European Trade Union Confederation (ETUC)
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Brian Bercusson Memorial Conference

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Brian Bercusson and European Labour Law

Cathy, Keith and Jeff have remembered our remarkable friend, Brian Bercusson in the most appropriate of ways. To Cathy, let me say simply, 'Thank you for letting us have Brian for all those years, during which the ETUC was going through a crucial formative period.' We all know that he was a man who loved his work and that in this sense he was probably impossible to 'manage'. He worked too hard, but he would have never done it any other way.

We are not always the best, in our movement, at stopping colleagues who overwork too. However, he was a deeply original thinker and for my part it is inconceivable that, even if I had instructed him not to do so as the general secretary of the ETUC, he would have taken any notice of me whatsoever.

In the ETUC, we took a great deal of notice of what he said and wrote. More of what he said, as what he wrote was often lengthy and extremely well researched and well argued. It was often complex, as the daily environment within which we find ourselves is often deeply complex and the choices we have to make equally so.

But my colleagues who worked closely with Brian are a talented bunch and, I believe, understood what he was on about, even if I, myself, did not always immediately do so!

Brian died suddenly on 15 August last year. He had just prepared the background document for the ETUC Summer School, to be held in London on 26-27 September. Just weeks after his death the rapidly accumulating global financial crisis broke and we have been engulfed by one tsunami after another since then. The world has changed completely.

But where it is going exactly, no one on earth knows. As Brian might have said 'a new paradigm does not happen overnight'. We would love to have had Brian here today, discussing how European trade unions should respond, dealing with the labour law aspects of our responses. He was a man who enjoyed a good challenge and could think about it endlessly into the small hours of the morning. We miss him greatly.

For that summer school, we asked Brian to prepare a short note on labour law. He was much exercised, as we all are in the European trade union world by a recent quartet of legal judgments in the European Court of

Justice – an accident waiting to happen as it has been termed by Richard Arthur of Thompsons.

The accident waiting to happen is the way the free movement of the single market interact with both the national industrial relations systems and fundamental social rights. The single market is a European competence; industrial relations is a national one. When there is a dispute about free movement, they clash. What are to be the terms of free movement? Which conditions apply? Is it when in Rome, do as the Romans do, or when in Sweden, do as the Latvians do?

The score at the moment is ECJ 4, European trade unions 0; and I do not exaggerate when I say that we are reeling at the score.

The cases have caused widespread concern in the European trade union world and are affecting adversely trade union support for the EU.

For the ETUC and its members the outcome of these cases represent a major challenge; how to establish and defend labour standards in an era of globalisation. In the ETUC's view, the ECJ does not sufficiently recognise that trade unions must defend their members and workers in general 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 of workers across Europe. This is an interest and concern that all trade unions share in Europe, be it in the 'old' or the 'new' Member States.

In addition, the ECJ is limiting the possibilities for Member States to safeguard the role of collective bargaining and their own labour legislation in dealing with the effects of increased cross border mobility of workers and companies.

Essentially, these outcomes expose some essential weaknesses of the current legal framework (of Treaties and Directives) at EU level that need to be addressed:

Firstly, the ECJ seems to confirm a **hierarchy of norms** (in the *Viking* and *Laval* cases), with market freedoms highest in the hierarchy, and collective bargaining and action in second place. This means that organised labour is limited in its response to the unlimited exercise of free movement provisions by business which apparently does not have to justify itself. Any company in a transnational dispute will have the opportunity to use this judgement against trade union actions, alleging

that actions are not justified and 'disproportionate'. Combined with a situation in several Member States in which it is very easy to get interim court-injunctions at the request of one party stopping trade unions in their actions – because, otherwise, they would run the risk of paying enormous damages – it becomes clear that ECJ cases may have a very negative impact on the balance between capital and labour. In some cases, the situation resembles the legal framework of the beginning of the 20th century and has led some to recall Taff Vale which, *inter alia*, led to the formation of the Labour Party.

Secondly, the ECJ interprets the Posting Directive in a very **restrictive** way. On the one hand, it **limits the scope for trade unions** (in the *Laval* case) to take action against unfair competition on wages and working conditions, and to guarantee equal treatment of local and migrant workers in the host country. Specifically, trade union action to lift the conditions of these workers above the minimum provisions of the Posting Directive would be unlawful.

As you will appreciate, this is being seen widely as a license for employers to hire workers via foreign subcontractors and agencies in order to pay them below local standards, and as a direct threat to the collectively agreed terms and conditions of indigenous workers. On the other hand, it **limits Member States** (in the *Rüffert* case and *Commission vs. Luxemburg* case) in applying their public procurement law or public policy provisions on situations of posting to prevent unfair competition between local and foreign service companies, which is not only to the detriment of workers but also of local companies – especially small and medium-sized enterprises (SMEs).

Not that that has been a problem for the UK Government. The Posted Workers Directive here only relates to statutory minimum conditions, not to fair wages or the terms of collective agreements. It does not have to be like that but while it is, the chances of more disputes like those at the Lindsey oil refinery remain high.

National governments and the EU institutions must take our concerns seriously about the way the ECJ is interpreting the Posting Directive. Does this interpretation really reflect and accommodate the original objective of this Directive, as stated in its preamble: '*(5) whereas (…) promotion of the transnational provision of services requires a climate of fair competition and measures guaranteeing respect for the rights of workers*'.

This is not the interpretation we are getting and we want changes. This is one point. But there is another. To help correct the balance between the freedoms of the single market and fundamental rights, we seek a '**Social progress clause**' to be added to the European Treaties. (The idea of such a clause was originally considered by Chancellor Merkel and Jean-Claude Juncker in the wake of the 'no' votes in France and the Netherlands on the old Constitutional Treaty.) Brian was a great help in preparing this clause.

A social progress clause should unambiguously clarify and establish the relations between fundamental social rights and economic market freedoms. Such a clause must be legally binding at the highest level, to ensure that it influences the decisions of the ECJ. Only a protocol, attached to the Treaties, can give sufficient guarantees in this regard with 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 EU;
b) it should clarify that economic freedoms and competition rules cannot have priority over fundamental social rights and social progress, and that in case 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 unfair competition on wages and working conditions.

By these means, we can establish trade union freedoms that are appropriate. We are not protectionist. We do not want to keep migrant workers or companies out but to establish in industrial relations the old principle of 'when in Rome do as the Romans do'.

I have picked out one of many themes that excited Brian. I could have chosen others - social dialogue, multinational enterprises, the future of trade unions, the informal economy and many more UK conquered peaks in the mountain range of problems that we face.

Brian was a bright, inventive spirit who was never afraid to tackle a new peak. He was a brave, stimulating, encouraging companion, always positive with a New World 'can do' spirit rather than Old World scepticism, a reassuring presence by your side. While mourning his loss, we take continued inspiration from his spirit.