



ETUC response to ECJ judgements Viking and Laval

Resolution adopted by the Executive Committee of the ETUC at its meeting of 4 March in Brussels EC.179

Introduction

On 11 December 2007 the ECJ gave its judgement in the Viking case, and on 18 December 2007 in the Laval case.

The judgments are of massive importance to the European trade union world, and not just to our colleagues directly affected in Sweden/Latvia and Finland/Estonia. It is deeply ironic that the Swedish and Danish models – the widely respected home of flexicurity – are under particular pressure from these cases.

They are different cases with different implications. The consequences of the Laval case for the Swedish system are the subject of social partner negotiations in Sweden, and talks are also underway in Denmark which shares many similarities with Sweden. The Viking case in the meantime has been settled out of court.

These are complex, confusing judgments and some in the European Commission and BusinessEurope are arguing that they only have implications for Sweden, Denmark and the International Transport Workers Federation.

But one thing is very clear: for the ETUC and its members the outcome of these two cases represents a major challenge. How to establish and defend labour standards in an era of globalisation? And in these cases the ECJ does not sufficiently recognise and allow trade unions to defend their members and workers in general against social dumping, to fight for equal treatment of migrant and local workers, and to take action to improve living and working conditions of workers across Europe.

Affiliates and their members, as well as progressive politicians around Europe and in the European Parliament are looking to the ETUC for guidance.

At the same time, it is also clear that we need further study to assess the cases in their legal and political complexity, in order to decide in more precise detail which measures to take and which demands to put on which table.

In an explanatory memorandum, attached to this resolution, the ETUC provides an assessment of the legal and political merits of the judgements and their possible impact and outlines proposals and recommendations for further action.

This resolution outlines a first ETUC response on key issues.

In the Laval case, the European Court of Justice, by accident or design, has challenged the European Parliament's compromise position on the Services Directive by ruling that collective action by unions to push for **equal pay** for migrant workers with host country workers could be regarded as an obstacle to free movement of services and therefore unlawful. Although the ECJ recognises the right to take collective action to counter social dumping, this would only be justified when **minimum rights** were at stake that apply in the Member State on the basis of legal provisions or generally binding collective agreements.

The Laval case is unclear as to the question of when collective agreements set **standards above minimum levels**; are these standards recognised by the ECJ as applicable standards? A German case – the Rueffert case – will be important on this issue when the judgment is issued shortly.

In the Viking case, although there are positive features to this case, one worrying point in particular stands out. The Court stressed that collective action must be "proportionate" to the issue in dispute. Presumably a court will define "**proportionality**" in the context of each case, so creating intolerable uncertainty for unions involved in virtually any case of industrial action over migration and free movement, a naturally growing area for disputes as Europe integrates its labour and services markets.

Also, the ECJ has given '**horizontal direct effect**' to the four freedoms of the Treaty, which means that any company in a transnational dispute has the opportunity to use this judgement against union actions, alleging that actions are not justified and "disproportionate".

We are being told that the right to strike is a fundamental right but **not as fundamental** as the EU's free movement provisions. At the same time, in some member states, the right to strike is a first rank constitutional right, and all Member States have ratified the relevant ILO and Council of Europe conventions which guarantee the freedom of association, and the right to collective bargaining and strike. The ILO Conventions on labour rights set world wide standards. These are challenged by the ECJ. This is not acceptable. Europe is expecting others to obey these rules, and cannot be a region that infringes the fundamental Conventions. Our fundamental rights are now at risk. So, generally, is trade union autonomy.

For the ETUC and its members, this is unacceptable, and we have to demand and initiate action to repair the damage being done. Unions and workers across Europe are now deeply concerned with defending their national systems – and we risk a protectionist reaction. Bolkestein’s proposal for a Services Directive derailed the EU Constitutional Treaty. The Laval case, in particular, could damage the ratification of the EU Reform Treaty as awareness of its implications spreads.

The idea of social Europe has taken a blow. Put simply, the action of employers using free movement as a pretext for social dumping practices is resulting in unions having to justify, ultimately to the courts, the actions they take against those employers’ tactics. That is both wrong and dangerous. Wrong because workers’ rights to equal treatment in the host country should be the guiding principle. Wrong because unions must be autonomous. And dangerous because it reinforces critics of Europe who have long argued that the single market would inevitably threaten social standards.

Moreover, democratic decisions are being challenged. The European Parliament and the Council, together with European trade unions succeeded in eliminating a redefinition of the Posting of Workers, from a minimum (floor of rights) to a maximum (ceiling of rights) Directive, through the initial Bolkestein proposal. The Posting of Workers Directive was adopted by the European legislator with a broad consensus in the understanding that it would be a minimum directive. In the same way the Lisbon Treaty will have a binding Charter of Fundamental Rights – the main reason for ETUC to support this Treaty. The Laval case challenges these democratic decisions by the European legislator. Thus, the Laval case also includes a democratic problem in the European project. Who make the final decisions? Judges or legislators?

What can be done?

A “Social Progress Clause”

Firstly, the ECJ has, in effect, declared unlawful union action to achieve equal pay in certain circumstances. Market freedoms have been ruled superior to fundamental rights. When legislation to introduce the free movement of goods was being introduced, Commissioner Monti, under ETUC pressure, introduced a clause which read “ This Directive may not be interpreted as affecting in any way the exercise of fundamental rights as recognised in Member States, including the right or freedom to strike. These rights may also include the right or freedom to take other actions covered by the specific industrial relations systems in Member States.”

The Services Directive has a similar clause as follows: “This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law, including the right to negotiate, conclude and enforce collective agreements and to take industrial action.”

What the ETUC now wants considered is a broader general clause to address the general implications of the Laval and Viking cases to make absolutely clear that the free movement provisions must be interpreted in a way which respects fundamental rights, and to embed this in the broader concept of social progress. As the new Lisbon Treaty (consolidated text) in its Article 3 (3), sub par. 3, says very explicitly: "The Union shall work for (...) a highly competitive social market economy, **aiming at** full employment and **social progress**". The clause would have as its objective to clarify the relation between the internal market and fundamental social rights.

A first draft of the text of such a clause could read as follows:

After some introductory references to the relevant texts in the Treaties, and a definition of the concept of social progress it would say:

"Nothing in the Treaty, and in particular neither fundamental freedoms nor competition rules shall have priority over fundamental social rights and social progress. 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 Community/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.

The protection of workers shall be interpreted in such a way as to recognize the right of trade unions and workers 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 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."

It is proposed that the ETUC further consults affiliates and legal experts about this clause, opens discussions with the European Commission (already started with the European Parliament), including an early meeting between the President and General Secretary of the ETUC and the President of the Commission. The status of any such clause will be crucial. What we demand is an instrument with the status and authority needed to give clear directions on the interpretation of the Treaties.

The judgments in two forthcoming cases – Rueffert vs. Niedersachsen¹ and COM vs. Luxembourg² – will have to be taken into account.

The Posted Workers Directive

This Directive was central to the Laval case much of which was about its relevance to the Swedish collective bargaining system.

The ETUC now needs to urgently assess the need for revision of this directive and explore among other things the following options:

- the introduction of a clear time limit for the definition of a posted worker, i.e. when a worker stops being a 'posted worker' (that is: being habitually employed for the service provider in the country of origin and only temporarily posted to another Member State) who is only covered by the mandatory rules of the host country via the Posting Directive, and from which moment he must be considered to be a worker moving to another country in the framework of 'free movement of workers', who is undeniably becoming part of the labour market of the host country and therefore must be treated fully and equally according to host country rules (some have suggested a limit of 3 months);
- make mandatory what are currently only 'options' for MS's (to apply all generally binding collective agreements to posted workers, etc.);
- ensure that host country collective agreements can provide for higher than minimum standards;
- make clear that both legislative sanctions and social partner activity including collective action are available to enforce these standards;
- ensure a broad scope for what can be considered 'public policy provisions' that MS's can apply in addition to the nucleus of minimum standards of the Posting Directive.

Temporary Agency Workers Directive

We need the speedy adoption of the draft Temporary Agency Workers Directive which has been blocked in the Council of Ministers – a block organised by the UK and German Governments. This Directive is highly relevant to mobility and migration and its principle of equal treatment would reassure unions that the EU was not to be a vehicle for social dumping.

Coordination of transnational aspects collective bargaining

The ECJ, in the Laval case, does not accept the so called Lex Britannia in Sweden, according to which a collective agreement already applicable to an employer must be recognized unless it is a foreign collective agreement (in this case a Latvian company with a Latvian collective agreement), as this is seen by the ECJ as discrimination.

¹ Dirk Rueffert versus Land Niedersachsen C-346/06

² European Commission versus Luxemburg C-319/06

The clear aim of this law to create a climate of fair competition on the territory of the host country is not recognized as an overriding reason of public policy that can justify such 'discrimination'.

It has now become urgent for the ETUC to develop a joint and coordinated strategy with its members to prevent conflicting collective agreements in cross border situations and the potential scope for abuses and manipulation arising from this. This issue should be further developed by the relevant committees and working groups in the ETUC, and this should lead to specific actions such as guidelines regarding the extra-territorial effects of collective agreements.

Other matters

The Laval case raises questions about the social dimension in public procurement, in particular in connection to ILO Convention 94.

There is also a need for affiliates to co-ordinate any European litigation with the ETUC so that collective experience can be used to strengthen future cases.

Further actions and activities will be developed by ETUC based on the proposals elaborated in the Explanatory Memorandum.

Conclusion

The ETUC calls on the European authorities to recognise that these cases are not solely about the models in Sweden and Denmark but have European wide implications. We call for early action to reassure unions that fundamental rights are not diminished by the free movement provisions of Europe. Already some are linking ratification of the EU Reform Treaty to correcting these cases. The ETUC supports the EU Reform Treaty, and that's why urgent action is necessary. Because it would be naïve of the European and national authorities to conclude that these cases will not be increasingly in the minds of workers and trade unions.
