way that lessens the value of their commitments.

Of the four modes of delivery, Mode 4 is the one where WTO members have opened up the least. The commitments are generally targeted at skilled workers, in particular highly-educated professionals. Members' schedules also delineate access conditions by further subdivisions of Mode 4, for example *independent professionals*, *contractual service suppliers* (employees of a service supplier from country A without a commercial presence in country B delivering a service to a client in B), *intra-corporate transferees* (employees that are sent by their employer to work temporarily in another Member where there employer has a commercial presence, but that remains employed by the company in the first state) and *business visitors* (employees of a service supplier in country A that enters country B to, for example, set up a commercial

[21] WTO Document S/C/W/301

presence or negotiate the sale of a service).[22] In addition, there is, as mentioned above, often a linkage with Mode 3 where temporary movement of labour is conditioned on foreign direct investments and the commercial presence of a foreign service supplier.

Mode 4 workers are still employed by the employer in the country of origin and are not residents of the country of work. As far as social security and taxes are concerned, they therefore normally fall under the jurisdiction of the country where the employer is established.[23] For labour law, the answer is more complicated and takes the route over *private international law*. Private international law is the set of rules that determine who has jurisdiction and which country's law should apply in cross-border situations. Each country has its own private international law, with the effect that it varies from country to country.

Within the EU, however, rules have been harmonised through *Regulation 593/2008/EC on the law applicable to contractual obligations (Rome I)*. The rules of the regulation are valid both between European Union countries and in relation to countries outside the European Union. According to Article 3, the main rule is that the parties are free to choose which country's law should apply to their contract. In the case of individual employment contracts, according to special provisions in Article 8 of the Rome I-regulation, the parties' choice is limited in order to protect employees. Technically, the main rule is that the parties are free to agree on the applicable law, but only as long as the employee is not deprived of protection that he or she would have had if no such agreement had been reached. In practice, the main rule is the provision in Article 8.2 that the applicable law is the law of the country in which the employee "habitually carries out his work".

The country where the work is habitually carried out shall not be deemed to have changed if the employee is *temporarily* employed in another country. This means that if an employee who normally works in Country A is sent by his or her employer temporarily to Country B to provide a service, the labour law of Country A still applies. If it is not possible to determine in which country the work is habitually carried out, "the contract should be governed by the law of the country where the place of business through which the employee was engaged is situated" (Article 8.3). The presumptions above may have to yield to a final provision in Article 8.4. If it "appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply". For Mode 4, these rules typically lead to the result that it is the labour law of the service provider's country of origin which is to apply, unless the employee performs the greater part of his obligation towards the employer in the country of work. The first case must nonetheless still be considered the main rule.

GATS does not contain any provisions equivalent to the *European Union Directive 96/71/EC on the posting of workers*, which proscribes that certain parts of country of work labour law should

[22] WTO Document S/C/W/301

[23] National social security systems and tax regimes typically define their personal scope in a way that excludes persons who are resident of and employed in another country.

apply to employees that are sent by their employer to provide a service in another country, regardless of Rome I. Instead, it is the Mode 4 workers' need for work permits that imposes country of work labour standards on employees sent by their employers to provide services in another WTO member. As mentioned above, work permits are often conditioned on the job in question fulfilling requirements regarding the wages and other working conditions. It is not uncommon, however, that these requirements are less strict or waived entirely for categories of Mode 4 workers, for instance intra-corporate transferees.[24] It is important to note however, that the fulfilment of conditions for work permits does not mean that country of work labour law as such becomes applicable. Instead, it is the contract of the Mode 4 employees with their employer in the country of origin that must fulfil the requirements.

Foreign service providers that are temporary work agencies can be affected by country of work regulation of their industry. In the EU, *Directive 2008/104/EC on temporary agency work* includes a principle of equal treatment which gives temporary agency workers the right to at least the basic working and employment conditions "that would apply if they had been recruited directly by that undertaking to occupy the same job" (Article 5(1)), together with rights concerning the access to employment, collective facilities, vocational training, and representation. These rules apply to visiting non-EU temporary work agencies as well.

A final possible route for country of work labour law to reach the working conditions of Mode 4 workers is if the foreign service provider signs a country of work collective agreement. This is not very common and preconditioned on the presence of strong trade unions and maybe even on country of work trade unions having a possibility to take industrial action against the foreign service provider (see below).

### 2.4 A Model for Cross-Border Manpower Mobility

If the manpower options and the categories of mobility are put together, we can construct a basic model describing the choices a user company has to solve its need for manpower with manpower from abroad. This has two dimensions: the manpower options and the categories of mobility.

*Employees* are, as explained above, distinguished from the other manpower options by the fact that they are hired directly by the user company. As shown in Table 1, if a company choses to recruit employees from abroad they will fall in the category of labour migration of employees. If the user company instead choses to temporarily transfer a person that is employed by another company within the same group it could however be considered as an *intra-corporate transfer (ICT)* which falls in the trade in services category and under GATS Mode 4. If the user company instead choses a *foreign temporary work agency,* the category of mobility will be trade in services as long as the company providing the manpower does not establish itself in the country of work, due to the fact that the employees are still employed in the country of origin. The same is true if the user company contracts a *foreign labour subcontractor.* Finally, self-

[24] In an 2009 analysis of Member GATS Mode 4 schedules, the WTO Secretariat writes that out of 70 members having committed explicitly on ICT, only nine have subjected them to quotas and only few are coupled with economic needs test. WTO Document S/C/W/301.

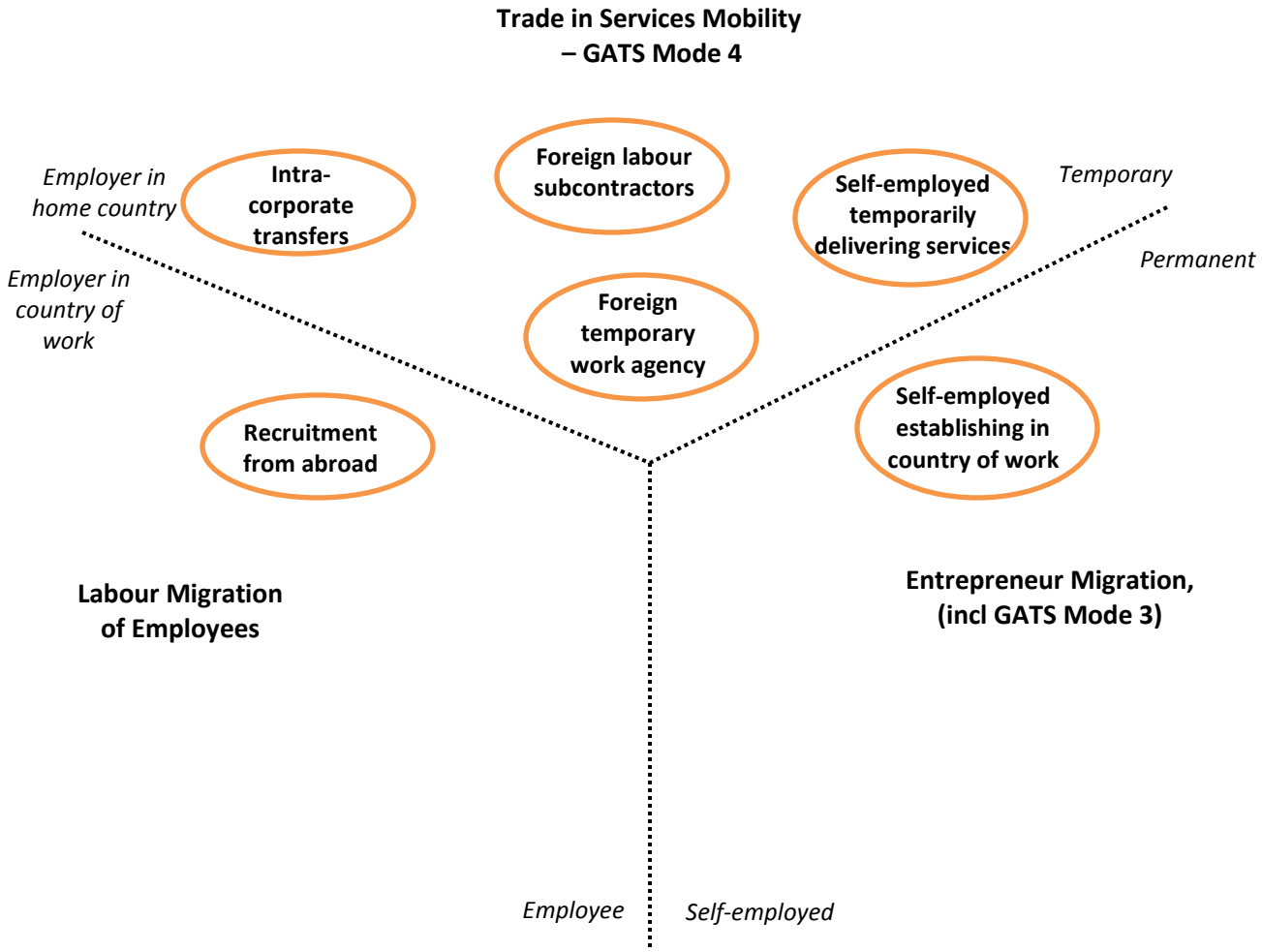
employed can cross a border to perform work either through moving their business and establishing themselves in the country of work (entrepreneur migration) or maintaining their business in the country of origin and only deliver services temporarily in the country of work (trade in services).

*Table 1. Cross-border Manpower Options*

| | *Employees* | *Temporary work agencies* | *Labour subcontracting* | *Self-employed* |
|---|---|---|---|---|
| *Labour migration of employees* | **Recruitment from abroad** | | | |
| *Trade in services mobility – GATS Mode 4* | **Intra-corporate transfers** | **Foreign temporary work agency** | **Foreign labour subcontractor** | **Self-employed temporarily delivering services** |
| *Entrepreneur Migration (incl GATS Mode 3)* | | | | **Self-employed establishing in country of work** |

Figure 2 is an attempt to graphically describe the distinctions between the six different cross-border manpower options. The distinction between labour migration of employees and trade in services under GATS mode 4 is whether the *employer is located in the country of work or in the country of origin*. The distinction between trade in services under GATS mode 4 and entrepreneur migration including GATS mode 3 is whether the presence in the country of work is *temporary or permanent*. Finally, the distinction between labour migration of employees and entrepreneur migration is whether the person migrating is an *employee or self-employed*.

*Figure 2. Distinctions between the different cross-border manpower options*




To finalise the description of the cross-border manpower options, we need to summarise the applicable regulation – country of work or country of origin – for each option in the fields of labour law, social security and taxation.

In the case of *recruitment from abroad,* country of work labour law applies and conditions for obtaining a work permit may further strengthen this, for example through requiring employers not just to comply with minimum standards but to grant wages and working conditions on the level of applicable collective agreements or corresponding to the average in the sector. If the migrant worker takes up residence in the country of work, he or she will belong to the country of work's social security system, both as concerns contributions and benefits. If the migrant worker's stay in the country of work is short in duration, the migrant's access to benefits may be restricted, but not necessarily the employer's duty to pay contributions, which means that it has no effect on the unit labour cost. Taxes are to be paid in the country of work, but many countries apply special (lower) rates if the duration of the stay is short or run special tax

regimes for foreign experts. These affect the take-home pay of the employees rather than employers unit labour costs, even if they could create space for slightly lower gross wages.

*Intra corporate transfers (ICT)* are more complex as the employee is still employed in the country of origin, albeit in another company within the same group. The main rule is therefore that the employee belongs to the labour law, social security system, and taxation regime of the country of origin. Conditions for work permits may, however, have the effect that the employers of intra-corporate transferees have to live up to country of work standards of wages and working conditions. ICTs are, however, sometimes exempted altogether from work permit requirements. *Foreign temporary work agencies* also fall predominantly under country of origin regulation. As in the case of ICTs, conditions for work permits may nonetheless have the effect that some country of work labour standards have to be considered. They may also have to follow country of work regulation on temporary work agencies. *Foreign labour subcontractors* follow the pattern of the former two, with country of origin regulation as the main rule, but modified through conditions for work permits. In all three cases, it is important to remember that albeit there may be requirements to live up to country of work labour standards they are still employed in the country of origin on country of origin employment contracts to which country of origin labour law applies.

S*elf-employed workers temporarily delivering a service* do not have an employment contract neither in the country of origin nor the country of work. Like the other three trade in services manpower options the main rules give that they fall under country of origin regulation in all three areas. As far as the need for work permits are concerned, information is hard to find. The reason is probably that most countries are reluctant to grant self-employed service providers access to their markets. In a 2009 WTO secretariat study of Members' GATS Mode 4 commitments, only seven countries had included openings for independent professionals in their schedules.[25] In case the category is opened up, however, work permit requirements seem to be less strict. None of the seven Members that had made openings in the independent professional category had made them subject to specific quotas and only one to a labour market needs test. There are also examples of self-employed workers temporarily delivering services for a shorter period being fully exempted from work or residence permit requirements.[26] Finally, *self-employed that establish themselves in the country of work* fall under country of work legislation in all three areas (but special income tax rates may apply). If the rules are followed, migrating entrepreneurs therefore do not enjoy any regulatory advantage over entrepreneurs already present in that country.

[25] WTO Document S/C/W/301.

[26] This is the case e.g. in Sweden, where self-employed who plan to work for a shorter period than three months do not need residence permits.

*Table 2. Applicable regulation: Main rules*

| | Labour Law | Social Security | Taxation |
|---|---|---|---|
| ***Recruitment from abroad*** | Country of work<br>**work permit may req country of work standards.* | Country of work<br>* short stay may exempt from benefits. | Country of work<br>*special income tax rates may apply if short stay or high-skilled worker. |
| ***Intra-corporate transfers*** | Country of origin<br>**work permit may req country of work standards*<br>**may be exempted from work permits* | Country of origin | Country of origin |
| ***Foreign temporary work agencies*** | Country of origin<br>**work permit may req country of work standards*<br>**country of work regulation of TWA.* | Country of origin | Country of origin |
| ***Foreign labour subcontractors*** | Country of origin<br>**work permit may req country of work standards* | Country of origin | Country of origin |
| ***Self-employed temporarily delivering services*** | Country of origin<br>**may be exempted from work permits* | Country of origin | Country of origin |
| ***Self-employed establishing in the country of work*** | Country of work | Country of work<br>*access to benefits may be restricted initially | Country of work<br>*special rates may apply |

# 3. Analysis

## 3.1 Mandatory Law as a Pillar of Social and Economic Models

The point of departure for the analytical part of this paper is that labour law, social security law and tax law are all mandatory and that they are so for a reason. Labour law covers all relationships between employers and employees or their organisations. Social security systems are at least partially mandatory without the possibility for individual employers and employees to opt out. Whether to pay taxes and the size of these taxes should not, at least not in theory, be optional.

The mandatory nature of labour law is commonly accredited to its role as social protection legislation or the necessity to protect the weaker party in an inherently uneven relationship. Labour law is also frequently justified in terms of human rights. The ILO has identified a number of "fundamental principles and rights at work" – the freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or

compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation – which it holds to be so fundamental that all members of the organisation have the obligations to guarantee them, regardless of whether they have signed the relevant ILO conventions or not.[27] In the case of tax law, the mandatory nature can be traced to the state´s need for revenue, but also to ideas of redistribution of wealth. For social security, all of the above mentioned rationales are relevant in justifying its mandatory nature: social protection, human rights, the need for revenue and the redistribution of wealth.

Labour law, social security law and tax law are, however, also important pillars of a country's economic and social model. Labour might not be a commodity but is definitely a means of production. The influence labour law, tax law and social security have over the economy can hardly be overestimated. All three serve as instruments to guide or channel choices and contractual outcomes to increase the total amount and change the character of goods and services produced. Labour law does not only set the standards for the relationship between employers and workers. It also sets standards for the competition between different employers and between different workers, as it regulates what means of competition can be used to compete for business and jobs. In the case of competition between firms, "the ability of one firm to adopt a high-productivity route to competitive success is limited if its rivals are able to compete on the basis of low pay and poor working conditions".[28] Labour law and social security sets a floor under which wages and working conditions are not allowed to fall, forcing firms to improve and invest in product development, technology or management practices. Supiot, referring to "l'égalité entre employeurs", points to placing different firms on an equal footing as concerns labour costs as one of the essential functions of labour law.[29] In the case of competition between workers, labour law works the same way, preventing underbidding and making it easier for workers to enter a high-productivity route, for example through investing in training. Nevertheless, the possibility to find manpower on the other side of the border comes with potential advantages. Labour migration may alleviate skills shortages or demographic shortages and access to foreign service providers can improve competition and lead to better functioning markets.

### 3.2 The Challenge of Cross-border Mobility to Social and Economic Models

Cross border manpower options challenge the above mentioned policy choices as they provide user companies with possibilities to avoid mandatory regulation and thus partially opt out of the social and economic model. In addition, cross-border mobility and the choice of manpower options also have consequences for the possibility to *enforce* these rules. The vulnerability of migrant workers and the difficulties in holding employers in another country accountable are but two factors that affect the possibility of enforcing regulation in these situations. One must also consider the potential conflict between the enforcement of labour standards and the progressive liberalisation of the trade in services. Below, the various cross-border manpower options will be analysed with a view to the possibility to uphold the mandatory nature of labour

[27] *ILO Declaration of Fundamental Principles and Rights at Work*.
[28] Ewing (1996) p. 26.
[29] Supiot (1997) p. 236.

law, social security systems and taxation, both in terms of the applicable regulation and its enforcement.

### 3.2.1 Labour migration of employees: Recruitment from abroad

As we have seen above, the main rule is that country of work regulation applies in all three areas and that conditions for work permits often reinforce this. The special income tax rates for experts and those that only stay a short period in the country of work can amount to differences in labour costs – or rather a possibility to pay slightly lower wages – as may the non-inclusion of some categories of migrant workers in country of work social security systems if this means that employers do not have to pay contributions for them. Overall, however, the regulation applied to employees that user companies recruit abroad does not differ much from that of employees already in the country why recruiting from abroad should normally not be a way for user companies to avoid regulation or reduce unit labour costs.

There is, however, a significant discrepancy between theory and practice. First, the fact that migrating employees fall under the same rules as other employees does not necessarily mean that they enjoy wages and working conditions on the same levels. Many labour immigration programmes require only minimum levels to be followed by employers as a condition for a work permit and even under programmes that require payment of the prevailing wage or conditions that correspond to those found in the relevant collective agreement it may be difficult to guarantee that they will not be paid less than native employees with the same education and experience as they could enter at the lower rungs of the scales of pay.

Second, despite formal rights, many migrant workers suffer from weak bargaining power. Lack of information, linguistic difficulties, and the fact that many work in low-paying, low-skilled jobs where they are easily replaced are some of the causes. In many cases, work permits are, at least initially, tied to one employer with the effect that the migrant employee does not have the option to change employer if they are discontent with the conditions or comportment of their current employer. In addition, migrant employees tend to lack alternative sources of income. In his study of labour immigration programmes in high- and middle- income countries Ruhs found that unemployment benefits was one of the two social rights most rarely granted to migrant workers.

The effect is that migrant workers tend to de facto suffer from worse working conditions than native workers. According to the ILO, migrant workers receive lower wages than native workers in similar positions and often suffer from employers' failure to pay their wages in full, on time, or at all.[30] Further, they are concentrated in high-risk and hazardous sectors and are more likely to work long hours.[31]

Still, compared to other cross-border manpower options, recruitment from abroad through the labour migration of employees stands out as the least problematic. From a legal perspective,

[30] ILO (2010) pp. 75f.
[31] ILO (2010) pp. 105f.

labour migration of employees stands out as the most inclusive form of manpower mobility as the main rule for this category of mobility is that migrant workers fall under the same rules as country of work workers, which makes the risk for underbidding and social dumping lower than for other categories.

### 3.2.2 Trade in Services Mobility – ICT, Temporary Work Agencies, Labour Subcontractors and Self-employed Temporarily Delivering Services

For the three cross-border manpower options where employees are employed in their country of origin but deliver services in the country of work the main rule is, as mentioned, that the labour law, social security system, and tax regime of the country of origin applies. Country of work labour standards may nonetheless play a role, through conditions for work permits or special regulation of temporary work agencies.

Taken together, this can amount to significant differences in unit labour costs, even if additional costs such as travel and housing are taking into account, and a not-so-level playing field between domestic and foreign service providers. That this problem is more than theoretical is evident from the tensions surrounding the posting of workers within the European Union (despite *Directive 96/71/EC on the posting of workers* requiring the application of parts of country of work labour law).[32] As differences in labour law, social security, and taxes tend to be larger between on the one hand high-income countries and on the other middle- and low-income countries, trade in services between countries in different stages of development is an even greater challenge to national social and economic models.

Working in one country with the formal employer located in another country does not only have consequences for the applicable law. It also complicates the monitoring of the actual working conditions. There is an evident risk that neither country of origin nor country of work authorities and trade unions have the full picture regarding the actual pay and working conditions. The could also feel less obliged to act on behalf of employees who are working in a country other than where the employer is located or uncertain about their mandate to do so. Depending on which form the trade in services takes, and on country of work legislation on subsidiaries, the visiting company may or may not have representative with legal capacity to represent the employer in the country of work. [33] Individual employees may also feel uncertainty regarding their own legal status, which adds to the general vulnerability of migrant workers described above (3.2.1).

Also conditions for work permits, which above have been identified as the primary country of work safeguard, become less efficient when the contract that should live up to the defined standards falls under the laws and jurisdiction of another country. In the case of special regulation concerning temporary work agencies, such as the equal treatment principle in EU

[32] The ECJ ruling in *Laval (C-341/05)* and its aftermath.

[33] For labour law systems that depend on collective agreements for establishing and upholding labour standards, such as those in the Nordic countries, the absence of a representative with legal capacity can cause severe problems as there is no one to negotiate with.

*Directive 2008/104/EC on temporary agency work*, the same weakness applies, at least as far as the obligations rests with the temporary work agency and not the user company.

Self-employed workers temporarily delivering services follow the same pattern as intra-corporate transfers, foreign temporary work agencies, and labour subcontracting, but often involve even less control as they may be exempted from or fall under different work permit provisions (above 2.4). All four cross-border manpower options that fall in the trade in services mobility category thus involve ample possibilities for user companies to procure manpower at unit labour costs well below the standard in the country of work.

Finally, experiences from the trade in services within the European Union have also highlighted another problem: the potential conflict between trade in services and fundamental labour standards. In the *Laval (C-341/05)* and *Viking (C-438/05)* cases, the European Court of Justice found that the right to take collective action is a fundamental right, but that it nonetheless has to be weighed against other rights such as the freedom to provide services (resembling GATS Mode 4) and the right of establishment (resembling GATS Mode 3). The ILO, however, does not accept this type of restrictions on the right to take collective action. According to established praxis from the ILO's monitoring body, the Committee on the Freedom of Association (CFA), the right to take collective action is part and parcel of the right to bargain collectively. In 2000, the CFA in Case 1963 concerning Australia noted "that by linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded" and requested that the Australian government amend the legislation in question. More recently, another ILO body, the *Committee of Experts* (CEACR), after a complaint from a British trade union for airline pilots (BALPA), found that the limits on the right to strike expressed in the Laval and Viking rulings violate ILO Convention No. 87, and urged the UK government to change their legislation.[34]

### 3.2.3 Entrepreneur Migration – Self-employed Establishing in Country of Work

As already mentioned, the final cross-border manpower option, a self-employed person establishing him- or herself in the country of work, is included mainly for reasons of completeness and clarity. Probably due to the high thresholds for getting a residence permit and the generally positive perception of entrepreneurs, this category of mobility is seldom discussed as problematic.

## 4. Policy Recommendations

The global market for manpower raises a number of issues that policy makers, including trade unions and employers' organisations, must consider if they wish to create a coherent policy for managing cross-border manpower mobility. Below, a number of recommendations are given to policy makers in industrialised countries that wish to combine openness to cross-border manpower mobility with maintaining and developing national social and economic models.

[34] *Report III (1A) Report of the Committee of Experts, 24 February 2010, Freedom of Association and Protections of the right to Organise Convention (No. 87), United Kingdom.*

### 4.1 Policing Definitions

As we have seen, the cross-border manpower options that create the most difficulties all belong to the trade in services mobility category. Taxes and social security contributions are paid in the country of origin and, at least as a main rule, country of origin labour law applies. That service providers established in one country should be able to take on occasional assignments in other countries without becoming subject to full country of work legislation is reasonable, as is the possibility to send experts and managers on intra-corporate transfers for shorter periods. The challenge to country of work social and economic models arise when the assignments become longer, involve a higher number of employees, and – in particular – when the business concept of the foreign service provider is to exploit regulatory differences.

Apart from discussing what requirements should be put on foreign service providers, for example in the form of conditions for work permits, policy makers should also pay attention to the borders between the three categories of mobility – labour migration of employees, trade in services mobility, and entrepreneur migration (above 2.4). The key distinctions are whether the employer is located in the country of origin or the country of work, and whether the service providers presence in the country of work is considered temporary or permanent.

One way to prevent that trade in services mobility leads to situations where two workers perform the same work, in the same place, for the same user company but fall under different regulations would be to define "temporary" through imposing time limits.

Another option would be to make sure that it really is in the country of origin that the service provider's employees "habitually carries out work", which as we have learned (above 2.3) is the rule used to identify the applicable labour law, at least for EU Member States. If the employee is sent temporarily to another country, he or she is still considered to habitually carry out work in the country of origin. In *Koelzsch* (C-29/10) the Court of Justice of the European Union (CJEU) found that "in a situation in which an employer carries out his activities in more than one Contracting State, the country in which the employee habitually carries out his work in performance of the contract, within the meaning of that provision, is that in which or from which, in the light of all the factors which characterise that activity, the employee performs the greater part of his obligations towards his employer." The case concerned the transportation sector and should not be used to draw far reaching conclusions for situations involving foreign service providers in other sectors. It is not unthinkable, however, that the same reasoning could be used in situations where the employee never has worked for the foreign service provider in the country of origin, but has been recruited solely for the assignment in the country of work. This would be in line with the mandatory nature of labour law.

Another way for the country of work to defend the mandatory nature of its regulation, particularly in situations where there are reasons to suspect that the foreign service provider and the user company have devised a scheme aimed at avoiding such regulation, would be to more often ask the question whether the foreign service provider really is the employer or whether the employee is actually employed by the user company. As explained (above 2.4) the distinction between the labour migration of employees and trade in services mobility is

whether the employer is located in the country of origin or in the country of work. If the user company is the employer, the main rules change and the relationship falls under country of work labour law and the employer has to pay social security contributions and taxes there too. This could also be a way to tackle the problem of false self-employed foreign service providers, situations where the user company contracts with foreign self-employed but where the actual circumstances under which the work is performed differ little or not at all from those of employees.[35]

### 4.2 Better Integration of Labour Law, Trade Law, and Labour Immigration Programmes

For natural reasons, the main concern when labour immigration programmes are constructed is to define who should be allowed to enter and under what conditions. Labour market issues are important – as evidenced by for example labour market needs tests and requirements on wages and working conditions – but programmes can improve further with better analysis of how migration law, labour law and trade law interact.

The ILO has identified migration status as one of the most important determinants for the wages and working conditions of migrant workers, with permanent migrants faring better than temporary migrants who in turn are better off than irregular migrants.[36] Still, despite concerns about the working conditions of migrant workers, manifest in for example requirements that the employer must pay at least the prevailing wage, the great majority of labour immigration programmes in high- and middle-income countries are temporary.[37]

Receiving countries fears that migrant workers will not go home after their work is finished also affect their trade policy. A common limitation imposed by industrialised countries on Mode 4 movements is that the employees providing the service must have been employed by the service provider in the country of origin for a certain period of time before being sent abroad further.[38] This is done in order to make sure that they maintain a strong link with their country of origin and to reduce the risk that they stay in the country of work. As we have seen, it also means that they fall under country of origin rather than country of work regulation.

Seen from this perspective, the best strategy for policy makers that wish to preserve their national social and economic models would arguably be to steer migration towards its most inclusive form, labour migration of employees, preferably permanent rather than temporary.

Migration policy makers and their trade policy colleagues should talk to each other also for other reasons. As Panizzon has pointed out, "with the exception of the non-refoulement principle in refuge law, […], the WTO members' commitments in Mode 4 of the GATS are the only binding international obligations in place to limit national sovereignty over the admission

[35] The problem of false self-employed in cross-border situations has been described e.g. by the social partners in the European construction industry. EFBWW and FIEF (2009).
[36] ILO (2010) p. 77.
[37] Ruhs (2011) p. 42.
[38] WTO Document S/C/W/301.

of foreigners".[39] Another author has described Mode 4 as "the only internationally agreed legal instrument with the potential to become a functioning multilateral labour migration regime".[40]

As explained above, through GATS, WTO members are required to liberalise access to their services markets, to treat services and service suppliers from all Members equally. However, the *most-favoured-nation* treatment is in some ways the anti-thesis of the *selectivity* and *bilateralism* of many labour immigration programmes. While GATS prescribes *market access*, labour immigration programmes use *quantitative limits* such as quotas and labour market needs test. The principle of *national treatment*, however weak in GATS, could be at odds with the desire of labour immigration programmes to treat migrant employees and entrepreneurs differently. Finally, labour migration policy is not a part of any process of *progressive liberalisation.* On the contrary, countries often try to maintain a discretion to change conditions for access according to the needs (or the political situation) of the host country.

For the time being, the numerous exemptions from the above mentioned principles, together with the rather limited commitments made by WTO Members in Mode 4, means that the potential conflict has not materialised fully. As the *national treatment* provision in GATS do not entail any general right to be treated equally to domestic service suppliers, it has been possible to accommodate labour immigration programme requirements of for example wage parity, professional qualifications, and linguistic proficiency. Likewise, *market access* limitations such as pre-employment requirements, whereby a potential Mode 4 worker must have worked for the country of origin company for a certain period of time before being sent to supply services, and labour market needs tests are so far accepted.[41]

The opposition to these kinds of limitations are nevertheless growing. Already in the year 2000, WTO members agreed that the scheduling of *labour market needs tests* (in WTO parlance *economic necessity tests*) should include non-discriminatory and objective criteria indicating why such a test is justified.[42] In 2003, a number of developing countries, including Brazil, India, Pakistan and Mexico tabled a plurilateral request calling on industrialised countries to make openings in Mode 4 also for unskilled workers.[43]

To avoid unintentional consequences, countries should also analyse bilateral migration agreements from a trade law perspective. To the extent that such agreements cover situations of temporary migration where the formal employer of the natural person providing the service is located in the country of origin, they fall under GATS Mode 4. In fact, host countries' concerns that labour migrants should return to their country of origin after the end of their contract may even favour arrangements where the migrant worker is still employed in their country of origin. But as the *most-favoured-nation* treatment applies unconditionally, that is regardless of whether the member has made any commitments in the area or not, a WTO

[39] Panizzon (2010) p. 10.
[40] Broude (2007) p. 4.
[41] WTO Document S/C/W/75.
[42] WTO Document S/CSS/W/12.
[43] WTO Document TN/S/W/14.

member that through a bilateral migration treaty grants service providers from a certain country access to its service markets runs the risk of violating the MFN clause of the GATS.[44]

### 4.3 Protecting Fundamental Labour Rights in Trade in Services Mobility

The potential conflict between trade in services and fundamental labour rights has already been discussed (above 3.2.2). The monitoring bodies of the ILO do not accept restrictions of the right to take collective action based on its interference with the trade in services of the kind imposed by the European Court of Justice in *Laval (C-341/05)* and *Viking (C-438/05).*

As most countries have obligations both to the WTO and the ILO, they must find a way to make sure that trade in services does not come into conflict with fundamental labour standards. From a strict public international law perspective, the 1969 Vienna Convention on the law of treaties, ILO Conventions 87 and 98 are generally considered to have precedence over GATS as the Member States signed and ratified these conventions long before the GATS. Nevertheless, the WTO has a monitoring system with much more 'teeth', as it can impose hard-felt economic sanctions on Members, while the ILO's monitoring mechanism operates more on a name-and-shame basis. Violating fundamental trade union rights as interpreted by the ILO could still be costly for European countries, as the European Court of Human Rights in recent years have held that the right to collective bargaining is "an essential element" of the freedom of association, making explicit references to the ILO.[45]

The objective of future trade in services negotiations should be to open up trade in services to an extent and in a way that allows WTO members, in particular the least developed countries, to reap the benefits of increased trade, while at the same time protecting the fundamental rights of workers and allow countries to retain some control over migration policy.

This will require skilful negotiation and it is highly likely that the industrialised countries will have to make some amends, and adjust labour migration policies to provide a better fit with WTO categorisation and criteria. One way to minimise potential conflicts would be to make application procedures for work permits faster, cheaper and less bureaucratic as this would make the 'too much red tape' argument against control of Mode 4 movements less valid. Another way would be to open up in the category *labour migration of employees*, as this would reduce the need for special solutions, such as intra-corporate transfers that fall in the trade in services category.

Further, the high income countries will also have to demonstrate that their negotiating position is not based on protectionist concerns. One of the keys to credibility in this respect is probably to increase the possibilities for immigration of low-skilled workers. Once again, the best way to do this will be in the form of labour migration of employees. In addition, the fact that negotiations on Mode 4 can be linked both to other modes of service delivery and to commitments under other WTO agreements – for example on agriculture and intellectual

[44] Panizzon (2010) p. 44.

[45] C.f. *Demir and Bakara v. Turkey [2008] ECHR 1348* and Enerji Yapi-Yol Sen v. Turkey (*Application No 68959/01) 21 April 2009*, and Ewing and Hendy (2010).

property – creates opportunities that are not present in traditional bilateral migration agreements, restricted to visa requirements, labour market openings, and development aid.

## 5. Concluding Remarks

This paper has given a brief overview of the international dimension of the market for manpower, the options that a user company has when it looks for manpower abroad, and the legal regulation of each such option. Hopefully, that exercise will help other scholars, and not just legal scholars, to understand the differences between different categories of mobility and why it is important to distinguish between them.

A large number of legal issues raised by cross-border manpower mobility have been touched upon briefly. Most of these issues warrant more in-depth analysis than has been possible here. One route could be to concentrate on a single cross-border manpower option, for example intra-corporate transfers or foreign temporary work agencies, to find out how labour law, taxation, social security, migration law and free trade agreements affects that particular option. Another possibility for future research would be investigating a single country of work and how it has come to regulate the different categories of mobility and cross-border manpower options.

# Bibliography


Broude, T (2007) "The WTO/GATS Mode 4, International Labour Migration Regimes and Global Justice" *Research Paper No 7-07* Faculty of Law, Hebrew National University of Jerusalem.

EFBWW and FIEF (2009) *Self-employment and Bogus Self-employment in the European Construction Industry*.

Ewing, K D (1996) *Working life: A New Perspective in Labour Law*. London, Lawrence and Wishart.

Ewing, K D & Hendy, J (2010) "The Dramatic Implications of Demir and Baykara" *Industrial Law Journal Vol 39, No 1* pp. 2-51.

Global Commission on Migration (2005) *Migration in an Interconnected World: New Directions for Action*. GCIM, Geneva.

ILO (2010) *International Labour Migration – A rights-based approach*. International Labour Office, Geneva.

Münz (2011) "The future of Europe's labour force – with and without international migration" in Karlsson & Pelling (eds) Moving Beyond Demographics – Perspectives for a Common European Migration Policy. Global Utmaning, Stockholm.

OECD (2010) *Open for Business – Migrant Entrepreneurs in OECD Countries*. OECD Publishing, Paris.

OECD (2011) *Taxation and Employment – OECD Tax Policy Studies*. OECD Publishing, Paris.

Panizzon, M (2010) "Trade and Labour Migration – GATS Mode 4 and Migration Agreements" *Occasional Papers No 47/January 2010 Dialogue on Globalisation*. Friedrich Ebert Stiftung, Geneva.

Ruhs, M (2011) "Openness, Skills and Rights: An empirical analysis of labour immigration programmes in 46 high- and middle- income countries." *Working Paper No 88, Centre on Migration Policy and Society*, University of Oxford.

Stoll, P-T and Schorkopf (2006) *WTO – World Economic Order, World Trade Law*. *Max Planck Commentaries on World Trade Law.* Martinus Nijhoff Publishers, Leiden.

Supiot, A (1997) "Du bon usage des lois en matière d'emploi" Droit Social 3/1997.

Wolfrum, R; Stoll, P-T, and Feinäugle, C (2008) *WTO – Trade in services. Max Planck Commentaries on World Trade Law*. Martinus Nijhoff Publishers, Leiden.

*WTO Document S/C/W/75 Presence of Natural Persons (Mode 4) 8 December 1998.*

*WTO Document S/CSS/W/12 Communication from India, 24 November 2000.*

*WTO Document TN/S/W/14 Communication from Argentina, Bolivia, Brazil, Chile, Colombia, India, Mexico, Pakistan, Peru, Philippines, Thailand and Uruguay. July 2003.*

*WTO Document S/C/W/301 Presence of Natural Persons (Mode 4) 15 September 2009.*