ECONOMIC FREEDOMS VS WORKERS' RIGHTS

The Viking, Laval, Rüffert and Luxembourg judgments

EUROPEAN TRADE UNION CONFEDERATION (ETUC)

To what extent can the exercise of fundamental social rights be reconciled with the requirements of the internal market? This is in essence the question put to the European Court of Justice (ECJ) in the four landmark cases Viking, Laval, Rüffert and Commission vs Luxembourg. These four cases have had chilling effects on trade unions' capacity to defend workers' rights.

The ETUC believes that a European labour market requires European 'rules of the game', combining open borders with adequate protection. The key conditions are:

- equal treatment of local and migrant workers, with no unfair competition on wages and working conditions;
- respect for national collective bargaining and industrial relations systems;
- equal access for all workers to social benefits;
- proper instruments and tools for the monitoring and enforcement of labour standards

The four ECJ cases have exposed the weaknesses of the current EU legal framework applicable to fundamental social rights and the free movement of workers and services. The ECJ has confirmed a hierarchy of norms, with economic freedoms ranking at the top, and the fundamental social rights of collective bargaining and collective action in second place.

For the ETUC and its members, the outcome of these cases represents a major challenge: how to establish and defend decent labour standards in an era of globalisation. The European Social Model needs to be safeguarded and the industrial relations systems in the Member States need protection.

It is important to understand the meaning of these cases for the trade unions in the EU, in order to see where problems at national level might occur or where some employers might want to use European case law in aggressive litigation tactics. There is indeed a clear risk that judges will increasingly be involved in industrial disputes. The ETUC has developed proposals to undo the damage done by those judgments. This offensive strategy requires strong solidarity amongst trade unions across Europe.

I. Outline of the cases

In the Viking judgment (11 December 2007), a Finnish shipping company, **Viking**, wanted to change the registered nationality of one of its ships from Finnish to Estonian, with a view to paying lower wage costs. The International Transport Workers' Federation sent a circular to affiliates to ensure that collective bargaining with Viking could only be held in the place of beneficial ownership (i.e. in Finland). In parallel, the Finnish Seamen's Union demanded a commitment from the company that it would continue to comply with Finnish labour law and would not lay off crew.

Viking argued that its right under the European Treaties to establish freely in the European Union was being violated, and the matter was eventually brought to the ECJ. **The Court recognized that the right to collective action is a fundamental right, but placed a narrow definition on the circumstances in which the exercise of this right can be recognized as a permitted restriction on the rights of businesses.**

In the **Laval** judgment (18 December 2007), a Latvian company was contracted to renovate school premises in Vaxholm, Sweden. The work was to be undertaken by employees who were to be posted from Latvia. The Swedish unions sought to negotiate a collective agreement with the employer about the terms and conditions of employment of the Latvian workers. The negotiations were unsuccessful, and the Swedish trade unions boycotted the company.

A reference was made to the ECJ on the compatibility of the collective action with companies' freedom to provide cross-border services in the Union and with provisions of Directive 96/71/EC, which regulates the rights of posted workers. **The Court held that a collective action seeking to entice a foreign employer to sign a collective agreement on more favourable terms and conditions than those referred to in the Posting of Workers Directive is unlawful under EU law,** irrespective of the fact that the purpose of the action is to protect standards in collective agreements from being undercut and to protect posted workers from being exploited in the domestic labour market.

In the **Rüffert** judgment (3 April 2008), a German company won a public contract to build a prison in Land Niedersachsen. A clause in the applicable procurement law required compliance with wage rates already in force on the site through collective agreement. The German company then subcontracted the work to a Polish firm. The contract was withdrawn when it was discovered that the 53 workers posted by the Polish company were in fact earning 46.57% of the applicable minimum wage for the construction sector.

The ECJ narrowly interpreted the Posting of Workers Directive 96/71 and considered that the mechanisms used by the public authority to extend the protection of the locally applicable collective agreement to posted workers were not an acceptable method of implementation of the Directive. The Court concluded that the

public authority could not in this case require that all the contractors agree to pay their employees the remuneration prescribed by the collective agreement in force at the building site.

- In the **Commission vs Luxembourg** judgment (19 June 2008), the European Commission had complained that by imposing on all employers - foreign and local - compliance with most of its labour law provisions, the Luxembourg government exceeded what is allowed under Community law. In particular, all employers had to comply with mandatory indexation of wages and all Luxembourg collective agreements. These provisions were considered as 'public policy' by the Luxembourg government, which means that they could not be departed from, regardless of the nationality of the employer.

The Court held that the government of Luxembourg had acted in breach of the EU Treaties and the Posting of Workers Directive by requiring foreign employers to comply with standards beyond those laid down in the Directive. ■

2. What do these judgments mean for the trade unions in Europe?

In very general terms they mean that it has become more difficult for trade unions in Europe to defend workers against unfair competition on wages and working conditions, to fight for equal treatment between migrant and local workers, and to take action to improve living and working conditions for workers across Europe. In addition, the scope for the national legislator to safeguard the role of collective bargaining and labour law in dealing with the effects of increased cross-border mobility of workers and companies has been greatly reduced.

How can we ensure that the same rules can apply to all workers, regardless of their nationality?

It is now more difficult than ever to ensure non-discrimination in the workplace, regardless of whether the protection is contained in collective agreements or in national labour law.

Working conditions fixed by collective agreement

The protection of collective agreements in the host Member State can still be extended to posted workers, but only for the terms and conditions of employment that are laid down in Article 3.1 of the Posting of Workers Directive, and only to the extent that this is done by a 'recognised' method, i.e. through:

- a "universally applicable" collective agreement; or
- a "generally applicable collective agreement" where the host Member State does not have a system to declare collective agreements universally applicable. The Court interprets the notion of "generally applicable" in a strict manner.

Furthermore, a collective agreement will apply only insofar as it corresponds to the terms and conditions of employment explicitly listed in Article 3.1 of the Directive. In other words, collective agreements cannot be enforced in their entirety upon employers of posted workers.

In concrete terms, this means that:

- Employers posting workers from another EU Member State are not automatically bound by the terms of a collective agreement in the host Member State which is not universally applicable;
- Even where the collective agreement is universally applicable, employers posting workers from another EU Member State are not bound by all the terms of the agreement;
- Where there is a universally applicable collective agreement, employers posting workers from another EU Member State do not have to observe supplementary agreements with higher standards;
- A public authority cannot impose compliance with local collective agreements. The ECJ does not consider such agreements "generally applicable" because in theory they would only cover those workers who are hired as part of a public contract.

Working conditions fixed by law

The Luxembourg judgment has considerably limited the possibility for the host Member State to impose terms and conditions of employment which it considers as 'public policy' but which exceed the list contained in the Posting of Workers Directive. **It must be assessed on a case-by-case basis whether the labour law provisions in question are 'crucial for the protection of the political, social or economic order (in such a way) as to require compliance by all persons present on the national territory, regardless of their nationality'.** The test will be difficult to pass.

Does this now mean that collective actions are unlawful under EU law?

Collective actions are not unlawful as such. The European Court of Justice does recognize the right to take collective action as a fundamental right which forms an integral part of the general principles of Union law. However, the Court has made the exercise of this right subject to major restrictions.

The impact of the judgments will vary depending on trade union policy and on the national legal boundaries to collective action. In general, trade unions might now tend to be more hesitant about actually taking action, especially in Member States where an employer can preventively ask a judge to stop the collective action.

The rulings of the ECJ are only applicable if the collective action can be characterized as having transnational effects. Industrial disputes arising in a purely domestic context should not in principle be affected by the judgments. But how to define when a case is still purely national? This issue will most certainly be the subject of legal challenges across the Union.

As soon as a European context comes into play, trade unions have to operate under major legal uncertainty when preparing collective actions:

Collective action concerning a company's decision to relocate to another Member State

In the Viking case, the Court ruled that the EU rules on freedom of establishment are also applicable to collective bargaining issues. This means that in the course of an industrial dispute concerning the cross-border relocation of a company, employers can rely directly on EU law against trade unions.

A collective action can be recognized as a permitted restriction on the rights of businesses to re-establish in the Union in narrowly defined circumstances. The national judge must assess the following:

- First, it has to be established that the 'jobs or conditions of employment at issue are jeopardised or under serious threat'
- Secondly, even if the collective action falls within this narrow band of permissibility, the courts have to ascertain that the collective action is suitable and does not go beyond what is necessary to attain its objective
- In determining what is necessary for these purposes, the judge will assess whether the trade union has exhausted any other methods of dispute resolution which cause fewer restrictions to freedom of establishment

Collective action related to the terms and conditions of employment of posted workers

In the Laval case, the Court ruled that the Posting of Workers Directive does not authorise collective actions seeking to impose terms and conditions of employment which are not fixed in advance in accordance with one of the methods described by the Posting of Workers Directive (law, universally applicable collective agreement or generally applicable collective agreement). Moreover, collective actions must not seek to impose matters which are not explicitly listed in Article 3.1 of the Posting of Workers Directive.

If a collective action falls outside the scope of the Posting of Workers Directive, it has to be justified on a case-by-case basis. The national judge will therefore assess whether the collective action pursues a legitimate objective compatible with the European treaties, is suitable for the attainment of that objective and does not go beyond what is necessary.

In concrete terms, this means that:

- In national systems where national law does not require a posting employer to comply with a statutory minimum wage or with universally applicable collective agreements, a trade union's right to take collective action against a posting employer in order to secure a collective agreement, or to seek compliance with the terms and conditions of a collective agreement, is greatly reduced;
- In national systems where national law requires a posting employer to comply with a statutory minimum wage, but there are no universally applicable collective agreements, it is now unclear whether a trade union may take industrial action with a view to requiring the posting employer to pay higher collectively agreed wages than the minimum set down in statute;
- In systems where national law requires a posting employer to comply with universally applicable collective agreements, the scope for a trade union to take industrial action to require the posting employer to observe terms and conditions of employment on matters which go beyond what is explicitly foreseen in the Posting of Workers Directive has been reduced.

To what extent do national trade unions and Member States have to comply with the decisions of the ECJ?

The decisions of the European Court of Justice are binding on the national laws of all EU Member States. The Court pointed out in Viking that although protected by the Finnish constitution, the right to strike cannot be relied upon when its exercise would breach EU law.

But the ECJ judgments have created considerable tension between international standards and Union law.

Despite what the ECJ says, it is also the responsibility of Member States to comply with binding international obligations. The right to collective bargaining and collective action is guaranteed in a multitude of international sources, such as the ILO Conventions No. 87 and 98, Art. 11 of the European Convention on Human Rights, Art. 5 and 6 of the (Revised) European Social Charter, as well as in Art. 28 of the Charter of Fundamental Rights of the EU. The interpretation given to those sources is incompatible with the interpretation given by the ECJ.

For example, the European Court of Human Rights has unanimously ruled that the right to strike is a human right recognised and protected in international law and, as such, can be limited only in strictly defined circumstances (cases *Demir and Baykara* of 12.11.2008, and *Enerji* of 21.04.2009).

In addition, following an application made by the British Airline Pilots' Association (BALPA), **the Committee of Experts of the International Labour Organisation expressed *serious concerns* in March 2010 about practical limitations on the effective exercise of the right to strike as a result of the ECJ judgments.** ■

3. How to undo the damage: the ETUC response

The entry into force of the Lisbon Treaty has sent a strong signal that the Union is committed to the respect of fundamental rights. In particular, the Charter of Fundamental Rights has become legally binding and the Union is currently negotiating its adhesion to the European Convention of Human Rights.

In the light of these new legal developments, as well as the recent case law of the European Court of Human Rights, the ETUC is convinced that the position of the European Court of Justice is no longer sustainable. In order to accelerate the revision process, the ETUC is pressing the EU institutions to urgently clarify the current legal framework, through the adoption of a Social Progress Clause and the revision of the Posted Workers Directive.

A Social Progress Clause

The ETUC proposes to add a Social Progress Clause to the Treaties. Such a clause would unambiguously clarify and establish the relation between fundamental social rights and economic market freedoms. This clause must take the form of a protocol to be attached to the European Treaties so as to be binding at the highest level to ensure that it influences the decisions of the ECJ.

It should contain the following key elements:

a) it should confirm that the single market is not an end in itself, but is established to achieve social progress for the peoples of the Union;
b) it should clarify that economic freedoms and competition rules cannot have priority over fundamental social rights and social progress, and that in the event of conflict, social rights shall take precedence;
c) it should clarify that economic freedoms cannot be interpreted as granting undertakings the right to exercise them to evade or circumvent national social and employment laws and practices, or for the purposes of unfair competition on wages and working conditions.

Revision of the Posted Workers Directive

The ETUC supports worker mobility and takes the view that cross-border mobility in the Union demands that proper conditions be put in place to secure workers' protection. For this reason, **the ETUC calls for a revision of the Posting of Workers Directive with a view to restoring its primary objective: ensuring a climate of fair competition and respecting workers' rights.**

In a Resolution adopted in March 2010, the ETUC put forward eight proposals for a revision:

- The **objectives** of the Posting Directive, i.e. respecting the rights of workers and ensuring a climate of fair competition, must be unambiguous.
- **Trade unions** should be allowed to put pressure equally on all companies to improve living and working conditions of workers and **to demand equal treatment** of workers performing similar work on the same territory, regardless of their nationality or the place of establishment of their employer.
- Companies must not be allowed to manipulate applicable law and standards by the use of **artificial constructions such as letterbox companies.**
- Collective agreements should be able to provide **more favourable conditions** than the legal minimum as long as equal treatment and non-discrimination of local and foreign companies is ensured.
- **Less rigid criteria** should be developed to judge whether a collective agreement can be upheld vis-à-vis a foreign service provider.

- Member States in their role of public authorities contracting out public works **(public procurement)** should be allowed via **social clauses** to demand observance of locally applicable collective wages and working conditions by any company, local or foreign, tendering for the contract.
- The very restrictive interpretation of the notion of **'public policy provisions'** developed in the Luxembourg judgement must be revised to include social objectives and the protection of workers.
- Member States and social partners must be allowed to use **effective monitoring and enforcement mechanisms,** for instance to check that the posted worker is really 'habitually' employed in the country of origin, and that it is intended that he/she returns at the end of the posting.

In the meantime, the European trade union movement must take stock of the impact of the judgments.

- *The traditional approach to litigation may have to be reviewed.* Trade unions across Europe must be aware of the potential European dimension of their actions. In this regard, the ETUC can play a key coordination role.
- *Posted workers are now more than ever a vulnerable category of workers.* The European trade union movement must continue to reach out to transnational mobile workers, in search of innovative ways of informing, supporting, protecting and organising migrant workers. In this regard, cross-border trade union cooperation and the coordination of collective bargaining are key aspects. ■

Background Information

• The **economic freedoms** referred to by the European Court of Justice as 'the four fundamental freedoms' are:
— Free movement for workers, which entails the abolition of any discrimination based on nationality between workers;
— Free establishment of nationals of a Member State in the territory of another Member State (referred to in the Viking judgment);
— Freedom of nationals of Member States established in one Member State to provide services in another Member State (referred to in the Laval, Rüffert and Luxembourg judgments);
— Free movement of capital.

• A **posted worker** is a worker who, for a limited period of time, carries out his work in a Member State other than the State in which he normally works. According to the **Rome I Regulation 593/2008/EC,** which determines which national law is applicable to contractual obligations in cross-border situations, the employment relationship of the posted worker remains subject to the legislation of his country of origin.

Because of the great differences in national labour laws throughout the Union, and to avoid 'social dumping', the **Posting of Workers Directive 96/71/EC** regulates the rights of posted workers.

The central provision of the Posting of Workers Directive is **Article 3.1,** according to which the host Member State must ensure, whatever the law applicable to the employment relationship, the application of the following terms and conditions of employment:
- maximum work and minimum rest periods;
- minimum paid annual holidays;
- minimum rates of pay, including overtime rates;
- the conditions of hiring-out of workers (in particular, temporary employment undertakings);
- health, safety and hygiene at work;
- protective measures with regard to pregnant women or women who have recently given birth, children and young people;
- equality of treatment between men and women and other provisions on non-discrimination.

According to Article 3.10, host Member States may also impose the observance of other terms and conditions of employment in the case of **public policy provisions.**

The Directive states that these terms and conditions must be found in law and/or collective agreements within the meaning of the Directive.

According to Article 3.8 of the Directive, a **universally applicable collective agreement** is an agreement that must be observed in law by all undertakings in a given geographical area or industry.

In the absence of such a system, the Directive foresees that Member States may base themselves on **generally applicable collective agreements,** which are those which are in practice generally applicable to all similar undertakings in a given geographical area or industry and/or agreements which have been concluded by the most representative social partners at national level and which are applied throughout national territory.

ETUC proposal for a Protocol on the relation between economic freedoms and fundamental social rights in the light of social progress ('the Social Progress Clause')

THE HIGH CONTRACTING PARTIES,

HAVING REGARD to Article 3(3) of the Treaty on the European Union,

CONFIRMING their attachment to fundamental social rights as defined in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers,

RECALLING that the Union shall work for a highly competitive social market economy, aiming at full employment and social progress *(Article 3(3) sub par. 1 of the TEU),*

RECALLING that the single market is a fundamental aspect of Union construction but that it is not an end in itself, as it should be used to serve the welfare of all, in accordance with the tradition of social progress established in the history of Europe,

WHEREAS, in accordance with Article 6(1) of the Treaty on the European Union, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights and in particular the fundamental social rights enshrined in this Charter,

BEARING IN MIND that, according to Article 9 *(new horizontal social clause)* of the Treaty on the Functioning of the EU, in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health,

HAVING IN MIND that the Union and the Member States shall have as their objectivesthe improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained *(Article 151(1) TFEU),*

RECALLING that the Union recognises and promotes the role of social partners, taking into account the diversity of national systems, and will facilitate dialogue between the social partners, respecting their autonomy *(Article 152 TFEU),*

WISHING to emphasise the fundamental importance of social progress for obtaining and keeping the support of European citizens and workers for the European project,

DESIRING to lay down more precise provisions on the principle of social progress and its application,

HAVE AGREED UPON the following provisions, which shall be annexed to the Treaty on the European Union and to the Treaty on the Functioning of the European Union:

Article 1 [Principles]

The European social model is characterised by the indissoluble link between economic performance and social progress, in which a highly competitive social market economy is not an end in itself, but should be used to serve the welfare of all, in accordance with the tradition of social progress rooted in the history of Europe and confirmed in the Treaties.

Article 2 [Definition of social progress and its application]

Social progress and its application means in particular:

The Union improves the living and working conditions of its population as well as any other social condition, ensures the effective exercise of the fundamental social rights and principles, and in particular the right to negotiate, conclude and enforce collective agreements and to take collective action, in particular protects workers by recognizing the right of workers and trade unions to strive for the protection of existing standards as well as for the improvement of the living and working conditions of workers in the Union also beyond existing (minimum) standards, in particular to fight unfair competition on wages and working conditions, and to demand equal treatment of workers regardless of nationality or any other ground, ensures that improvements are being maintained, and avoids any regression in respect of its already existing secondary legislation.

The Member States, and/or the Social Partners, are not prevented from maintaining or introducing more stringent protective measures compatible with the Treaties, when implementing Union secondary legislation, avoid any regression in respect of their national law, without prejudice to the right of Member States to develop, in the light of changing circumstances, different legislative, regulatory or contractual provisions that respect Union law and the aim of social progress.

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Article 3 [The relation between fundamental rights and economic freedoms]

Nothing in the Treaties, and in particular neither economic freedoms nor competition rules, shall have priority over fundamental social rights and social progress as defined in Article 2. In case of conflict, fundamental social rights shall take precedence.

Economic freedoms cannot be interpreted as granting undertakings the right to exercise them for the purpose or with the effect of evading or circumventing national social and employment laws and practices or for social dumping.

Economic freedoms, as established in the Treaties, shall be interpreted in such a way as not infringing upon the exercise of fundamental social rights as recognised in the Member States and by Union law, including the right to negotiate, conclude and enforce collective agreements and to take collective action, and as not infringing upon the autonomy of social partners when exercising these fundamental rights in pursuit of social interests and the protection of workers.

Article 4 [Competences]

To the end of ensuring social progress, the Union shall, if necessary, take action under the provisions of the Treaties, including under Article 352 of the Treaty on the Functioning of the European Union. ■

Links to sites with further information:
http://www.etuc.org
http://www.etui.org

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