The impact of the ECJ judgements on Viking, Laval, Rüffert and Luxembourg on the practice of collective bargaining and the effectiveness of social action
Abstract

This briefing note gives a short overview of the impacts of the Laval-case, the Rüffert-case, the Commission vs. Luxembourg, and the Viking-case on the practice of collective bargaining and the effectiveness of social action in the European Union, with the aim of giving the broadest possible update on the consequences of these important judgments on the social dimension of the Internal Market.
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1 Introduction
What wages and working conditions are to be applied to workers who, within the framework of the transnational provision of services, are sent to work temporarily in the territory of another Member State? Should the employment relationship of the posted workers be governed by the laws of the host state or the state of origin? Or should the employment conditions partly be regulated by both of the national laws? How shall the right to take collective action within the single market be balanced against economic freedoms?

These issues were, in 2007 and 2008, addressed in a series of cases from the EU-Court; the Laval-case, the Rüffert-case, the Commission vs. Luxembourg and the Viking-case. The four cases – jointly referred to as the Laval-quartet – have given rise to an intense political and judicial debate. The aim of this briefing note is to give a short overview if the impacts of the Laval-quartet on the practice of collective bargaining and the effectiveness of social action.

2 The situation prior to the Laval-quartet
2.1 Before the Posting of Workers Directive
The main question addressed by the Posting of Workers Directive is which employment conditions shall apply to workers temporarily posted from one Member State to another. Even before the adoption of the Directive in 1996, it was clear, according to case law that the Member States could, if they so decided, extend their national labour laws to posted workers. Extending national labour law could be a restriction of the free movement of services (Article 56 TFEU, ex 49 EC), which could be justified in accordance with the so called Gebhard-formula: a restriction on the free movement of services can be accepted only if justified by overriding reasons of public interest and if it is proportional (that is, the measure is suitable for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it).

2.2 The Posting of Workers Directive
The main amendment achieved through the Posted of Workers Directive, compared with the previous case law concerning Article 56 TFEU, was that the Directive prescribed that host countries are not merely permitted, but have an obligation to ensure that posted workers have ‘a nucleus of mandatory rules for minimum protection’ in the host country. This so-called ‘hard nucleus’ is defined as rules (a) laid down by statutes or – for the building sector – by collective agreements that have been declared generally applicable and (b) concern certain specified terms and conditions (health and safety, maximum working hours, minimum wage etc.).

1 The European Court of Justice has through the Lisbon Treaty been renamed the Court of Justice of the European Union or shorter the EU-Court.
2 C-341/05 Laval un Partneri [2007] ECR I-11767
3 C-346/06 Rüffert [2008] ECR I-1989
4 C-319/06 Commission vs Luxembourg [2008] ECR I-4323
5 C-438/05 The International Transport Workers’ Federation and The Finnish Seamen’s Union [2007] ECR I-10779
6 Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
7 C-113/89 Rush Portuguesa [1990] ECR I-1417
8 See, inter alia, Case C-55/94, Gebhard [1995] ECR I-4165,
A crucial question concerning the Posting of Workers Directive has been whether the Directive should be interpreted as something more than obliging the Member States to protect the posted workers. Did the Directive also limit the possibility of a Member State to extend other parts of national labour law to the posted workers? Did the Posting of Workers Directive only provide a floor of protection that the host states must extend to posted workers? Or did it also establish a ceiling of employment conditions that host states are allowed to extend to posted workers? Another way of formulating the same question is to ask whether the Posting of Workers Directive is mainly to be understood as a minimum labour law directive (aimed at protecting the host state labour and/or the posted workers) or if it is a free movement of services directive, facilitating cross-border service providers, by limiting the regulatory powers of the host state in relation to posted workers.

Good legal arguments could be – and have been – put forward for interpreting the Directive both as more of a maximum free movement directive than a minimum labour law directive, as well as the other way around. The question of how the Directive should be conceived is now largely settled through the Laval-quartet.

From a governance perspective it is, however, worth pointing out that the institutional debate leading to the Directive clearly indicates that the Directive – at least by many– was thought of more as establishing a minimum labour law directive, rather than exhaustively coordinating measures that the host state was allowed to adopt in relation to posted workers. Nevertheless, the Posting of Workers Directive was adopted with reference to EU competence in the field of free movement of services (now articles 53 and 62 TFEU). The reason for the choice of the legal base was at the time to circumvent the lack of competence for the EU (including the UK) in the social field. By using the competence for the free movement of services the Directive could be adopted through qualified majority voting, instead of demanding unanimous agreement in the Council. The latter alternative was not available since the UK and Portugal were opposing the Directive.

At the time when the Directive was adopted, the choice of legal base was criticised. The argument was that the Posting of Workers Directive was not aimed at making it easier for the free movement of services. Rather the Directive was a labour law directive, which would have required unanimity. The question was whether the legality of the Directive would be challenged by the UK in the EU Court.9

2.3 The Services Directive

The question of the floor or ceiling character of the Posting of Workers Directive re-emerged with the drafting of the Services Directive.10 According to the Commission’s first draft for the Services Directive (the Bolkestein proposal) the country of origin principle should have been applied, except for matters covered by the Posting of Workers Directive.11 The Posting of Workers Directive would then have set the limit of the Member States’ competence in relation to posted workers. The proposal was criticized in this respect, inter alia, and that part of the proposal was withdrawn in the democratic process leading to the final Directive. The final Service Directive could rather be said to reflect the view that it should not affect relations between the social partners, including the right to negotiate and conclude collective agreements, and the right to strike and to take other industrial actions (cf. Art. 1(7)).12

9 For a discussion of these argument see, Biagi (1996), Biagi (1999) and Davies (1997).
12 See further Barnard (2008).
The European legislator in this way demonstrated that they did not intend the Posting of Workers Directive to be a maximum ‘free-movement of service directive’ but rather a ‘minimum labour law directive’.

3 The Laval-quartet

3.1 The Viking case

The Viking case concerned a collective action relating to the reflagging of a vessel from Finland to Estonia. The EU-Court ruled that such a collective action is not excluded from the scope of Article 49 TFEU (ex 43 EC) on the right of establishment. The Court also stated that Article 49 TFEU is capable of conferring rights on a private undertaking which may be relied upon against a trade union. Finally, the Court held that a collective action, such as that at issue in the dispute, constitutes a restriction of the right of establishment. The restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is proportional (according to the Gebhard-formula). It was for the national court to ascertain whether the restriction could be justified.

After the judgement by the EU-Court, parties in the dispute arrived at a settlement, and the case has been withdrawn from the national court.

3.2 The Laval case

Laval was a Latvian company which posted workers from Latvia to work for construction companies in Sweden. Laval was subject to collective actions by Swedish trade unions. The aims of the collective actions were to force Laval to enter into negotiations with the trade union on the rates of pay for posted workers. Further, the aim was to sign a collective agreement, the terms of which laid down (a) as regards some of the matters covered by the hard nucleus of the Directive, more favourable conditions than those resulting from the relevant national legislative provisions for minimum protection, and (b) other terms relating to matters not included in the hard nucleus. To put it another way, the demand put forward by the trade union included provisions which were both ‘beside’ and ‘above’ the hard nucleus according to the Posting of Workers Directive.

The EU-Court held that Article 56 TFEU and Article 3 of Posting of Workers Directive precludes a trade union from attempting, by means of collective action such as the one in the case, to force a provider of services established in another Member State to enter into negotiation regarding rates of pay and to sign a collective agreement with terms both ‘beside’ and ‘above’ the hard nucleus. Further, the Court argued that the collective action could not be justified, since the demands were not transparent. The demands must be sufficiently precise and accessible so as not to render it impossible or excessively difficult in practice for such an employer to determine the obligations with which he is required to comply.13

In its final judgement the Swedish Labour Court held the trade unions liable to pay punitive damages (see below).

13 The EU-Court also found that a piece of Swedish legislation – lex Britannia – was not in line with articles 56-57 TFEU (ex Articles 49 EC and 50 EC).
3.3 The Rüffert case

A German company won a tender with the German state of Lower Saxony concerning the construction work at a prison. According to the law on public procurement in Lower Saxony the contractor must undertake to pay at least the remuneration prescribed by the collective agreement in the place where those services are performed. Such a clause was included in the contract with the German company. The company subcontracted work to a Polish service provider and the Polish workers were paid lower wages than prescribed by the relevant collective agreement. Since the German company did not comply with the contract in this respect, Lower Saxony annulled the contract and imposed financial penalties on the company.

The EU-Court found that the demand to pay wages according to the relevant collective agreements did not comply with the Posting of Workers Directive, interpreted in the light of Article 56 TFEU. According to the Court the wages were not fixed in accordance with one of the procedures provided for in the Posting of Workers Directive. The collective agreement mentioned in the Public Procurement Act in Lower Saxony was not generally applicable (according to Article 3.1 of the Directive). Further, the method used in Lower Saxony could, for several reasons, not be regarded as an application of the method in 3(8) of the Directive. One reason was that Article 3(8) may only be used if there is no system for declaring collective agreements to be of universal application, which is not the case in the Federal Republic of Germany.

3.4 Commission vs Luxembourg

In case C-319/06 the Commission held that Luxembourg had failed, in several respects, to implement the Posting of Workers Directive correctly. Of special interest is the Court’s interpretation of Article 3.10 of the Directive. This Article recognises that the Member States may extend conditions of employment on matters beside the hard nucleus if they concern public policy provisions. The public policy exception is, the Court argues, a derogation from the fundamental principle of freedom to provide services, which must be interpreted strictly and the scope of which cannot be determined unilaterally by the Member States.

3.5 Summarising the Laval-quartet

The Laval-quartet has in many respects clarified the interpretation of Articles 43 and 56 TFEU and the Posting of Workers Directive.

Collective actions may be a restriction of economic freedoms

The EU-court in several ways clarified the relationship between collective actions and the free movement of services and the right of establishment. According to the EU-Court, collective actions initiated by a trade union against a private undertaking in order to induce that undertaking to enter into a collective agreement are not in principle excluded from Articles 49 and 56 TFEU. Further, collective actions may – at least in cross-border situations like the once in Laval and Viking – be considered a restriction on the freedom of services and the right to establishment. The restrictions may be justified according to the Gebhard-formula. The Viking and Laval cases concerned various types of collective action, and the judgements imply that the protection of the right to different kinds of collective actions is not uniform but depends on the nature and aim of the action in question.
Collective action is a fundamental right

The EU-Court recognized the right to take collective action, including the right to strike, as a fundamental right which forms an integral part of the general principles of Community law, the observance of which the Court ensures. The Court does not give more substantial guidance about what the fundamental character of the right to collective action means. The Court seems anxious to stress that there are restrictions to the exercise of that right, both at national and EU level. It follows from Laval that the free movement of services may impose far-reaching restrictions on the right to collective action, at least if the actions taken by a trade union do not aim directly at regulating the employment conditions of its own members.

The Posting of Workers Directive as a ceiling

The EU-Court interprets the Posting of Workers Directive almost as an exhaustive coordination of the national measures for protecting workers in posting situations. The Court’s interpretation thus comes rather close to an understanding of the Posting of Workers Directive as a ceiling: that is, an almost exhaustive description of the competence of the Member States in relation to posted workers.

However, it should be noted that the Directive does not harmonise the material content of those mandatory rules for minimum protection. That content may accordingly be freely defined by the Member States, in compliance with the Treaty and the general principles of Community law.

Further, the Member state may also extend conditions of employment on matters other than the nucleus of mandatory rules if they concern public policy provisions (Article 3.10). The concept of public policy provisions is interpreted strictly (Commission vs. Luxembourg). This possibility is not open to trade unions, since they are not bodies governed by public law (Laval p. 84).

4 National responses

4.1 Introduction

The interpretation of the Posting of Workers Directive as a maximum free movement of services directive will potentially have extensive consequences, especially for Member States such as Denmark and Sweden whose industrial relations regimes are based on the autonomous collective bargaining model. In this model, it is on the whole the exclusive responsibility of trade unions to safeguard rather high average, flexible, levels of wages and employment conditions for all different categories of employees. The unions safeguard the levels of wages by trying to force – ultimately by (threat of) collective action – employers who do not belong to any employers’ organisation (and thus not as members bound by collective agreement) to conclude ‘accessory agreements’, i.e. collective agreements in which the employer undertakes to apply the collective agreement covering the branch of activity in question.

Both in Denmark and Sweden it was, immediately after Laval and Viking, considered necessary to review the legislation in order to comply with the new case law, while still preserving the autonomous collective bargaining model.
In other Member States there has also been a huge debate concerning the Laval-quartet. However, it seems as if this debate has not resulted in any new or amended legislation in the laws on posting of workers or the laws on collective action.\textsuperscript{14}

This is for instance the case in Belgium, Finland, Italy, Poland and the UK. In Germany the Rüffert case has triggered some amendments of the public procurements laws of those ländere which – like Lower Saxony – contained an obligation to comply with collective agreements. However, no amendments of the German Posting of Workers Act have been adopted as a consequence of the Laval-quartet.

In some Member States there have been industrial disputes related to cross-border situations. For instance, the Finnish Labour Court in 2009 gave judgement on a case concerning cabin crews posted to Finland in order to fly the Helsinki-Phuket-Helsinki route. In the UK there has been a dispute between the air pilots union BALPA and British Airways in relation to a planned set up of a subsidiary company in another EU State (see below). At the Lindsey Oil Refinery the workers organised an unauthorised collective action, aiming at ending the employment of a group of posted workers, so that British workers could have the opportunity to do the same work.\textsuperscript{15}

\subsection{4.2 Denmark}

In Denmark amendments of the Posting of Workers Act were adopted already by the end of 2008. The amendments make it clear that Danish trade unions may use collective actions against foreign service providers in order to conclude collective agreements which regulate pay (but not other employment conditions) for posted workers. The possibility of resorting to collective action is limited in four ways.

1. The wages should be equal to the wage that Danish employers are obliged to pay for performing similar work.
2. The pay shall be regulated by a collective agreement which (a) is agreed upon by the most representative social partners in Denmark and (b) is applied throughout the Danish territory.
3. The foreign service provider shall be informed about the provisions of the collective agreements.
4. The claims in the agreements should be sufficiently clear, containing reference to the salary which must be paid.

Denmark has to some extent actively utilized the possibility of interpreting uncertainties in the \textit{acquis communautaire} in order not to interfere with the Danish labour market model.

\textit{First}, Denmark has re-interpreted article 3.8 of the Directive. According to this provision, a Member State which does not have a system for declaring collective agreements universally applicable may base themselves on ‘collective agreements which have been concluded by the most representative employers’ and labour organisations at national level and which are applied throughout national territory.’ It seems obvious that the drafters of the Directive had a model in mind where the Member State through a decision identifies a specific collective agreement which shall apply to the posted workers. Instead the Danish act informs the foreign service provider that he might meet a demand for concluding certain kinds of collective agreement concerning pay.

\textsuperscript{14} For the following, see Blücker and Warneck (2010).

\textsuperscript{15} See further, Barnard (2009).
This interpretation seems to be in line with a view taken by the EU-Court that the purpose of the Directive is not to harmonise systems for establishing terms and conditions of employment in the Member States. Rather the Member States are free to choose a system which is not expressly mentioned among those provided for in the Directive (Laval p. 68).

Second, the Danish interpretation of the concept of minimum pay seems rather extensive. As already mentioned, the right to take collective action may – according to the new Danish law – be exercised only in order to conclude collective agreements regarding pay. The concept of minimum rates of pay may, according to the Directive, be defined by the national law and/or practice of the host state (Article 3.1). Denmark has made use of the possibility to define nationally what constitutes pay. It should, according to travaux préparatoires be possible to ‘convert’ cost that a Danish employer has according to the collective agreement (for instance, regarding holidays and leave) into a fixed sum in cash. It is argued that otherwise there would not be any equality between the pay for the posted worker and what a Danish employer has to pay according to the collective agreement.

4.3 Sweden

In Sweden the Laval-judgement has given rise to two different processes. The first is a legislative process of amending the Swedish law on collective actions in relation to foreign service providers. The second process is the judicial process between Laval and the trade unions in the Labour Court. The main issue in the case was under which conditions a trade union shall be liable for damages.

Lex Laval

The process of amending the statutes in Sweden was more controversial than in Denmark. The amendments were finally adopted in March 2010. After the amendments, it is explicitly stated in the Swedish Posting of Workers Act that a trade union may take collective action with the aim of regulating the employment conditions of posted workers, subject to three conditions.

First, the employment conditions which the trade union demands must correspond to the conditions contained in nationwide collective agreements that are generally applied in the relevant sector. This provision is based on the same kind of interpretation of Article 3 (8) as was made in Denmark.

Second, the demand may only concern minimum pay or other conditions in the hard nucleus (according to the Directive). In contrast to Denmark the conditions do not only relate to pay but covers also other conditions falling within the scope of the hard nucleus. The Danish idea of ‘converting’, for instance, holiday costs into pay, was not taken up in Sweden.

Third, collective action is not allowed if the posted workers already enjoy at least the same conditions in the state of origin. This provision is linked to an ‘evidential requirement’. A collective action may not be taken, if the employer proves that the posted workers have conditions which are essentially at least as favourable as the minimum conditions in the collective agreement.
The Swedish Labour Court delivered its final judgement on 2 December 2009. Since the EU-Court in its preliminary ruling had found that the collective actions were unlawful according to EU law, the only question left for the Swedish Labour Court was whether the trade unions were obligated to pay punitive and/or economic damages to Laval due to the unlawful collective actions. Laval claimed damages for economic losses of around 140 000 Euro and punitive damages (that is damages for non-economic losses) of almost the same amount.

In short, the Labour Court considered it to be established that there is a general legal principle within EU law that damages may be awarded between private parties upon a violation of a Treaty provision. One prerequisite for such horizontal liability is, according to the Labour Court, that the specific of EU rule that has been violated, has horizontal direct effect. Further, the breach of that rule must be sufficiently serious and there must be a direct causal link between the breach and the loss or damage sustained by the individuals. Since Laval had not proved that it had suffered economic harm to the amount claimed, the economic damages were denied. Laval was awarded punitive damages of around 50 000 Euro. Three out of seven judges were of a dissenting opinion.

The judgement is in several aspects innovative and controversial. The trade unions have, according to an extraordinary procedure in the Swedish Code of Procedure, applied to the Supreme Court claiming that the judgement should be reopened.

5 Developments in international and European law

5.1 The European Court of Human Rights

During 2008 and 2009 the European Court of Human Rights delivered a series of cases developing how trade union rights are protected under the freedom of association (Article 11 European Convention on Human Rights). In earlier case law the Court has considered that Article 11 safeguards freedom to protect the occupational interests of trade-union members by the union’s collective action, but has left each State a free choice of the means to be used towards this end. The trade unions should be enabled to strive for the protection of their members’ interests. Nevertheless, the right to collective bargaining or collective action was not considered indispensable for the effective enjoyment of trade-union freedom. It might be one of the ways by which trade unions could be enabled to protect their members’ interests. But the trade unions could also, in other ways, be allowed to seek to persuade the employer to listen to what the union had to say on behalf of its members.

However in the grand chamber judgement Demir and Baykara, the Court stresses that the interpretation of the Convention can and must take into account elements of international law other than the Convention (such ILO conventions), the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. With regard to the developments in labour law, both international and national, and to the practice of Contracting States, the Court held that the right to bargain collectively, in principle, has become one of the essential elements of the ‘right to form and to join trade unions for the protection of [one’s] interests’ set forth in Article 11. This indicates that collective bargaining is not just one of the ways in which trade unions may protect the interests of their members (compare Viking p. 86).

16 Demir and Baykara v Turkey, Application No 34503/97, 12 November 2008, Enerji Yapi-Yolsen v Turkey, Application No 68959/01, 21 April 2009 and Danilenkov m.fl. v Russia, Application No 67336/01, 30 June 2009.
It indicates also that the right to strike constitutes an important aspect in the protection of trade union members’ interests (Enerji Yapı-Yolsen).

An interference with the freedom of association according to Article 11 may be justified if ‘prescribed by law’, pursued by one or more legitimate aims and is ‘necessary in a democratic society’ for the achievement of those aims. It should be noted that the justification according to Article 11 asks whether the interference with the trade union rights could be justified. In Laval and Viking the question is put the other way around: could the restriction of the economic freedoms be justified?

5.2 The ILO Committee of Experts

The Laval and Viking cases have been dealt with by the ILO Committee of Experts on the Application of Conventions and Recommendations.17

BALPA – a trade union for airline pilots – complained in 2009 to the Committee against the United Kingdom for breach of the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87). BALPA had decided to go on strike, following a decision by its employer, British Airways, to set up a subsidiary company in another EU State. The airline decided to request an injunction, based upon the argument that the action would be unlawful according to EU law, as interpreted in Viking and Laval. Further, the airline claimed that, should the strike take place, it would claim damages estimated at £100 million per day. Under these circumstances, BALPA did not follow through with the strike, stating that it would risk bankruptcy if it were required to pay the damages claimed by the airline.

The Committee stressed that its task is not to judge the correctness of the case law of the EU-Court, but rather to examine whether the impact of these decisions at national level are such as to deny workers freedom of association rights under Convention No. 87. Nevertheless, the Committee considered that the doctrine that is being articulated in the Laval and Viking judgements is likely, in practice, to have a significant restrictive effect on the exercise of the right to strike, in a manner contrary to the Convention.

In its previous case law the Committee has permitted restrictions on the right to strike. However they have never in the permitted restrictions included the need to assess the proportionality of interests bearing in mind a notion of right of establishment or freedom to provide services. The Committee has earlier only suggested that, in certain cases, restrictions may be considered in order to avoid damages which are irreversible or out of all proportion to third parties. The Committee in the BALPA-decision emphasized that there was no basis for revising its position in this respect.

In the view of the Committee the omnipresent threat of an action for damages that could bankrupt the union, now possible in the light of the Viking and Laval judgements, creates a situation where the rights under the Convention cannot be exercised.

Further, the Committee argued that the restrictions on the right to strike following from the right of establishment and free movement of services between Member States are, in the current context of globalization, likely to be ever more common. This is particularly apparent with respect to some sectors of employment, like the airline sector. For the workers in these sectors, restrictions on the right to strike following from the economic freedoms may be devastating to their ability to negotiate meaningfully with their employers.

17 Report of the Committee of Experts on the Application of Conventions and Recommendations (2010), ilolex nr 062010GBR087
5.3 The Lisbon Treaty

The Lisbon Treaty entered into force on 1 December 2009. It has been argued that the Treaty provides a new legal context for another balance between the internal market and national social regulation. The Lisbon Treaty explicitly states that the Union shall work for social market economy (Article 3.3 TEU). Further, the European Charter of Fundamental Rights has been made legally binding at Treaty level. With this background General Advocate Villón has recently argued that working conditions which constitute overriding requirements of public interest shall, after the entering into force of the Lisbon Treaty, no longer be interpreted restrictively. It remains to be seen if this line of argument will be accepted by the Court.

6 European ways ahead

The European Commission has during the last year adopted different strategies to increase the effectiveness of the Posting of Workers Directive, for instance by adopting measures to enhance administrative cooperation between the Member States in the context of the posting of workers. The European Commission and the French Presidency invited the European Social Partners to jointly develop an analysis of the consequences of the Laval-quartet. The report of the social partners, presented on 19 March 2010, indicates a considerable distance between the parties.

Further, in 2009 President Barroso announced before the European Parliament the intention to present a regulation to improve the way the Directive on posting of workers is interpreted and implemented. Presentation of an initiative is awaited within a year. However, the more precise direction of such an initiative has not been made public.

One possible direction of such an instrument is indicated in the Monti Report ‘A new Strategy for the Single Market’, presented on 2 May 2010. The Report indicates two possible legislative initiatives. First, the Report questions whether the Posting of Workers Directive still provides an adequate basis to manage the increasing flow of cross-border temporary secondment of workers, while protecting workers’ rights. The Report suggests action at the European level to dispel the ambiguities that still affect the interpretation of the Directive by facilitating access to information, strengthening the cooperation between national administrations and better sanctioning abuses. In this context, the Report stresses the importance of intensifying the fight against ‘letter box companies’ and strengthening posted workers’ access to legal remedies against abuses of their rights suffered in the host country.

Second, the Report is concerned about workers’ right to take collective action within the single market and its status vis-à-vis economic freedoms. The Report mentions the possibility that the Lisbon Treaty could provide a legal impetus which would provide a legal base for an adequate response to the concern about the right to take collective action (see above). If this is not the case, the scope for further policy action should be explored. These questions should not, according to the report, be left to future occasional litigation before the EU-Court or national courts.

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18 See for instance Monti (2010).
19 C-515/08 Santos Palhota, opinion of General Advocate Pedro Cruz Villón. 2010-05-05.
Instead political forces have to engage in a search for a solution, in line with the Treaty objective of a ‘social market economy’.

The Report rejects both the idea of amending the Treaty with a so called ‘social progress clause’ and the idea of regulating the right to strike at EU level. Instead, the Report recommends a third strategy. The Report suggests a solution modelled after Regulation (EC) No 2679/98 (the so-called Monti Regulation). The Regulation would introduce a provision ensuring that the posting of workers in the context of the cross-border provision of services does not affect the right to take collective action, without touching upon the Posting of Workers Directive. Such a provision could be complemented by a system, involving both the Member States and Commission, for the informal solution of disputes concerning the application of the Posted of Workers Directive when they risk causing a significant impediment to the functioning of the single market.

7 Implications of the Laval-quartet

7.1 Introduction

The Laval-quartet has both political and labour market implications. The political implications concern the support for the integration project. As pointed out in the Monti Report, the Laval-quartet has revived the divide between advocates of greater market integration and those who feel that the call for economic freedoms and for breaking up regulatory barriers is code for dismantling social rights protected at national level. ‘The revival of this divide has the potential to alienate from the Single Market and the EU a segment of public opinion, workers’ movements and trade unions, which has been over time a key supporter of economic integration.’

The labour market implications concern the actual effects of the judgement on national labour markets and national industrial relations. These effects will evidently influence the political implications. I will in the following section briefly highlight four such implications of the Laval-quartet.

7.2 A new balance for competition and the level of protection of posted worker

In practical terms the most important novelty of the Laval-quartet is perhaps the interpretation of the Posting of Workers Directive as an almost exhaustive coordination of the national measures for protecting workers in posting situations. Through this interpretation the EU-Court actually defines the notion of unfair competition. It is not a situation of unacceptable social dumping so long as the hard nucleus of the host State is applied. Other differences in labour standards between the host State and the State of origin are not regarded as unfair competition, according to this interpretation of the Directive.

A consequence is that the idea of equal treatment of domestic and foreign service providers, as regards wages and employment conditions, has been rejected in favour of a principle of minimum protection. The aim of establishing such a narrow definition of unfair competition is obviously to promote free movement of services.

23 Monti (2009) 68
The understanding of the notion of unfair competition as a principle of minimum protection is highly controversial. On the one hand, many would argue that the different treatment of domestic and posted workers would seriously undermine the possibility of maintaining good working and living conditions in the host states, at least in some sectors and for some categories of workers.

Further, it could be argued that considerable differences in conditions between different groups of workers performing similar jobs are a possible source for social unrest. On the other hand, others would argue that the principle of minimum protection promotes economic integration of the new Member States, by making it possible to utilize the comparative advantage of lower wages cost. It could also be argued that the risk of negative effects on the host state labour markets is exaggerated and the differences in wages will be reduced over time, as a consequence of economic integration.

In order to substitute the principle of minimum protection with a principle of equal treatment of domestic and foreign service providers with regard to employment conditions, an amendment of the Posting of Workers Directive would be required. Technically such an amendment would not necessarily be very complicated. The amended Posting of Workers Directive could be adopted in accordance with the social policy competence using the ordinary legislative procedure (article 153 TFEU). The amendment could, for instance, prescribe that the Member State may extend national labour law both beside and above the hard nucleus, if the measures are based on equal treatment and the obligations put on the foreign service provider are sufficiently precise and accessible.

However, it is doubtful whether there is sufficient support amongst the Member States for amending the Posting of Workers Directive in that direction. Such an amendment would require a qualified majority in the Council. Even though there was in 1996, with an EU-15, a qualified majority for a 'minimum labour law'-version of the Posting of Workers Directive, this is probably not the case today in the EU-27.

### 7.3 Better transparency

The new case law, especially the Laval case, has provided impetus for better transparency concerning what wages and employment conditions a foreign service provider must apply in relation to posted workers. The employment conditions must be sufficiently precise and accessible in order not to render it impossible or excessively difficult in practice for a foreign service provider to determine the obligations with which it is required to comply.

When amending the Posting of Workers Acts in Denmark and Sweden, considerable weight was put on improving transparency in relation to foreign service providers. In Denmark it is explicitly stated in the Act that the provisions in the collective agreement shall be sufficiently clear. In Sweden, the role of the liaison office has been strengthened. The office is now required to provide information about the collective agreement which the foreign service provider might need to meet a demand to conclude.

This is probably an area where further improvements could be made, for instance through a dialogue between the Commission and the Member States.
7.4 Enforcement

The supervision and enforcement of employment and working conditions is a crucial issue. As indicated above, the Posting of Workers Directive does not provide for equal treatment of domestic and foreign service providers, but is based on a principle of minimum protection. Since the posted workers will not be fully integrated into the industrial relations of the host state, they will not in practice be covered by the normal mechanisms for supervision and control of working condition in the host state. Neither will they in practice be under any close scrutiny by the control mechanisms in the state of origin. In this way there is a risk of creating a free zone for irregular or undeclared work where neither the labour laws of the host state nor the labour laws of the state of origin are, in practice, enforced.

It is – as stressed in the Monti Report – of key importance that posted workers’ access to legal remedies against abuses in the host country is strengthened. Member States shall, according to the Directive, take appropriate measures in the event of failure to comply with it. They shall in particular ensure that adequate procedures are available to workers and/or their representatives for the enforcement (article 5). The article indicates that enforcement is not coordinated by the Directive, but is primarily a matter for the Member State.

It is common knowledge that the enforcement of labour law could not be left to the workers’ themselves, but needs institutional support. An effective enforcement must also be organised close to the workplace. In the Member States different models for enforcement are applied, involving both public authorities and workers’ representatives. In the Nordic countries supervision of minimum standard of labour conditions is to a large extent effective and exercised by the trade unions or the social partners in cooperation. With this background, the need to use national institutions, such as labour inspectorates and trade unions, in the enforcement of the minimum protection provided for by the Directive must be stressed.

7.5 National Collective Bargaining

The interpretation of Article 3.8 made in the amendments of the Danish and Swedish statutes on posting of workers provides a reasonable adjustment of their national industrial relations system to the Posting of Workers Directive. The autonomous collective agreement model could essentially still apply, although on a level of minimum protection and not on an equal treatment basis.

On the other hand, since the Directive does not aim to harmonize the material content of the hard nucleus, the Member States and, to some extent the social partners, may, de facto, define the level of protection afforded through the hard core, by adopting minimum standards. This gives incentives to adopt high national minimum standards, especially concerning wages. There seems at present to be a tendency to raise the minimum wage in some countries, like Germany and Sweden, in order to lower the risk of social dumping. These tendencies seem to counteract the idea of decentralisation and flexibilisation of the content of collective agreements which have been dominant in the Nordic countries during recent decades.

24 Monti (2009) 70.
7.6 The Right to Collective Action

The restriction in the right to collective action put up by the Viking and Laval cases have substantially limited the possibility for trade unions to protect the interests of their members in cross border situations. The combination of making the lawfulness of collective actions dependent on a vague proportionality test combined with a threat of action for damages does have manifest preventive effect on the possibility of exercising this fundamental right. The stance taken by the EU-Court seems problematic for, if not directly clashing with, the position taken by the European Court of Human Rights and the ILO Committee of Experts.

As has already been mentioned above, the entering into force of the Lisbon Treaty provides a new legal context in which the balance between the right collective actions and economic freedoms could be reconsidered. It could here be mentioned that the question of trade union liability for collective action contrary to the economic freedoms, which was at the fore in the BALPA case and the judgement of the Swedish Labour Court in Laval, has not been tried by EU-Court.

In national labour law other methods than (full) economic reparation are often used to counteract unlawful collective actions. The national experiences should be taken into account when deciding on remedies for unlawful collective actions.

The Monti Report has highlighted some problems with adopting so called ‘social progress clause’ and regulating the right to collective action at EU level. The third strategy proposed in the Monti Report could provide a practical solution, although it must be born in mind that the problem does not only apply in relation to free movement of services. As is illustrated by the Viking and BALPA cases the same conflict could also arise in relation to the right to establishment.

By proposing a system for informal dispute solution, the Monti Report indicates a certain distrust of the EU-Court’s ability to handle these kinds of cases. Another method of dealing with this problem would be to establish a specialised court to hear and determine at first instance certain classes of action or proceeding (Article 257 TFEU). Specialised social or labour courts are common in many Member States.
References


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