



VIKING and LAVAL CASES

Explanatory Memorandum

(for Executive Committee of the ETUC, 4 March 2008)

I. Introduction

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

In this memorandum, the ETUC provides an assessment of the possible impact of the judgements, and outlines proposals and recommendations for further action.

General assessment

Both cases are about trade unions taking action against social dumping: in the Viking case against the re-flagging of a Finnish ship to Estonia with the aim of applying lower standards to the seamen on the ship; in the Laval case against the application of Latvian wages and working conditions on Latvian workers employed by a Latvian company on a Swedish construction site.

In both cases the collective action was part of a broader collective bargaining strategy.

In the Viking case it was the FOC-policy of the ITF, which is fighting flags of convenience (i.e. re-flagging for the sole purpose of lowering standards) by a coordinated strategy among its member unions which says that only the union of the country where the ship is 'beneficially owned' has the right to collective bargaining (and therefore the Estonian union refused to enter into collective bargaining with Viking, while Viking refused to bargain with the Finnish seamen's union).

In the Laval case it was the general Swedish collective bargaining practice by which foreign companies active on Swedish territory are approached to sign a Swedish collective agreement (but Laval refused to enter into negotiations about the application of Swedish wages and working conditions with the Swedish unions, and instead concluded a collective agreement with the Latvian construction workers union applicable to the posted workers in Sweden).

In both cases, the right to take collective action to protect workers against social dumping as such was recognized by the ECJ as a fundamental right which forms an integral part of the general principles of Community law. This must be certainly seen as an important step forward.

However, the Court made the exercise of this right subject to certain restrictions, which led in both cases to a negative judgement regarding the collective bargaining and action strategies at stake. This has caused enormous unrest among trade unions and their members around Europe and especially in the countries and sectors most closely concerned.

In the period since the judgement a wealth of articles and assessments by academics and others has been published. The last word on how to interpret both cases from both a legal and political perspective has certainly not yet been said, and the current position does not have the ambition to present such final interpretations.

However, 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? Does the ECJ 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?

And if not, what should be our response?

In ETUC's view, the outcomes expose some essential weaknesses of the current legal framework (of Treaties and Directives) at EU level that need to be addressed:

- 1) the ECJ seems to confirm a hierarchy of norms, with market freedoms highest in the hierarchy, and collective bargaining and action in second place. Although collective action is recognized as a fundamental right that may restrict fundamental freedoms, its exercise must be reconciled with Community law and therefore has to be justified and must be proportional;
- 2) the ECJ interprets the Posting Directive in a restrictive way, which limits the scope for trade unions to take action against social dumping and to guarantee equal treatment of local and migrant workers in the host country.

II. Fundamental freedoms vs. fundamental rights: a hierarchy of norms?

II.1. The ECJ's approach

It is important to underline that the ECJ in the Viking case (as confirmed in the Laval case) took a position on the right to collective action that was not unexpected from the perspective of its recent case-law,

and some of its elements should be valued as an important step forward (below in italic):

- 1) The ECJ *recognizes the right to take collective action as a fundamental right that is an integral part of the general principles of Community law*; the ECJ points at ILO convention 87 as ratified by MS's, the European Social Charter and the Charter of Fundamental rights to argue that this means that the right to take collective action does not fall outside the scope of Community law.
- 2) However, the exercise of this right maybe subject to certain restrictions, i.e. this right is not absolute (and in this the Court refers explicitly to the Constitutions of Finland and Sweden, in which the right to strike is also not unconditionally guaranteed), and must be protected in accordance with Community law and practices.
- 3) Article 43 and 49 have horizontal direct effect, i.e. they are not only addressed at Member States, but can be also invoked by private undertakings against a trade union (because, according to the ECJ, otherwise the obligation of MS's to abolish obstacles to the fundamental freedoms could be compromised by 'private actors' such as trade unions and associations).

*The Court then continues **with regard to Viking:***

- 4) According to the ECJ, the collective action in the Viking case has the clear aim and effect of making relocation less attractive, and therefore is in itself a restriction of the freedom of establishment.
- 5) It can therefore only be accepted if the collective action is justified. To assess that, the ECJ applies classic case law:
 - a) Does the action pursue a legitimate aim compatible with the Treaty, and is it justified for overriding reasons of public interest? The answer is, that *the protection of workers is a legitimate interest, which is recognized in the ECJ's case law as an overriding reason of public interest, which therefore in principle justifies a restriction of one of the fundamental freedoms*, but that the national court must assess if in practice the aim was really the protection of workers. The ECJ refers as argument to the fact *that the EU does not only have economic but also social objectives, including the improvement of living and working conditions*, and therefore free movement provisions of the Treaty must be balanced against its social policy objectives.
 - b) Is the action suitable for the achievement of the objective concerned, and does it not go beyond what is necessary to attain that objective?

With regard to the actions by the Finnish Seamen's Union (FSU), the ECJ says that it is up to the national court to assess if the objectives pursued really concerned the protection of workers, but the ECJ already gives a hint on what is and is not to be considered 'protection' in this case:

when the jobs or working conditions were really jeopardised or under serious threat (which would not be the case if the employer would have given guarantees to safeguard them).

Secondly, the national court must on the one hand take into account *that collective action is 'one of the main ways in which unions protect the interests of their members'*, but on the other hand it must examine if the union did not have other means at its disposal which were less restrictive of the freedom of establishment (the 'proportionality test') and whether the union had exhausted those means before taking action ('last resort').

However, with regard to the FOC-policy of the ITF, the ECJ says that it cannot be objectively justified, because it is a general policy that applies irrespective of whether in practice the conditions of employment of the workers are harmed by the employer's exercise of his freedom of establishment.

With regard to Laval:

In the Laval case, the ECJ follows a similar line of reasoning. The collective action is seen as a restriction of the freedom to provide services; however, it may be justified.

When it comes to the 'tests' the ECJ argues as follows:

- a) The action has a legitimate aim namely the protection of workers.
- b) This aim constitutes an overriding reason of public interest *because it wants to protect workers of the host state against possible social dumping (!). Also, a blockading action by a trade union of the host state to ensure that posted workers have their terms and conditions of employment fixed at a certain level falls within the objective of protecting workers (!)*
- c) However, the action is in this case according to the ECJ not justified, because, in short, a) the Swedish practice of implementing the Posting Directive is not a system that is recognized by the Posting Directive, b) the Swedish practice of forcing foreign companies to negotiations on pay and other conditions form part of a national context which lacks legal certainty and transparency (see further below in section on the Posting Directive).

Problematic issues that need further assessment are:

(non-exhaustive list)

- Although the ECJ indicates that fundamental freedoms and fundamental rights need to be 'balanced' against each other, the Court does not seem to get the balance right. Those exercising a fundamental freedom do not have to justify their actions, and can even invoke those freedoms when they are deliberately used for social dumping reasons, which should not be accepted as legitimate business interests.
A genuine 'balancing' act would mean that the exercise of fundamental freedoms must (also) be justified in the light of fundamental rights.
- The relationship between the EU Treaties on the one hand and international law of ILO and Council of Europe on the other hand is not clarified. The ECJ ignores a possible clash of legal orders (which may cause problems for MS's that have ratified these international conventions). It maybe too much thinking in terms of 'reconciling' fundamental freedoms and rights.....¹
- The ECJ does not recognize the right to collective bargaining and industrial action as such, but only when they are used to 'protect workers'. This means also, that they ask from national courts to judge if unions are really aiming at protecting workers (which assumes that courts enter into a judgement of the content of trade union policies and actions, and thereby interfere with the autonomy of social partners);
- The ECJ deals with collective action as if it is just another obstacle, i.e. uses the same line of reasoning (justification, proportionality), instead of taking into account that it is a fundamental right, which might necessitate a different approach;
- The EU has no competence to legislate on collective action, but the ECJ gives detailed guidelines to national courts about how to judge strike actions; this is highly questionable;
- The ECJ makes no clear difference if a union when taking action is representing its members or not (i.e. does not make a difference between primary action and sympathy action, which according to the case law of the Strasbourg court on the ESC should be taken into account);
- The ECJ gives articles 43 (freedom of establishment) and 49 (freedom to provide services) horizontal direct effect. This may lead in the foreseeable future to a flood of cases of enterprises against unions taking action against relocation and social dumping. Also in this context it is not clear how the ECJ deals with the independent and overarching freedom of association and right to collective bargaining and collective action.
A fundamental question in this regard is that trade unions are now covered by the prohibition of obstacles of the Treaty as if they are public bodies, but that at the same time they have no recourse to the arguments of justification that public bodies can invoke, i.e. public policy provisions.

¹ See also in Viking case, consideration number 52, in which the ECJ denies that it is inherent in the very exercise of trade union rights and the right to take collective action that fundamental freedoms will be prejudiced to a certain degree.

Although maybe not totally unexpected, it cannot be denied that the ECJ seems to confirm in both cases a clear hierarchy of norms, with market freedoms – recognized as fundamental rights (!?) – highest in the hierarchy. The exercise of these freedoms is accepted unquestioned i.e. does not have to be justified in the light of fundamental rights, even when they are used deliberately for social dumping (as was the situation in both cases).

Collective bargaining and collective action are recognized as fundamental rights but the exercise of these rights is at the same time deemed to be an obstacle to free movement, unless justified for overriding reasons of public interest such as the protection of workers against social dumping, and if 'proportional' (necessary to reach the objective, and 'last resort').

Proposed ETUC response

One option is to use the current momentum around the cases to demand for an additional protocol or solemn declaration, that would clarify that the Treaties including the free movement provisions must be interpreted in a way that respects fundamental rights (a kind of Monti-clause at the level of the Treaties), and which would explicitly recognize that the fundamental right to collective bargaining and collective action cannot be limited to minimum standards but allows full scope to trade unions to fight for the improvement of living and working conditions of workers.²

Such a "Social Progress Clause" could be issued in connection to the EU Reform Treaty and its horizontal social clause of new article 5, a. (There is a precedent for this procedure with the Amsterdam Treaty to which the Employment Chapter was added at a late stage. Also, around the Maastricht Treaty a Protocol was adopted to limit the effect of the ECJ's Barber-judgement on equal pay for men and women with regard to supplementary pensions. There are also precedents with the Monti clause in the Monti-regulation on the free movement of goods³, and a similar clause in the Services Directive⁴).

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 an explanation of the concept of 'social progress', it would say:

² A similar protocol was adopted during the negotiations on the Maastricht Treaty, to limit the scope of the so-called Barber judgment of the ECJ (on complementary pensions and equal treatment of men and women).

³ Text in Monti-regulation: *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.*

⁴ *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.*

"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. 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.

In order to have full legal effect on the interpretation of the Treaties, such a clause should preferably be included at some stage into primary EU law, for instance by way of a Protocol to the (new) Treaties.

Another option could be to demand the 'updating' of the explanations to the EU-Charter, and especially to Article 28 on collective action.

Further study needs to take place to explore further options (see below).

II.2. Protecting national systems against the market, or demanding 'equality of arms' to be established at EU level?

An important aspect of the debate is the question if we have to concentrate on how to better 'shield' national industrial relations and social protection systems against the 'invasion' by internal market law (and if so, how?), and/or if we must develop (also) a response at EU level, demanding recognition of transnational trade union rights and the right to take collective action of (at least) equal weight as the market freedoms, to provide labour with 'equality of arms' vis-à-vis globalizing capital (and if so, how?). In this, there will be no easy answers.

We may have to revisit the compromise, lying at the basis of the European Economic Community as it was established at the end of the 1950's, between welfare protection to be pursued at national level and the internal market and free trade to be pursued at Community level, the assumption being that economic growth would automatically lead to social progress.

The Community would only intervene in social matters when in a specific area distortion of competition had to be prevented (example: equal pay men and women).

However, in recent decades, several developments (EMU, increasingly 'activist' interpretation of the ECJ of free movement rules, a shift to the right in Commission and Member States) have led to a situation in which internal market rules are increasingly invading domestic sovereignty space.

The hot question to be answered is therefore:

- if the increasing limitation of domestic welfare sovereignty can be stopped or reversed (and if so, how?)
- if that is desirable or at all possible in the face of globalization and increasingly mobile capital and services
- and if not, if it should not be matched or remedied by a transfer of competence to the EU (and if so in which areas).

Proposed ETUC response:

Further study is necessary to assess the various options available to better balance and reconcile the single market with national industrial relations systems on the one hand (including to 'shield' them against invasive action by the internal market), and on the other hand to provide trade unions that take transnational action with 'equality of arms' vis-à-vis globalizing capital.

ETUC should consider to

- establish a Taskforce to further investigate these options
- put this issue on the agenda of the 2008 Summer School
- organise a high level conference in the second half of 2008 for affiliates and external experts

III. The Posting Directive: its limits and limitations

III.1. Bolkestein via the backdoor?

Some reactions suggest that the compromise on the Services Directive (excluding labour law from its scope, recognizing that the fundamental right to collective bargaining and collective action would not be affected by it, and deleting the restrictions to the enforcement of the Posting Directive) has been overhauled by the Laval case,

and that we are confronted with a 'new Bolkestein' (a country of origin principle via the backdoor). This is questionable.

However, we may be facing the waking up of the 'sleeping dog' that was always there, i.e. the fact that the Services Directive did not limit in any way the possible scope of article 49 and its application to elements left outside or 'not affected by' the Services Directive.

It is important to clarify that the original approach of the Services Directive with regard to the country of origin principle was to say, that the rules applicable to cross border service providers, when active in the host country, would be the rules of the country in which they were established. Labour law was not clearly exempted and the Posting Directive was seen as providing the maximum space for host country rules.

This was in the final Directive replaced by the much more logical (in view of the ECJ's case law) approach of the 'removal of obstacles'. In this approach, even if something would be considered an obstacle, there would be room for justification.

This means that, depending on how the Posting Directive is interpreted (as a maximum Directive or not, see below) the approach of the ECJ will be that – on issues that are outside the scope of the Posting Directive – these may be considered obstacles that can and must be justified.

III.2 The Posting Directive a 'maximum Directive'?

A major issue to be clarified is, how the ECJ interprets (and restricts) the scope of the Posting Directive in the Laval judgement.

Is it a minimum Directive (i.e. Member States can oblige foreign service providers, either by law or collective agreement, to more than the minimum) or a maximum Directive (i.e. providing for harmonized rules on what can and cannot be demanded from foreign service providers)? And what does this mean for the respective systems of implementation in Member States and possibilities for unions to demand equal treatment of posted workers and to counter social dumping?

Our first assessment is, that according to the ECJ in Laval the Posting Directive is a maximum Directive with regard to the matters that can be regulated in mandatory rules, the degree of protection that can be required, and the methods that can be used to ensure that employment conditions must be equally observed by all national and foreign undertakings in the same region or sector.

At the same time, within the context of these partly procedural limits, Member States – depending on the systems that they have in place - have quite a lot of scope to apply both statutory and collectively agreed standards to posted workers.

This means that the level of standards applicable to posted workers across Europe may differ widely, depending on the system of labour law and industrial relations in the country concerned.

Some countries apply almost all their labour law and collective agreements to posted workers, in others they may only be covered by very minimal statutory provisions.

The Laval judgement implies that the ECJ favours a legal/statutory approach that provides legal certainty and predictability over a collective bargaining approach that provides flexibility.

The ECJ puts a lot of emphasis on the minimum character of the standards (and especially of pay rates), the legal certainty and predictability of the standards, and on equal treatment of companies, but does not allow collective action to ask for more (i.e. to demand 'equal treatment' of workers).

However, one must keep in mind the Swedish context of the Laval case and a more detailed and precise analysis of the ECJ's judgement must be made to assess which implications this may have for the various systems in MS's (with a combination of legal and collectively agreed minimum standards) and current practices with regard to the implementation of collective agreements on posted workers.

It seems to follow from the Laval case that only those provisions of collective agreements are recognized as mandatory minimum standards which are regulating the matters mentioned in article 3 (1), which are interpreted quite restrictively (when it comes to pay only 'minimum rates of pay' !), and are made generally binding or applicable by one of the methods explicitly mentioned in the Posting Directive.

The upcoming judgement in the **Rueffert case**⁵ (announced for beginning of April) will shed some more light on this important aspect, but on the basis of the Laval judgement we do not expect a very favourable outcome.....

In the meantime, another case that is currently before the ECJ (**Commission versus Luxemburg**, C319/06)⁶ may turn out to be of equally worrying importance for countries in which the whole body of

⁵ Rueffert versus Land Niedersachsen, C-346/06. Judgement expected on 4 April 2008. The Rueffert case, a German case, deals with the relationship between minimum wages established in a nation-wide collective agreement for the construction sector in Germany that is declared generally binding, and the higher collectively agreed wages applying to all companies and workers in the place where the work is done (the land Niedersachsen), and puts the question on the table if the public procurement law of Niedersachsen can oblige a Polish subcontractor to apply the local standards (that also apply to all its German competitors in that region).

⁶ In this case, brought before the ECJ by the European Commission, the Commission complains among other things about the fact that Luxemburg has interpreted the term 'public policy provisions' of article 3.10 of the Posting Directive too widely. This Article allows Member States to apply to posted workers also other terms and conditions of employment than those mentioned in article 3,1 of the Directive, as long as these are 'public policy provisions'. The Advocate General concluded in this case already that Luxemburg had gone too far. It can be expected that the ECJ uses this case to give a restrictive interpretation to what can be defined as 'public policy provisions'.

labour law, or important parts of it, has been declared by the MS as being 'public policy provisions' in the sense of Article 3,10 of the Posting Directive (in addition to Luxemburg this may be Belgium, Italy and France.....). Affiliates replying to the Netlex questionnaire have also drawn attention to this issue (see below).

The ECJ does not accept that foreign companies would be 'forced' by way of collective action into collective bargaining with unions to set the minimum pay rates, 'in a context in which it is difficult to determine the obligations to which it is required to comply'.

This seems to imply that foreign companies are exempt in general from the pressure of collective bargaining and collective action, and that such actions could only be justified when taken to establish the 'nucleus of minimum standards' of the Posting Directive (see below). Even if one would interpret the Posting Directive in a restrictive sense in terms of what mandatory minimum standards to apply, why would that mean that unions can never ask for more, if they do the same with national companies? Isn't that an unacceptable restriction of the right to collective bargaining?

According to experts, the case law of the Strasbourg Court on the ESC ensures that unions, when representing their members against an employer in primary action cannot in such a way be limited in their demands.

Additional problematic points related to the Laval judgement are (non-exhaustive list; issues raised in responses to the Netlex questionnaire):

- We have information about several Member States (such as Italy) where methods to deem collective agreements generally binding or applicable may not be sufficiently clearly laid down in law. This may be the case in other countries as well.
- The Laval judgement is ambiguous and unclear as to the question if (generally binding) collective agreements, when they are setting higher standards than the minimum standards set by law, are recognized by the ECJ as the applicable minimum standards⁷. If not, the Laval case would turn out to have an even greater and more disastrous impact on quite a number of countries in which this is the common practice (France, Belgium, the Netherlands, etc.). However, it seems illogical that the ECJ would really have this in mind, as they clearly accept generally binding collective agreements as of the same value as statutory law in terms of their legal certainty and equally binding effect on enterprises.
- Several affiliates have raised the question how the ECJ would deal with a situation in which a country has declared all, or part of, labour law to be public policy provisions in the sense of article 3, 10. As mentioned above, a recent case before the ECJ may shed some more (worrying) light on this.

⁷ See among other things consideration 78 in the Laval judgment

- French colleagues have drawn attention to the potential danger of more 'flexible' legislating practices, where increasingly minimum standards in the law are vague or absent and the detail is left to collective agreements. This may have negative effects on the possible application of those standards to posted workers

Proposed ETUC response:

Short term:

a. Make national systems Laval- and Viking-proof

ETUC with the support of Netlex/ETUI will:

- investigate with affiliates their national systems to identify possible problems
- develop guidelines on the interpretation of Laval and Viking and how to prevent/remedy possible problems

b. Call on Member States to transpose and implement the full scope of the Posting Directive

Many MS's do not use the current scope of the Posting Directive, as interpreted by the ECJ, to the full.

For instance, they have not used the option to apply **all** their generally binding collective agreements to posted workers, or have not bothered to apply other public policy provisions to posted workers.

They should take measures to better enforce the definition of a posted worker, i.e. that he or she must be habitually employed in the country of origin, and not just hired for the posting job abroad.

They also should adopt better regulation at national level to prevent letterbox companies etc. to operate from abroad to avoid host country rules.

c. Demand urgent adoption of the Temporary Agency Directive

This would at least with regard to agency workers introduce a clear equal treatment principle with reference to comparable workers of the user company.

Medium term:

Consider revision of the Posting Directive, to simplify and strengthen it.

On several occasions since 2003 the ETUC has drawn attention to points for possible improvement of the Posting Directive, although always taking a careful position as to the need of revision.⁸

⁸ ETUC positions 2003, 2006 and 2007, see ETUC website

The Laval judgement could signal that some revisions might be necessary. However, it is important to wait for the judgements in the Rueffert case and the COM-vs.-Luxemburg case, as these may either widen or reduce the scope for concern.

The following points should be addressed:

- 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, and not just the one in the construction sector, 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

In addition, ETUC should demand a strengthening of the so-called 'Information Directive' (about the minimum information that workers should receive from their employer regarding their employment relationship) to include all relevant provisions regarding their posting.

III.3 Mobility of labour: 'free movement of services' or 'free movement of workers'?

Most workers in Europe have increasingly very strong feelings about the unfair competition by migrant and mobile workers that are hired via subcontractors and agencies and (therefore) paid below standards. These are very legitimate concerns that should be seriously addressed exactly to prevent xenophobia and ill-guided protectionism, the kind of things the ECJ may have wanted to tackle.

Most debates until now have focussed on the question if and how the Posting Directive could or should be adapted to better guarantee equal treatment, instead of only minimum protection.

However, it is questionable if the legal basis on which this Directive is based, and the approach it is taking (defining the kind of mandatory rules that host countries must or can apply regardless of the law applicable to

the employment contract between service provider and worker) would allow for taking a fundamentally different approach.

There may be good reasons to start a debate again on the expanding scope of the 'free movement of services' provisions in relation to the 'free movement of workers' provisions when it comes to the mobility of labour within the EU.

It would be interesting to look at this also with a historical perspective. Originally, the moving around of workers within the EU was supposed to be governed by the 'free movement of workers' articles of the Treaty (39 to 42), which have a strong non-discrimination and equal treatment approach (relating to the host country!) as well as – one could say on the basis of article 40,d - a clear reference to the need to prevent social dumping (40,d speaks about 'threats to the standard of living and level of employment in the various regions and industries').

The articles on free movement of services were aimed at free movement of service companies and self employed professionals, with the assumption that people moving around in the framework of services would 'not become part of the labour market of the host country'. The Posting Directive focuses on guaranteeing minimum standards (mandatory rules of the host country) for temporary workers that are supposed to be - and remain - habitually employed in the country of origin, and is therefore often seen as a clarification of the relevant articles of the so called Rome convention that defines the applicable law to contracts including contracts of employment.

In recent times, there is an enormous increase of temporary agencies and other forms of 'labour-only subcontracting' that provide an increasing amount of workers to cross border user companies (with no clear notion of how 'temporary' this is, and often no check as to their 'habitual' place of work, many of them just hired for the posting job!) and that are certainly having an effect on labour markets in host countries!!

These activities 'hide' behind the free movement of services paragraphs of the Treaty, and one could question if it was really the intention of the Treaty to deal with such enormous flows of EU citizens and workers via the 'free movement of services'.

This is certainly something that the ETUC should put into question again. What is essentially mobility of labour should be covered by the Treaty provisions written for that purpose.

Proposed ETUC response:

Longer term:

Start a debate on how to limit the scope of the free movement of services provisions in the Treaty with regard to labour-only services in favour of the free movement of workers provisions.

Promote a renewed debate on a Regulation regarding the establishment of a clear host country principle for labour standards and working conditions (which has been proposed in 1972)

III.4. Social clauses in public procurement law limited by the Posting Directive?

Both in the Laval case and in the upcoming Rueffert case public authorities are involved and public procurement rules at stake.

In both cases, the local or regional authorities made application of local collective agreements conditional for the acceptance of the tender by the foreign service provider. (In the Laval case, the ECJ did not pay sufficient attention to the fact that the Vaxholm community had a clause in its public procurement regulation expecting the tenderer to apply a Swedish collective agreement to his workers).

Public authorities and the obligation to tender for construction works and services provided to them puts especially local authorities in the heart of the matter.

They have to accept the best (i.e. in principle cheapest) bids, and social criteria can be only applied in a restrictive way.

At the same time, the local companies (often SME's) are very much dependent on the work available for public authorities. Their continuity, and the employment of their workers, is very much under threat when foreign companies can compete with them on conditions that are not accessible to them (foreign wages) and/or are considered to be below socially adequate standards.

Proposed ETUC response:

Short term:

- Affiliates should be asked to verify if and to which degree their national legislation on public procurement has introduced the possibility to apply social criteria, especially with regard to wages and working conditions;
- On this basis, and taking into account the judgement in the Rueffert case, ETUC should assess if the European framework rules need to be strengthened;
- The ETUC should explore possibilities to work in this together with CEEP, as there clearly exist joint interests.

IV. A pro-active litigation strategy

a. ETUC should set up a litigation network and early warning system

There is an urgent need to ensure that the ETUC is informed at an early stage about potential ECJ cases with a wider EU/trade union remit, and that affiliates and/or academic experts can provide the ETUC with the necessary background information and legal expertise on national systems and peculiarities so that the ETUC is able to provide adequate and timely support and coordination, for instance in terms of drafting briefing notes and urging 'friendly' Member States to submit favourable positions to the ECJ.

The proposal is, to set up a specific group, connected to ETUC's network of legal experts NETLEX, which would be responsible to monitor case law at national and European level with regard to trade union and workers rights, and to install an "early-warning-system". Ideally, the members of this group would identify relevant cases in an early stage, so that the phrasing of preliminary questions to the ECJ can be influenced, and potential test cases can be found.

The group would be constituted of one representative for each EU country (27 members) either a legal expert from a member organisation, or an academic proposed by affiliates. Members of the group would need to have and to maintain close connections to the trade unions in their country. The European Industry Federations would be also asked to provide a representative, as many cases have a strong sectoral dimension.

The ETUC would ask the European Commission to provide for additional financial means to the Netlex-budget so that this group can be trained and can meet at least once a year, and so that key documents can be translated. In its yearly meeting, preferably an exchange of information and expertise will take place with the existing ETUI-REHS legal expert group.

A protected website will be set-up so that the participants of this group can exchange the information on and new national cases and current cases before the ECJ in a very effective and quick way.

b. A possible role for the ETUC at the ECJ via the national courts

The ETUC should in relevant cases with a strong European and trade union dimension, after consulting the parties in those cases, consider to ask permission to the national court to intervene as an 'interested party'. Once the national court allows the ETUC to submit a position, also the ECJ will have to allow the ETUC to take part in the proceedings before the ECJ.

c. An independent right to submit positions to the ECJ for European Social Partners

According to the rules of procedure of the ECJ, all Member States have a right to submit positions in any case that is dealt with by the ECJ.

It is very unsatisfactory that even in cases like Viking and Laval, which deal with the core business of trade unions and social partners in general, there is no entry for the European social partners, although they are explicitly recognized in the EU Treaties as co-legislators etc.

ETUC should confront the European institutions with this, and demand that the ECJ at least would consider to – on a voluntary basis – notify the European social partners of all cases with a direct or indirect social policy dimension,

and especially those regarding the interpretation of agreements by the European social partners, and allow them to submit positions. In the longer term, the rules of procedure of the ECJ should be adapted to acknowledge the privileged status of the social partners as institutional actors in the EU Treaty and to authorise them, like the Member States, to intervene before the ECJ.

d. A social chamber in the ECJ?

There have been reforms to the structure of the ECJ in the past. The decisions in Viking and Laval could be used to make a case for establishment of a specialist tribunal, the social chamber of the the ECJ.

Proposed ETUC response:

Short term:

- set up a litigation network and early warning system within Netlex
- consider to make use of the currently already existing option to ask access to national courts in relevant cases, in consultation with affiliates concerned, to submit a position as an interested party and thereby also get access to the ECJ

Longer term:

- demand change of rules of procedure of ECJ to allow European social partners to submit positions in cases regarding the interpretation of their European agreements
- consider to demand a reform of the structure of the ECJ to establish a social chamber.

V. Coordination of transnational dimensions of collective bargaining

The ECJ, in the Laval case, does not accept the so called Lex Britannia in Sweden, according to which collective agreements already applicable to an employer must be recognized (i.e. that in that case no collective action can be taken to enforce another Swedish collective agreement) unless it is a foreign employer – in this case a Latvian company with a Latvian collective agreement –, as this is seen as discrimination. The clear aim of this law to create a climate of fair competition is not recognized as an overriding reason of public policy that can justify such discrimination.

Although it was expected that the ECJ would be especially critical about this element, it has now become even more 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.

Proposed response ETUC:

The ETUC should develop guidelines regarding the extra-territorial effects of collective agreements.

These could consist of the following elements (to be further developed):

- affiliates should be careful in giving their collective agreements a scope beyond their country's territory
- if they do so, it must be to the clear advantage of the workers, for instance offer them reimbursement of travel costs between home country and host country, allowances to deal with higher costs of living in the host country etc., which also would show clearly that these provisions would be limited to clear cases of temporary posting abroad of workers who are normally working for the same company in their home country;
- the collective agreement should probably contain a 'more favourable clause' (similar to the one in article 6 of the Rome Convention), saying that the collective agreement may not be interpreted so as to deprive the worker from statutory or collectively agreed rules in the host country that are more favourable to him;
- the collective agreement should also not contain provisions that would stand in the way of the worker organising in a host country union to represent his interests in the host country.

Affiliates should be recommended to increase and improve the coordination cross border (bilateral and multilateral contacts etc.).

Bilateral agreements about how to deal with each others collective agreements can be useful (see for example Netherlands and Belgium, where for instance in the construction sector there is a agreement between the unions concerned about which provisions of their collective agreements are more favourable for cross border workers).

An important point to further develop within the ETUC and among affiliates is the organising of posted workers by unions in the host countries, which may require removal of obstacles to become members in host country and/or the introduction of dual membership (in country of origin and host country), reaching out to them in their own language, etc.

A more long term policy could be to develop coordinated policies and agreements between unions from various countries on which laws and collective agreements apply to major worksites with cross border dimensions (such as the tunnel between Sweden and Denmark, etc.)
