

## ETUC

### *Context internal market, impact EJ cases*

The ETUC fully respects and values the important role of the ECJ within the EU's institutional framework. However, this does not mean that it considers each and every judgement of the ECJ infallible. In particular with regard to the recent four cases at stake in this report the ETUC is of the opinion that other legal interpretations than the ones given by the ECJ would have been very well possible under the current Treaties.

Moreover, the ETUC is of the opinion that the four ECJ cases have exposed the weaknesses of the current EU legal framework applicable to the free movement of workers and services, which has had a negative impact on the level of confidence among workers and citizens in the benefits of the internal market, has increased Euroscepticism, and feeds into the trends of rising protectionism and xenophobia, in the context of the current economic and financial crisis. Moreover, they are endangering social partnership models and national industrial relations. These weaknesses should therefore be urgently addressed.

In ETUC's view, there are two dimensions of weakness:

- a weakness at the level of the European Treaties, because the ECJ confirmed a hierarchy of norms, with market freedoms highest in the hierarchy and the fundamental rights of collective bargaining and action in second place;
- a weakness in the legal framework applicable to posted workers, as the ECJ interpreted the Posting Directive in a very restrictive way, limiting the scope for Member States and trade unions to adequately protecting posted workers against unfair competition on wages and employment conditions.

### *Economic freedoms and fundamental rights*

ETUC is very concerned about the alleged balance introduced by the ECJ between economic freedoms and social fundamental rights. For the ETUC, the ECJ judgments limit the right to take collective action significantly but leave however economic freedoms untouched.

The right to take collective action is recognised in international standards (e.g. ILO, Council of Europe) and national constitutional laws. Consequently, any limitations on the right to take collective action are only acceptable at the level at which this right is recognised. The ETUC considers that setting limitations with reference to EU internal market rules is unacceptable. Furthermore, such restrictions or limitations cannot result from an economic test. The ETUC recalls that international norms of for instance the ILO do not allow the application of such economic tests and do not accept the concept of proportionality.

Moreover, the ETUC believes that preserving the capacity of unions to take collective action is also in the interest of employers who need strong negotiating partners to agree on working conditions collectively. Likewise, the existence of strong trade unions is essential to steer individuals' expectations and to channel social unrest. The Viking case, however, has created phenomenal legal uncertainty, which puts into question the exercise of the fundamental right to collective action. The sustainability of industrial relations is therefore at risk. In addition, there is a real risk of judicialisation of industrial conflict, with companies tempted to use interim injunctions to stop industrial action - even before it has been taken- in any case with a potential cross border dimension, and the trade union responsibility for potentially huge damages in such cases. This can have the – unwanted and undesirable –

consequence of promoting wild-cat strikes, as organised collective action is becoming extremely difficult to execute in a lawful manner.

In ETUC's view, this should be addressed by clarifying in non-ambiguous terms at the level of the Treaties that the exercise of the economic freedoms must respect fundamental social rights, as being in line with the aims of social progress and the improvement of living and working conditions recognized by the EU Treaties.

### *Fair competition*

ETUC wants to emphasize that the Posting Directive is based on the recognition, as stated in its preamble, that respect for the rights of workers and a climate of fair competition are necessary preconditions for promoting the transnational provision of services.

However, as a consequence of especially the ECJ judgements in the Laval, Rüffert and Luxembourg cases these preconditions are no longer sufficiently fulfilled nor guaranteed.

The ETUC regrets that the ECJ judgments in these cases has given a very restrictive interpretation of the Posting of Workers Directive. By considering the nucleus of mandatory rules not only as a minimum but also as a maximum to be imposed on foreign service providers, the ECJ rulings constitute an incentive for companies to hire migrant workers as posted workers through foreign companies in order to circumvent national labour laws. This is not only detrimental to workers but also for the companies of the host Member State, which may often have to observe working conditions going beyond those that must be observed by foreign service providers. Therefore, following the interpretation given by the ECJ, the ETUC calls into question the adequacy of the Posting of Workers Directive to protect workers and to provide a level playing field for companies.

The ETUC considers in particular that the fundamental right of freedom of association and collective bargaining imply the right to take collective action, as also recognized in recent cases of the ECHR. Trade unions by their very nature aim at the improvement of the living and working conditions of workers, and should always be allowed to exercise their fundamental rights to collective bargaining and collective action to negotiate better working conditions for any workers including posted workers and to fight for equal treatment between local and migrant workers.

Also Member States and public authorities should have the possibility to impose a higher level of protection, including through social criteria in public procurement, than the minimum contained in Article 3.1 of the Directive, to pursue social aims, guarantee a level playing field between companies, and guarantee the non discrimination of posted workers in the host country.

This means among other things that the public policy provision should be interpreted more widely, thereby fully respecting the competence of the member States in this area.

### *Obstacles/conditions*

In ETUC's opinion, labour law standards and measures designed to secure workers' protection, when respecting the principle of non-discrimination of local and foreign workers and companies, should be regarded as preconditions for a sound development of mobility of companies and workers in the internal market and not as obstacles to free movement in the Union.

In ETUC's view, the increasingly European labour market(s) require a framework of firm and fair 'rules of the game', combining open borders with a level playing field for companies and adequate protection of workers.

At national level, measures should be taken to ensure that social and industrial relations systems are 'mobility proof', i.e. capable of dealing with the increased mobility of workers and companies in a way which prevents unfair competition on wages and working conditions and safeguards national systems and traditions of collective bargaining. At EU level, such national measures should be recognized and accepted as legitimate when they are based on the principle of non-discrimination of companies and workers, instead of challenged as potentially incompatible with the internal market.

### *Transparency/applicable labour standards*

ETUC acknowledges that transparency and legal certainty was one of the issues raised in the Laval judgement. In any case, the ETUC strongly disagrees with the employers that the four ECJ judgments have added to legal certainty. Moreover, the ETUC considers that the argument of 'legal certainty' cannot be used as an excuse to interfere with the essential features of national labour law and industrial relations. It must be underlined that it is common knowledge that the national (Swedish) model in question relies very much on collective bargaining at the workplace, and that depriving the trade unions from the essential tools they need to entice meaningful negotiations with local and foreign companies on the same footing undermines the very functioning of this system.

In the Ruffert case, the issue of legal (un)certainty or lack of transparency for companies was not at stake as the local public procurement law clearly pointed out the applicable collective agreement. Furthermore, since companies would contractually undertake to respect the relevant labour standards, they could hardly pretend not to have been informed about them. As a consequence of the Ruffert case, the existing public procurement laws in German federal states have been annulled, to the detriment of workers (both local and posted workers) and of local employers and companies in situations of competition with foreign service providers.

The Luxembourg judgment has also increased the uncertainty for posted workers and employers alike. The Court has ruled that the notion of public policy must be interpreted strictly and that its scope cannot be determined unilaterally by each Member State. As a result, the validity of national provisions of a public policy nature will have to be assessed on a case by case basis, by the ECJ itself. Considerable uncertainty as to the applicable labour standards therefore arises. In parallel, as there is no clear guideline as to when a public policy measure can be regarded as legitimate, the ETUC is concerned that the Luxembourg case law constitutes a strong incentive for litigation.

Finally, the ETUC stresses that companies, workers and trade unions need to be able to determine in advance the applicable regime not only to the actual labour standards but also to the rules governing collective action. By introducing a general proportionality test which is to be applied on a case by case basis by national jurisdictions, the Viking judgment has created tremendous uncertainty in this regard.

### *Non-discrimination*

The ETUC is of the opinion that the principle of 'equal treatment' is a key principle in the internal market, taking as a starting point that all actors on the internal market, workers as

well as companies, should not be discriminated against because they come from another Member State.

Upholding this principle is of the utmost importance for the acceptance among workers and citizens of the internal market.

As already highlighted under the 'fair competition' section, the ETUC regrets the restrictive interpretation by the ECJ of the Posting of Workers Directive. As a consequence of the ECJ rulings, the general principle of non discrimination between workers and companies alike is no longer respected. When a foreign subcontractor can only be held liable for minimum levels of pay and working conditions in the host country, whereas domestic (sub)contractors will have to or are expected to apply higher (collectively agreed) standards, a clear incentive for 'social dumping' is in place. Instead of creating a level playing field for foreign and domestic companies/service providers, it may lead to reverse discrimination (i.e. discrimination of local companies).

Where in such situations trade unions would take action in favour of workers, they are limited by the restrictive interpretation of the ECJ, conditioning the validity of collective actions to respect for the Posted Workers Directive, and assimilating trade unions to emanations of the State, thereby severely limiting their scope to fight for the improvement of the living and working conditions of workers, including demanding equal treatment of workers in the place where the work is done.

Also, following the judgments it is no longer clear that the host Member State can impose terms and conditions of employment that go beyond the minimum level contained in Article 3.1 so as to guarantee the public interest in the proper functioning of their labour markets, including the non discrimination of local and foreign workers and companies including service providers. Finally, the notion of public policy has been deprived from most of its practical effect, further increasing the potential discrimination on essential aspects of labour law.

### *Diversity*

According to the ETUC, the ECJ rulings have an enormous impact on national industrial relations systems. In particular:

- Proportionality tests to assess the validity of collective actions have until now been an unknown concept in a number of jurisdictions. The involvement of the judge in national industrial relations systems will trigger unpredictable consequences throughout the Union
- the ECJ rulings display a rigid vision of collective bargaining and collective action, which is not compatible with a number of existing traditions. This is the case in particular for the criteria used to define collective agreements under the terms of the Posted Workers Directive.
- the excessively rigid criteria imposed by the Ruffert judgment for the recognition of collective agreements in public procurement procedures annuls this national practice of sustaining collective bargaining and disregards the specific responsibility of national public authorities to guarantee decent work, as also recognized in ILO Convention 94, which has been ratified by 10 EU Member States, and is considered to be an 'up to date' convention that deserves further ratification by the European Commission.
- the ECJ willingness to assess on a case by case basis public policy notions, following a rigid justification test, infringes with Member States prerogatives to determine which aspects of their labour law are so essential to the public interest that they must be respected by all undertakings operating on their territory

Furthermore, whilst the diversity of industrial relations systems should be fully respected, the ETUC recalls that the Union also has for objective the promotion of social dialogue (Art 136 EC). The ETUC considers that the Viking, Laval and Ruffert judgments fail to take into account this objective as the role and prerogatives of trade unions have been severely curtailed. The sustainability of industrial relations has been threatened. This should be an issue of general concern.