

# EUROPEAN PARLIAMENT

2004



2009

---

*Session document*

**A6-0370/2008**

30.9.2008

## REPORT

on Challenges to collective agreements in the EU  
(2008/2085(INI))

Committee on Employment and Social Affairs

Rapporteur: Jan Andersson

Rapporteur for opinion (\*):  
Tadeusz Zwiefka, Committee on Legal Affairs

(\*) Associated committee – Rule 47 of the Rules of Procedure

## CONTENTS

	<b>Page</b>
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
EXPLANATORY STATEMENT .....	14
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS (*) .....	17
OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION.....	21
RESULT OF FINAL VOTE IN COMMITTEE .....	24

(\*) Associated committee – Rule 47 of the Rules of Procedure

## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on Challenges to collective agreements in the EU (2008/2085(INI))

*The European Parliament,*

- having regard to Article 2,, first indent, Article 2 and Article 3(j) of the Treaty on European Union,
- having regard to Articles 136, 137, 138, 139 and 140 of the EC Treaty,
- having regard to Articles 12, 39 and 49 of the EC Treaty,
- having regard to the Treaty of Lisbon of 13 December 2007, in particular Article 3 thereof,
- having regard to Article 152 of the Treaty of Lisbon which recognizes the importance of social dialogue and collective bargaining for development,
- having regard to Articles 27, 28 and 34 of the Charter of Fundamental Rights of the European Union,
- having regard to the European Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 11 thereof,
- having regard to the European Social Charter, in particular Articles 5, 6 and 19 thereof,
- having regard to the European Convention on the Legal Status of Migrant Workers,
- having regard to Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>1</sup> (the PWD),
- having regard to the Commission's services report on the implementation of Directive 96/71/EC (SEC(2006)0439) (Services Report),
- having regard to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts<sup>2</sup>,
- having regard to the 'Monti' clause of Council Regulation (EC) No. 2679/98 of 7 December 1998 on the functioning of the internal market in relation to the free movement of goods among the Member States<sup>3</sup>,

---

<sup>1</sup> OJ L 18, 21.1.1997, p. 1.

<sup>2</sup> OJ L 134, 30.4.2004, p. 114.

<sup>3</sup> OJ L 337, 12.12.1998, p. 8.

- having regard to Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market<sup>1</sup>,
- having regard to the judgments of the Court of Justice of the European Communities (the ECJ) of 27 March 1990 in Case C-113/89 *Rush Portuguesa Ltda v. Office Nationale d'Immigration*<sup>2</sup>,
- having regard to the judgments of the ECJ of 9 August 1994 in Case C-43/93, *Vander Elst*<sup>3</sup>, of 23 November 1999 in Joined cases C-369/96 and C-376/96, *Arblade*<sup>4</sup>, of 25 October 2001 in Joined cases C-49/98, C-50/98, C-52/98, C-54/98, C-68/98 and C-71/98, *Finalarte*<sup>5</sup>, of 7 February 2002 in Case C-279/00, *Commission v Italy*<sup>6</sup>, of 12 October 2004 in Case C-60/03, *Wolff & Müller GmbH*<sup>7</sup>, of 21 October 2004 in Case C-445/03, *Commission v Luxembourg*<sup>8</sup>, and of 19 January 2006 in Case C-244/04, *Commission v Germany*<sup>9</sup>,
- having regard to the judgment of the ECJ of 11 December 2007 in Case C-438/05, *International Transport Workers' Federation and Finnish Seamen's Union*<sup>10</sup> (the *Viking Case*),
- having regard to the judgment of the ECJ of 18 December 2007 in Case C-341/05, *Laval un Partneri Ltd*<sup>11</sup>,
- having regard to the judgment of the ECJ of 3 April 2008, Case C-346/06, *Rüffert*<sup>12</sup>,
- having regard to the following ILO conventions: ILO-94 Labour Clauses (Public Contracts); ILO87 Freedom of Association and Protection of the Right to Organize; ILO98, Right to organise and collective bargaining; ILO-117 Basic Aims and Standards of Social Policy, especially Part IV; ILO-154 Collective Bargaining,
- having regard to its resolution of 26 October 2006 on the application of Directive 96/71/EC on the posting of workers<sup>13</sup>,
- having regard to its resolution of 15 January 2004 on the implementation of Directive 96/71/EC in the Member States<sup>14</sup>,

---

<sup>1</sup> OJ L 376, 27.12.2006, p. 36.

<sup>2</sup> [1990] ECR I-1470.

<sup>3</sup> [1994] ECR I-3803.

<sup>4</sup> [1999] ECR I-8453.

<sup>5</sup> [2001] ECR I-7831.

<sup>6</sup> [2002] ECR I-1425.

<sup>7</sup> [2004] ECR I-9553.

<sup>8</sup> [2004] ECR I-10191.

<sup>9</sup> [2006] ECR I-885.

<sup>10</sup> OJ C 51, 23.2.2008, p.11.

<sup>11</sup> OJ C 51, 23.2.2008, p. 9.

<sup>12</sup> not yet published in OJ.

<sup>13</sup> OJ C 313 E, 20.12.2006, p. 452.

<sup>14</sup> OJ C 92 E, 16.4.2004, p. 404.

- having regard to its resolution of 23 May 2007 on promoting decent work for all<sup>1</sup> ,
  - having regard to the Common Principles of Flexicurity, endorsed by the European Council on 12/13 December 2007 as well as Parliament's resolution of 29 November 2007 on Common Principles of Flexicurity<sup>2</sup> ,
  - having regard to Article 45 of its Rules of Procedure,
  - having regard to the report of the Committee on Employment and Social Affairs and the opinions of the Committee on Legal Affairs and the Committee on the Internal Market and Consumer Protection (A6-0370/2008),
- A. whereas the EC Treaty acknowledges the fundamental rights laid down in the Charter of Fundamental Rights of the European Union, in the constitutions of the Member States and in different international treaties and conventions, as basic references in Community law and practice,
  - B. whereas the EC Treaty lays down a number of relevant principles, whereas one of the main purposes of the Community is an internal market characterised by the abolition, between Member States, of obstacles to the free movement of goods, persons, services and capital, and with a social dimension
  - C. whereas one of those principles is the recognition of citizens' basic constitutional rights, including the right to form trade unions, the right to strike and the right to negotiate collective agreements,
  - D. whereas the fundamental principles of the internal market include freedom of movement for workers, freedom of establishment and freedom to provide services,
  - E. whereas, according to Article 39 of the Treaty, freedom of movement for workers entails the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment,
  - F. whereas restrictions on fundamental freedoms are possible under the EC Treaty, if they pursue legitimate aims compatible with the Treaty, are justified by overriding reasons of public interest, are appropriate to achieve the objectives pursued and do not go beyond what is necessary to achieve those objectives; whereas at the same time, according to Article 52 of the Charter of Fundamental Rights of the European Union, any limitations on the exercise of the rights and freedoms recognised by that Charter may be made only if they are proportionate and necessary and if they genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others,
  - G. whereas 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; this right will also be enshrined in the Treaty if the Lisbon Treaty is ratified,

---

<sup>1</sup> Texts adopted, P6\_TA(2007)0206.

<sup>2</sup> Texts adopted, P6\_TA(2007)0574.

- H. whereas the Commission has on several occasions stressed the importance of the existing national framework of employment legislation and collective bargaining for the protection of workers rights,
- I. whereas the Commission's report on industrial relations in Europe 2006 shows that highly developed collective bargaining can have a positive influence on social inclusion,
- J. whereas according to Article 136 of the EC Treaty, the Community and the Member States "shall have as their objectives ... improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained"; and whereas with a view to achieving this objective, Article 140 of the EC Treaty provides that the Commission is to promote close cooperation between Member States in the social policy field, particularly in matters relating to the right of association and collective bargaining between employers and workers,
- K. whereas, according to the preamble of the PWD, the promotion of the transnational provision of services requires conditions of free and fair competition and measures guaranteeing respect for the rights of workers and in accordance with the legal framework relating to national employment law and industrial relations in the Member States,
- L. whereas the PWD clearly states in recital 12 that "Community law does not preclude Member States from applying their national legislation, or collective agreements entered into by employers and labour, to any person who is employed, even temporarily, within their territory, although his employer is established in another Member State" and that "Community law does not forbid Member States to guarantee the observance of those rules by the appropriate means",
- M. whereas the objective of the PWD – to provide a climate of fair competition and measures guaranteeing respect for the rights of workers – is important, in an era in which the transnational provision of services is expanding, for the protection of the workers concerned, while respecting the framework of employment law and industrial relations in the Member States,
- N. whereas, according to the PWD, the laws of the Member States must lay down a nucleus of mandatory rules for minimum protection of posted workers to be observed in the host country without preventing the application of terms and conditions of employment more favourable to workers,
- O. whereas Article 3(8) of the PWD allows the directive to be implemented either through legislation or through collective agreements which have been declared universally applicable, or which are generally applicable to all similar undertakings in the industry concerned or which have been concluded by the most representative employers' and labour organisations at national level and which are applied throughout the national territory, the ECJ also affirms that since the purpose of the PWD is not to harmonise systems for establishing terms and conditions of employment, Member States are free to choose a system at national level which is not expressly mentioned among those provided for in the PWD,
- P. whereas the nucleus provisions in Article 3(1) of the PWD consists of international

mandatory rules which the Member States have commonly agreed upon; notes that the public order provisions in Article 3(10) also consist of international mandatory rules but are framed in such a way that Member States have discretion in terms of their definition in national legislation; notes further that the use of Article 3(10) is important for Member States as it enables them to consider a variety of labour market, social policy and other concerns including protection of workers, whilst respecting the principle of equal treatment,

- Q. whereas mobility of workers has greatly contributed to employment, prosperity and EU integration, giving citizens new opportunities to develop knowledge and experience and to attain better living standards,
- R. whereas Article 28 of the Charter of Fundamental Rights of the European Union codifies the right of collective bargaining and collective action,
- S. whereas uniform application and enforcement of the provisions of the PWD are essential to achieving its objectives, in particular respect for collective bargaining arrangements existing in the Member States,
- T. whereas Article 3(1)(a) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market <sup>1</sup>(Services Directive) clearly indicates that it is not intended to replace, and is without prejudice to, the PWD ,
- U. whereas for the free movement of goods the following clause (known as the “Monti clause”) was included in Council Regulation (EC) No. 2679/98<sup>2</sup>; Article 2: “This Regulation 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”,
- V. whereas Article 1(7) of the Services Directive provides that: “This Directive does not affect the exercise of fundamental rights as recognised in the Member States and by Community law. Nor does it affect the right to negotiate, conclude and enforce collective agreements and to take industrial action in accordance with national law and practices which respect Community law”,
- W. whereas the European Council has established principles to create labour market models that have, in addition to a high level of security, a high level of flexibility, (known as “the flexicurity model”); whereas it is recognised that an important part of a successful flexicurity model includes strong social partners with significant scope for collective bargaining,
- X. whereas it is the role of the ECJ to interpret Community law in the light of fundamental rights and freedoms and to ensure that in the interpretation and application of the EC Treaty the law is observed,

---

<sup>1</sup> OJ L 376, 27.12.2006, p.36.

<sup>2</sup> OJ L 337, 12.12.1998, p. 8.

- Y. whereas it is up to national courts to ascertain, on a case-by-case basis, whether the criteria regarding the restriction of fundamental freedoms and their compatibility with Community law are fulfilled,
- Z. whereas the right to take collective action and to conclude collective agreements is a fundamental right which forms an integral part of the general principles of Community law; whereas in that context the ECJ should not rely on a statement of the Council and the Commission dated 24 September 1996 that has not been adopted by Parliament (as co-legislator) which would restrict the interpretation of the concepts of "public policy provisions" and "national provisions crucial to political order" merely to mandatory rules laid down in legislation,
- AA. whereas the Albany judgement (C-67/96) in the field of competition law gave trade unions a significant degree of discretion regarding labour market issues,
- AB. whereas it has been noted that differing views and interpretations existed within the ECJ and between the Court and its Advocates-General in the various cases relating to the PWD, in particular in Case C-341/05 *Laval*<sup>1</sup> and Case C-346/06 *Rüffert*<sup>2</sup>; whereas when such views and interpretations differ, there may be a case for clarification of the balance between fundamental rights and freedoms,
- AC. whereas the choice of the legal basis of the PWD is based on the assumption that posted workers do not enter the host state's labour market; whereas the lack of a time limit for being considered as a 'posted' worker, together with a frequent use of a wide notion of posting of workers show that posted workers nevertheless often enter the host state's labour market,
1. Emphasises that freedom to provide services is one of the cornerstones of the European project; considers however, this should be balanced, on the one hand, against fundamental rights and the social objectives set out in the Treaties and on the other hand, against the right of the public and social partners to ensure non-discrimination, equal treatment, and the improvement of living and working conditions; recalls that collective bargaining and collective action are fundamental rights that are recognised by the Charter of Fundamental Rights of the European Union and that equal treatment is a fundamental principle of the European Union;
  2. Is of the opinion that any EU citizen should have the right to work anywhere in the European Union and thus should have a right to equal treatment; therefore regrets that this right is not applied uniformly across the EU; is of the view that transitional arrangements remaining in place should be subject to rigorous review by the Commission, to assess whether they are truly necessary to prevent distortions in national labour markets and, that where that is not found to be the case, they should be removed as quickly as possible;

---

<sup>1</sup> Judgment of the Court of Justice of 18 December 2007 in Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767 (the *Laval* case).

<sup>2</sup> Judgment of the Court of Justice of 3 April 2008 in Case C-346/06 *Rüffert*, not yet published in the ECR (see OJ C 128, 24.5.2008, p. 9).



3. Emphasises that freedom to provide services does not contradict and is not superior to the fundamental right of social partners to promote social dialogue and to take industrial action, especially, since this is a constitutional right in several Member States; stresses that the intention of the Monti clause was to protect fundamental constitutional rights in the context of the single market; recalls at the same time that free movement of workers is one of the four freedoms of the internal market;
4. Welcomes the Lisbon treaty and the fact that the Charter of Fundamental Rights of the European Union is to be made legally binding; notes that this would include the right of trade unions to negotiate and conclude collective agreements at the appropriate levels and, in the case of conflicts of interest, to take collective action (such as strike action) to defend their interests;
5. Emphasises that freedom to provide services is not superior to the fundamental rights contained in the Charter of Fundamental Rights of the European Union and in particular the right of trade unions to take industrial action, in particular since this is a constitutional right in several Member States; emphasises therefore that the ECJ rulings in Rüffert, Laval and Viking demonstrate that it is necessary to clarify that economic freedoms, as established in the Treaties, should be interpreted in such a way as not to infringe upon the exercise of fundamental social rights as recognised in the Member States and by Community 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;
6. Stresses that the PWD allows public authorities and social partners to lay down terms and conditions of employment which are more favourable to workers according to the different traditions in the Member States;
7. Stresses that recital 22 of the PWD states that the Directive is without prejudice to the law of the Member States concerning collective action to defend the interests of trades and professions which is confirmed by Article 137(5) of the EC Treaty;
8. Emphasises therefore the need to safeguard and to strengthen equal treatment and equal pay for equal work in the same workplace as laid down in Articles 39 and 12 of the EC Treaty; considers that in the framework of freedom to provide services or freedom of establishment, the nationality of the employer, or of employees or posted workers cannot justify inequalities concerning working conditions, pay or the exercise of fundamental rights such as the right to strike;
9. Underlines the importance of preventing negative effects on labour market models that are already able to combine a high degree of flexibility in the labour market with a high level of security and, instead, of promoting this approach further;

### ***General impact***

10. Notes that the horizontal effect of certain provisions of the EC Treaty depends on precise

conditions being fulfilled, inter alia the condition that those provisions confer rights on an individual who has an interest in compliance with the obligations concerned; expresses its concern that, in the specific circumstances of the judgements recently given by the ECJ, the horizontal effect of Article 43 of the EC Treaty was duly identified, and considers that this might result in more cases before the Court;

11. Welcomes the fact that, according to the principles and traditions of the European Union, many Member States, in cooperation with social partners, have put in place high standards of working conditions that improve the well-being of all workers and enhance economic growth as well as competitiveness;
12. Believes that the intention of the legislator in the PWD and Services Directive is incompatible with interpretations which may invite unfair competition between undertakings; notes that undertakings that sign and follow collective agreements could have a competitive disadvantage over undertakings that refuse to do so;
13. Also takes the view that the freedom to provide cross border services in the internal market is further enhanced by ensuring that domestic and foreign service providers face similar economic and labour market conditions at the place of service delivery;
14. Actively promotes competitiveness on the basis of knowledge and innovation as laid down in the Lisbon Strategy;
15. Questions the introduction of a proportionality principle for actions against undertakings which, by relying on the right of establishment or the right to provide services across borders, deliberately undercut terms and conditions of employment; considers that there should be no question as to the use of industrial action to uphold equal treatment and to secure decent working conditions;
16. Emphasises that the EU's economic freedoms cannot be interpreted as granting undertakings the right to evade or circumvent national social and employment laws and practices, or to impose unfair competition on wages and working conditions; considers therefore that cross border actions of undertakings which may undercut terms and conditions of employment in the host country must be proportionate and cannot automatically be justified by the Treaty provisions on, for example, free movement of services or freedom of establishment;
17. Emphasises that Community law has to respect the principle of non discrimination; emphasises further that the Community legislator has to ensure that no obstacles are created either to collective agreements, for example, those implementing the principle of equal pay for equal work for all workers in the workplace, regardless of their nationality or that of their employer, in the place where the service is provided, or to industrial action in support of such an agreement which is in accordance with national laws or practice;
18. Acknowledges that the ECJ rulings in the Laval, Rüffert and Luxembourg cases have caused some great concerns as to the way in which minimum harmonisation directives must be interpreted;

19. Notes that the social considerations referred to in Articles 26 and 27 of Directive 2004/18 (Public Procurement Directive) enable the Member States to create fair competition conditions by laying down terms and conditions of employment which go beyond the mandatory rules for minimum protection;
20. Is of the opinion that the limited legal basis of free movement of the PWD may lead to the PWD being interpreted as an express invitation to unfair competition concerning wages and working conditions; therefore considers that the legal basis of the PWD could be broadened to include a reference to the free movement of workers,
21. Emphasises that the current situation might as result lead to workers in host countries feeling pressured by low wage competition; considers therefore that consistent implementation of the PWD must be ensured in all Member States;
22. Recalls that nine Member States have ratified the ILO Convention 94 on Labour Clauses (Public Contracts); regrets that even judicial rulings fail sufficiently to take into consideration ILO convention 94 and is worried that the application of this Convention in the Member States concerned might be in conflict with the application of the PWD; calls on the Commission to clarify this situation as a matter of urgency and to continue to promote the ratification of this Convention in order to enhance further the development of social clauses in public procurement regulations, which itself is an aim of the Public Procurement Directive;
23. Notes that it has not been recognized that, under the ILO conventions 87 and 98, restrictions on the right to industrial action and fundamental rights can only be justified on grounds of health, public order and other similar factors;

### ***Demands***

24. Calls on all Member States properly to enforce the PWD; further emphasises that labour market legislation and rules concerning negotiations and collective agreements are the competence of Member States and social partners; points out, in this respect, that it is the task of the Member States to improve and to make full use of prevention, monitoring and enforcement measures, in conformity with the subsidiarity principle;
25. Considers that current Community legislation has both loopholes and inconsistencies and therefore may have lent itself to interpretations of the PWD that were not the intention of the Community legislator, who was looking for a fair balance between the freedom to provide services and the protection of workers rights; calls on the Commission to prepare the necessary legislative proposals which would assist in preventing conflicting interpretation in the future;
26. Therefore welcomes the statement of 3 April 2008 in which the Commission committed itself not only to continue to tackle competition that is based on low social standards but also emphasised that the freedom to provide services does not contradict and is not in any way superior to the fundamental right to strike, and to join a trade union; encourages the implementation of the Council Conclusions of 9 June 2008 without delay to remedy

- shortcomings in the implementation, to prevent further problematic situations and abuses and to create the desired climate of mutual trust and confidence; calls on the Commission and the Member States to foster closer cooperation between the Member States, national authorities and the Commission with regard to monitoring and the exchange of best practice; considers that this would be an effective way to combat misuse;
27. Welcomes the Commission's indication that it is now ready to re-examine the impact of the internal market on labour rights and collective bargaining.
  28. Suggests that this re-examination should not exclude a partial review of the PWD, with specific regard to the issues of applicable working conditions, pay levels, the principle of equal treatment of workers in the context of free movement of services, respect for different labour models and the duration of posting.
  29. Believes that the exercise of fundamental rights as recognised in the Member States, in ILO Conventions and in the Charter of Fundamental Rights of the European Union, including the right to negotiate, conclude and enforce collective agreements and the right to take industrial action should not be put at risk.
  30. Emphasises that it must be made absolutely clear that the PWD and other directives do not prohibit member states and social partners from demanding more favourable conditions, aimed at equal treatment of workers, and that there are assurances that Community legislation can be implemented on the basis of all the existing labour market models.
  31. Calls on the Commission to implement the decisions of the Council regarding the establishment of an electronic system for exchange of information as a matter of urgency as it could enable Member States to combat abuses more effectively.
  32. Asks the Member States and the Commission to adopt measures to combat abuses, in particular regarding activities of those "letterbox-companies" which are not engaged in any genuine and effective business in the country of establishment but which have been created, sometimes even directly by the main contractor in the host country, for the sole purpose of carrying out business in the host country, in order to circumvent the full application of host country rules and regulations in particular with regard to wages and working conditions ; calls on the Commission to lay down clear rules to combat "letterbox companies" in its code of conduct for undertakings under the Services Directive;
  33. Reaffirms that fundamental social rights are not subordinate to economic rights in a hierarchy of fundamental freedoms; therefore asks for a re-assertion in primary law of the balance between fundamental rights and economic freedoms in order to help avoiding a race to lower social standards;
  34. Welcomes the common position of the Council on a new Temporary Agency Directive which would provide for non-discriminatory treatment from the first day of employment unless the social partners agree otherwise;
  35. Calls on the Commission to put forward the long awaited Communication on transnational collective bargaining proposing the establishment of a legal framework for transnational

collective agreements;

o

o      o

36. Instructs its President to forward this resolution to the Council and the Commission, and the Parliaments of the Member States.

## EXPLANATORY STATEMENT

### Introduction

In December 2007 the European Court of Justice (ECJ) delivered its judgments in two cases on how the EU balances the economic and the social objectives of the Treaty. *The Viking case* concerns a collective action relating to the reflagging of a vessel from Finland to Estonia. In *the Laval case* a Swedish trade union, by means of collective action, had tried to force a Latvian provider of services to sign a collective agreement when performing services in Sweden.

In April 2008 the ECJ delivered another verdict in the *Rüffert case*. The case concerns the right of public authorities, when awarding contracts for work, to demand that tendering companies commit themselves to pay wages that are in line with rates already agreed through collective bargaining where the work is carried out, or whether this could be outlawed as a restriction on the freedom to provide services under Article 49 of the Treaty.

The report is focusing on the principle consequences of the verdicts and not so much on national problems in the implementation which should be dealt with promptly at the national level.

### Principles

The first part of the report deals with the guiding principles for the internal market and the necessary balance between the free movement of services and the rights of workers.

Anyone should have the right work anywhere in the European Union and it is regretful that this right is not applied uniformly across the EU. However this has to be balanced against fundamental rights and the possibility for governments and trade unions to ensure non-discrimination and equal treatment. We cannot turn a blind eye when migrant workers are paid less than national workers, sending the message she/he is worth less than the national workers performing the same job. It is in everybody's interest that workers enjoy equal conditions, whether national or migrant. **Thus, equal treatment and pay for equal work should always be the main principle.**

### Effects of the ECJ ruling

#### *The posting Directive (PWD)*

Traditionally, the PWD has been interpreted as a *minimum* directive in the sense that it lays down a “hard core” of minimum working conditions that member states have to ensure and that also applies to temporary, foreign workers. However, the PWD does not exclude systems with higher protection. The reasons for this interpretation are mainly to be found in article 3(7) in the directive “*Paragraphs 1 to 6 shall not prevent application of terms and conditions that are more favourable to workers*”.

This perception is, however, changed with the Laval ruling, in which the court states that article 3(7) in the Posting Directive “*cannot be interpreted as allowing the host Member State to make the provision of services in its territory conditional on the observance of terms and conditions of employment which go beyond the mandatory rules for minimum protection*”. The ruling furthermore states that the PWD lays down the degree of protection that the host member state “*is entitled to require those undertakings to observe*” (our emphasis) (Para. 80),

and continues in the next paragraph “*the level of protection which must be guaranteed to workers posted to the territory of the host Member State is limited, in principle, to that provided for in Article 3(1), first subparagraph, (a) to (g) of Directive 96/71*”. What the host member state can impose on a visiting company is thus limited to the core of the PWD, and nothing beyond that. In other words, what we thought was a minimum directive has become a *maximum* directive.

In the reasoning of this ruling, the court has, for practical purposes, *abolished* article 3(7) allowing more favourable terms and conditions. Thus, national wage agreements can be undercut for posted workers. This interpretation is further developed and explained in the Rüffert case. The ECJ states in paragraph 32 that the normal wage in Niedersachsen “*cannot be considered to be a term and condition of employment which is more favourable to workers within the meaning of Article 3(7) of Directive 96/71.*” The Court continues to say that “*such an interpretation would amount to depriving the directive of its effectiveness (see Laval un Partneri, paragraph 80).*” In other word the directive could not be interpreted in the way it is written since it would go against the purpose of the directive which according to the court is to bring about the freedom to provide services and not the protection of workers.

### ***The balance between the free movement of services and the fundamental right to strike***

The ECJ in the Viking and Laval cases introduces a horizontal direct effect of article 43 and 49 which can be used by employers and service providers to challenge collective agreements and industrial actions with a cross-border effect. The autonomy for collective bargaining from competition rules is thereby not extended to the field of free movement. This brings about risks: Industrial relations in the Member States could be put under legal scrutiny; uncertainty in industrial relations; a “flood” of cases to the ECJ. Any company in a transnational dispute has the opportunity to use this judgement against union actions, alleging that it was “disproportional”.

The verdict says that the right to strike is a fundamental right but not so fundamental as the EU's free movement provisions. This could lead to wage competition and make it difficult for trade unions to ensure equal treatment.

### **Demands**

Since these verdicts have proven that the current legislation is not sufficient enough to provide a balance between the freedom to provide services and the workers rights, we need to take immediate action to ensure that necessary changes in European legislation are made in order to counter the possible detrimental social, economical and political effects of the ECJ judgements.

These changes should be considered;

- Review the PWD.
- Summarize the social clauses of the Monti directive and the Service directive in a social clause in primary law or in an inter-institutional agreement.
- Immediately adopt the Temporary Agency Directive in which it is clarified that the same rules should immediately apply to temporary agency workers as if they were employed directly by the enterprise.
- Adopt measures to combat letterbox-companies, undertakings not engaged in any genuine and meaningful business in the country of origin but created, sometimes even

directly by the main contractor in the host country, for the sole purpose of offering 'services' to the host country in order to avoid the full application of host country rules and regulations especially with regard to wages and working conditions.



10.9.2008

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS (\*)**

for the Committee on Employment and Social Affairs

on Challenges to collective agreements in the EU  
(2008/2085(INI))

Rapporteur (\*): Tadeusz Zwiefka

(\*) Associated committees – Rule 47 of the Rules of Procedure

### **SUGGESTIONS**

The Committee on Legal Affairs calls on the Committee on Employment and Social Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

- A. whereas the Treaty establishing the European Community acknowledges the fundamental rights laid down in the Charter of Fundamental Rights of the European Union, as well as in the Member States' constitutions and in different international treaties and conventions, as fundamental references for EU law and practice,
- B. whereas the Treaty establishing the European Community lays down a number of principles; whereas one of the main activities of the Community is an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital, as well as a policy in the social sphere,
- C. whereas one of those principles is the recognition of citizens' basic constitutional rights, including the right to form trade unions, the right to strike and the right to negotiate collective agreements,
- D. whereas the fundamental principles of the internal market include freedom of movement for workers, freedom of establishment and freedom to provide services,
- E. whereas, according to Article 39 of the Treaty establishing the European Community, freedom of movement for workers entails the abolition of any discrimination based on

nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment,

- F. whereas the right to take collective action and to conclude collective agreements is a fundamental right which forms an integral part of the general principles of Community law; whereas in that context the Court of Justice should not rely on a statement of the Council and the Commission dated 24 September 1996 that has not been adopted by the European Parliament as co-legislator in order to restrict the interpretation of the concepts of "public policy provisions" and "national provisions crucial to political order" merely to mandatory rules laid down in legislation,
  - G. whereas Article 3(1)(a) of the Services Directive clearly indicates that that Directive is not intended to replace Directive 96/71/EC (the PWD)<sup>1</sup> and is without prejudice to it,
  - H. whereas restrictions on fundamental freedoms are possible under the EC Treaty, if they pursue legitimate aims compatible with the Treaty, are justified by an overriding reason of public interest, are suitable to attain the objectives pursued and do not go beyond what is necessary to attain them; whereas at the same time, according to Article 52 of the Charter of Fundamental Rights, any limitations on the exercise of the rights and freedoms recognised by that Charter may be made only if they are proportional and necessary and if they genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others,
  - I. whereas it is the role of the Court of Justice to interpret Community law in the light of fundamental rights and freedoms and to ensure that in the interpretation and application of the EC Treaty the law is observed,
  - J. whereas it is up to the national courts to ascertain, on a case-by-case basis, whether the criteria for regarding the restriction of fundamental freedoms as compatible with Community law are fulfilled,
  - K. whereas uniform application and enforcement of the provisions of the PWD are essential in order to ensure its objectives, and in particular respect for collective bargaining arrangements existing in the Member States,
  - L. whereas it has been noted that differing views and interpretations existed within the Court of Justice and between the Court and its Advocates-General in the various cases relating to the PWD, in particular in Case C-341/05 *Laval*<sup>2</sup> and Case C-346/06 *Rüffert*<sup>3</sup>; whereas when such views and interpretations differ, there may be a case for clarification in the light of the balance between fundamental rights and freedoms,
1. Points out that none of the recent judgments of the Court of Justice<sup>4</sup> affects either the

---

<sup>1</sup> Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services (OJ L 18, 21.1.1997, p. 1).

<sup>2</sup> Judgment of the Court of Justice of 18 December 2007 in Case C-341/05 *Laval un Partneri Ltd* [2007] ECR I-11767 (the *Laval* case).

<sup>3</sup> Judgment of the Court of Justice of 3 April 2008 in Case C-346/06 *Rüffert*, not yet published in the ECR (see OJ C 128, 24.5.2008, p. 9).

content of any collective agreements which might be concluded in Member States or the right to conclude such;

2. Underlines that, according to the case-law of the Court of Justice, Member States may not impose minimum standards in matters other than those provided for in the PWD and the content of such minimum standards may not be determined by a source which is not provided for by that directive;
3. Underlines the need to guarantee certain minimum workplace conditions for workers moving within the EU;
4. Observes that national rules which fail to take into account collective agreements – irrespective of their content – to which undertakings that post workers to a host country are already bound in the Member State in which they are established, give rise, as ascertained by the Court of Justice, to discrimination against such undertakings, in so far as under those national rules they are treated in the same way as national undertakings which have not concluded a collective agreement;
5. Recognises that, as the Court of Justice has clearly stated in the *Laval* and *Viking* cases, the right to take collective action falls within the scope of Community law;
6. Notes that the horizontal effect of certain provisions of the EC Treaty depends on precise conditions being fulfilled, *inter alia* the condition that they confer rights on an individual who has an interest in compliance with the obligations thus laid down; expresses its concern that, in the specific circumstances of the cases recently ruled on by the Court of Justice, the horizontal effect of Article 43 of the EC Treaty was duly identified, and considers that this might result in more cases before the court;
7. Calls on the Member States to ensure proper implementation, application and enforcement of the PWD; calls on the Commission to provide appropriate guidance to Member States regarding the implementation, application and enforcement of that directive;
8. Welcomes in that respect the Commission's Recommendation of 3 April 2008<sup>1</sup> and the Council Conclusions of 9 June 2008<sup>2</sup> on enhanced administrative cooperation in the context of the posting of workers in the framework of the provision of services;
9. Calls on the Commission to take appropriate action vis-à-vis those Member States that do not apply Community law in this field as interpreted by the Court of Justice.

---

<sup>4</sup> See, in addition to the judgments in *Laval* and *Rüffert*, cited above, the judgment of the Court of Justice of 11 December 2007 in Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union* [2007] ECR I-10779 (the *Viking* case).

<sup>1</sup> OJ C 85, 4.4.2008, p. 1 and OJ C 89, 10.4.2008, p. 18.

<sup>2</sup> Not yet published in the OJ.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	9.9.2008
<b>Result of final vote</b>	<div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="text-align: right; padding-right: 10px;">+:</div> <div>24</div> </div> <div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="text-align: right; padding-right: 10px;">-:</div> <div>0</div> </div> <div style="display: flex; justify-content: flex-end; align-items: center;"> <div style="text-align: right; padding-right: 10px;">0:</div> <div>0</div> </div>
<b>Members present for the final vote</b>	Marek Aleksander Czarnecki, Bert Doorn, Monica Frassoni, Lidia Joanna Geringer de Oedenberg, Othmar Karas, Piia-Noora Kauppi, Klaus-Heiner Lehne, Katalin Lévai, Antonio Masip Hidalgo, Hans-Peter Mayer, Manuel Medina Ortega, Hartmut Nassauer, Aloyzas Sakalas, Francesco Enrico Speroni, Daniel Stroj, Rainer Wieland, Jaroslav Zvěřina, Tadeusz Zwiefka
<b>Substitute(s) present for the final vote</b>	Vicente Miguel Garcés Ramón, Jean-Paul Gauzès, Georgios Papastamkos, Gabriele Stauner, Jacques Toubon, Ieke van den Burg
<b>Substitute(s) under Rule 178(2) present for the final vote</b>	Renate Weber

16.7.2008

## **OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION**

for the Committee on Employment and Social Affairs

on Challenges to collective agreements in the EU  
(2008/2085(INI))

Rapporteur: Małgorzata Handzlik

### **SUGGESTIONS**

The Committee on the Internal Market and Consumer Protection calls on the Committee on Employment and Social Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

- A. whereas the right to take collective action is recognized as fundamental right in the general principles of Community law, and whereas this right has been confirmed by the European Court of Justice,
- B. whereas the principle of the free movement of services as an essential element of the internal market, as well as the core objectives of the Union such as the promotion of economic and social progress and the strengthening of economic and social cohesion, are at the heart of European integration, and whereas therefore that freedom should in any case be compatible with the social partners' right to collective bargaining,
  - 1. Underlines the need to maintain the balance between the freedom to provide services and the freedom of establishment and guaranteeing a regulatory framework for the protection of workers;
  - 2. Points out, taking into account European Court of Justice rulings, that imposing working conditions on workers posted by service providers from other Member States, which is not required or allowed by Directive 96/71/EC of the European Parliament and of the Council of 16 December 1996 concerning the posting of workers in the framework of the provision of services<sup>1</sup>, or forcing service providers to enter into negotiations on such working conditions with trade unions, leads to an unjustified restriction on the freedom to provide services; is of the opinion, therefore, that collective actions must not aim at imposing working conditions which go beyond Directive 96/71/EC and which are not sufficiently precise and accessible;

---

<sup>1</sup> OJ L 18, 21.1.1997, p. 1.

3. Notes that it is important that the rules on the European labour market are transparent and equivalent for all, but also that different political traditions make it impossible to have a single labour market model; considers that, where certain Member States are particularly affected, a detailed impact assessment of the judgments should be carried out at national level in consultation with the social partners;
4. Stresses that there is no need to revise the provisions of Directive 96/71/EC before the actual challenges to the different models of collective agreement have been analysed and clarified at national level;
5. Points out that Article 3(7) of Directive 96/71/EC enables posted workers to benefit from the home country's more advantageous conditions during their posting in the host country;
6. Considers that correct application and enforcement of the provisions of Directive 97/61/EC are essential to secure the attainment of its objectives, namely to facilitate the provision of services while guaranteeing the appropriate protection of workers, and to fully respect collective bargaining arrangements existing in the Member States to which workers are posted within the framework of that Directive;
7. Calls on the Member States to remedy shortcomings in the implementation, application and enforcement of Directive 96/71/EC, in particular by simplifying administrative provisions and formalities and arranging for closer cooperation between the administrations of Member States; urges the Commission to take appropriate action against Member States that do not apply Community law in this way;
8. Calls on the Commission to provide more guidance to Member States and service providers on the posting of workers in the framework of the provision of services, taking into account the guiding principles of Directive 96/71/EC and European Court of Justice rulings in order to avoid further discrepancies regarding the interpretation of that Directive;
9. Calls on the Commission to make a clear statement with regard to the right of Member States to go beyond the hard core of minimum labour standards as long as these higher standards are generally applicable within the territory where the work is carried out.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	15.7.2008
<b>Result of final vote</b>	+: 20 -: 17 0: 0
<b>Members present for the final vote</b>	Gabriela Crețu, Mia De Vits, Janelly Fourtou, Martí Grau i Segú, Małgorzata Handzlik, Malcolm Harbour, Anna Hedh, Eija-Riitta Korhola, Kurt Lechner, Lasse Lehtinen, Toine Manders, Catiuscia Marini, Nickolay Mladenov, Catherine Neris, Bill Newton Dunn, Zita Pleštinská, Giovanni Rivera, Zuzana Roithová, Heide Rühle, Leopold Józef Rutowicz, Salvador Domingo Sanz Palacio, Christel Schaldemose, Andreas Schwab, Eva-Britt Svensson, Jacques Toubon, Barbara Weiler, Marian Zlotea
<b>Substitute(s) present for the final vote</b>	Emmanouil Angelakas, André Brie, Colm Burke, Giovanna Corda, Jan Cremers, Benoît Hamon, Joel Hasse Ferreira, Filip Kaczmarek, Manuel Medina Ortega, José Ribeiro e Castro, Olle Schmidt
<b>Substitute(s) under Rule 178(2) present for the final vote</b>	Dragoș Florin David, Jan Olbrycht

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	22.9.2008
<b>Result of final vote</b>	+: 38 -: 0 0: 5
<b>Members present for the final vote</b>	Jan Andersson, Edit Bauer, Iles Braghetto, Philip Bushill-Matthews, Alejandro Cercas, Ole Christensen, Luigi Cocilovo, Jean Louis Cottigny, Jan Cremers, Proinsias De Rossa, Harlem Désir, Harald Ettl, Ilda Figueiredo, Joel Hasse Ferreira, Stephen Hughes, Ona Juknevičienė, Jean Lambert, Raymond Langendries, Bernard Lehideux, Elizabeth Lynne, Thomas Mann, Maria Matsouka, Mary Lou McDonald, Elisabeth Morin, Siiri Oviir, Marie Panayotopoulos-Cassiotou, Jacek Protasiewicz, Bilyana Ilieva Raeva, Elisabeth Schroedter, José Albino Silva Peneda, Kathy Sinnott, Gabriele Stauner, Ewa Tomaszewska, Gabriele Zimmer
<b>Substitute(s) present for the final vote</b>	Gabriela Crețu, Petru Filip, Sepp Kusstatscher, Ria Oomen-Ruijten, Csaba Sógor, Anja Weisgerber
<b>Substitute(s) under Rule 178(2) present for the final vote</b>	Wolfgang Bulfon, Carmen Fraga Estévez, Iratxe García Pérez, Helmut Kuhne, María Isabel Salinas García